THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

JUNE 7, 2002 and DECEMBER 12, 2002

IN THE

Supreme Court of Nebraska

VOLUME CCLXIV

PEGGY POLACEK

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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 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
		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
		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

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No. S-00-1293: **State v. Sobey**. Affirmed as modified. Stephan, J.

No. S-01-172: **State v. Smith**. Affirmed. Per Curiam.

No. S-01-331: **Weidner v. Weidner**. Affirmed. McCormack, J.

No. S-01-661: **State v. Greer**. Affirmed. Per Curiam.

No. S-01-673: **Kleager v. Atkins**. Affirmed in part, and in part reversed. Wright, J.

Nos. S-01-696, S-01-697: **Fauss v. Norfolk Avenue Liquor Mart**. Affirmed. Wright, J. Gerrard, J., not participating.

No. S-01-725: **State v. Jones**. Affirmed. Connolly, J.

No. S-01-749: **Slate v. Slate**. Reversed and remanded with directions. Miller-Lerman, J.

No. S-01-897: **Gallner v. Gallner**. Affirmed. Miller-Lerman, J.

No. S-01-1004: **In re Interest of Merissa F**. Affirmed. Miller-Lerman, J.

No. S-01-1079: **Yilek v. Yilek**. Appeal dismissed. Connolly, J.

No. S-01-1094: **Jameson v. Blackmer**. Affirmed as modified. Stephan, J.

No. S-01-1227: **In re Interest of Michael N**. Appeal dismissed. McCormack, J.

No. S-02-227: **Jones v. Stenberg**. Affirmed. Stephan, J.

No. S-02-278: **State v. Bussard**. Affirmed. Per Curiam.

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No. S-33-020033: **Winstrom v. Spethman**. Application to docket original action filed by petitioner denied.

No. S-34-020002: **In re Application of Henry**. Application for reinstatement granted; Thomas E. Henry reinstated to active membership status in the Nebraska State Bar Association.

No. S-86-848: **Kula v. Kula**. Cause not being shown, case dismissed.

No. S-99-1059: **State ex rel. NSBA v. Jensen**. Respondent reinstated to the practice of law in the State of Nebraska.

Nos. S-00-620, S-01-1249: **Benjamin v. City of Lincoln**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-01-362: **Cole v. Blum**. Affirmed. See, rule 7A(1); *Cole v. Blum*, 262 Neb. 1058, 637 N.W.2d 606 (2002).

No. S-01-634: **State ex rel. Counsel for Dis. v. Koenig**. Application of respondent for reinstatement granted; Lyle J. Koenig reinstated to active membership of the Nebraska State Bar Association.

No. S-01-718: **Heathman v. Kenney**. Affirmed. See, rule 7A(1); *Garza v. Kenney*, 264 Neb. 146, 646 N.W.2d 579 (2002); *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

No. S-01-1035: **United Neb. Bank v. Department of Banking**. Stipulation allowed; appeal remanded with directions; each party to pay own costs and attorney fees.

No. S-01-1339: **State v. Keyser**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-032: **Carbajal v. Havely**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-02-133: **State v. Kinser**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-136: **Lowry v. Wireless II, L.L.C**. Appeal dismissed. See rule 7A(2).

No. S-02-234: **State v. Nelson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-258: **State ex rel. Counsel for Dis. v. Huisinga**. Order of public reprimand.

No. S-02-284: **State v. Quintana**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-285: **State v. Quintana**. By order of the court, appeal dismissed for failure to file briefs.

No. S-02-293: **State v. Justice**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-02-366: **State v. Jackson**. Appellee's suggestion of remand sustained.

No. S-02-455: **State v. Ericksen**. By order of the court, appeal dismissed for failure to file briefs.

No. S-02-514: **State v. Smith**. Appeal dismissed. See rule 7A(2).

No. S-02-541: **State ex rel. Counsel for Dis. v. Sutera**. Order of disbarment.

No. S-02-635: **Patz v. Kinney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-883: **State v. Lyle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-944: **State v. Witmer**. Judgment reversed, and cause remanded to Court of Appeals for further consideration in light of *Smith v. State*, 167 Neb. 492, 93 N.W.2d 499 (1958), and *State v. Owen*, 2 Neb. App. 195, 508 N.W.2d 299 (1993). See Neb. Ct. R. of Prac. 7A(3) (rev. 2001). Appellant's pending motions are referred to Court of Appeals for disposition.

No. S-02-988: **State ex rel. Counsel for Dis. v. Allen**. Having failed to show cause, respondent is suspended from the practice of law forthwith until further order of the court.

No. S-02-1189: **State ex rel. Gieschen v. Skinner**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SANDRA J. PAWLUSIAK, APPELLEE, V.
KEITH A. PAWLUSIAK, APPELLANT.

645 N.W.2d 773

Filed June 7, 2002. No. S-00-1114.

1. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
2. **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.
3. **Evidence: Appeal and Error.** One may not introduce evidence and then maintain that it was error for the court to consider the evidence introduced by that party.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

John F. Eker III for appellant.

Judith D. Retelsdorf for appellee.

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

MCCORMACK, J.

NATURE OF CASE

In this appeal, Keith A. Pawlusiak asks us to review two findings of the district court for Douglas County arising from the dissolution of his marriage with Sandra J. Pawlusiak. The first issue is whether the $30,000 annuity payment made as part of a workers' compensation settlement award to Keith constitutes income for purposes of calculating child support. The annuity was payable at the end of 5 years. The district court divided the $30,000 evenly over 5 years and increased Keith's monthly

income by $500 per month. The second issue is whether the district court abused its discretion in deducting real estate sales expenses from the value of the marital home.

BACKGROUND

On March 15, 2000, the district court entered a decree dissolving the 18-year marriage of Sandra and Keith. The district court did not make any findings related to the marital estate or any other financial matters, but, rather, ordered that a hearing on these matters would be held at a later date. This hearing was subsequently held on August 10. At the hearing, no testimony was received but a number of exhibits were offered and received pertaining to the parties' assets and liabilities.

Two of these exhibits related to Keith's workers' compensation settlement award. In 1986, Keith was involved in an accident arising out of and in the course of his employment. As a result, Keith filed a petition with the Nebraska Workers' Compensation Court.

On April 10, 1995, the compensation court approved a settlement between Keith and his employer and the employer's insurance company. The agreement provided that in exchange for a release of all liability arising from the 1986 accident, the employer and insurance company would (1) pay Keith an initial cash payment of $140,000, (2) pay outstanding medical expenses, (3) establish a medical trust fund to pay future medical expenses, and (4) purchase an annuity for Keith's benefit. This annuity would pay Keith $30,000 after 5 years, $50,000 after 10 years, $75,000 after 15 years, $100,000 after 20 years, $125,000 after 25 years, $150,000 after 30 years, and $150,000 after 35 years. The initial $30,000 payment was due within 1 month of the date of the decree in this case and had been received by Keith at the time of the August 10, 2000, hearing.

At the August 10, 2000, hearing, Keith offered two exhibits relating to the value of the marital home. One of the exhibits was an appraisal report from a certified residential appraiser. Both exhibits deducted "sales charges" of approximately 8 percent to arrive at the present equity. Sandra offered no evidence disputing the exhibits offered by Keith.

In calculating the child support, the district court found that Keith received monthly income of $712 in the form of Social Security disability payments. Addressing the $30,000 annuity payment, the court found that the annuity payment represented "reimbursement of post-decree lost earning capacity" and concluded that the annuity constituted income under the Nebraska Child Support Guidelines. For calculation of child support, the district court divided the $30,000 evenly over 5 years and thus added $500 per month to Keith's income. When added to the Social Security payments, Keith's monthly income was determined to be $1,212 per month. The court ordered Keith to pay $409.91 in child support per month. The decree provided that when only one child remains a minor, which occurred on October 25, 2000, the child support dropped to $285.32 per month.

Regarding the marital home, the district court found that "[t]he property has a present fair market value of $84,000.00, with a mortgage balance of $69,947.69. Assuming hypothetical real estate expenses of $6,720.00, the home has a present net equity of $7,332.31." The home was awarded to Sandra, but because Sandra did not have the resources to purchase Keith's interest, Keith was awarded a lien over the home in the amount of his half of the net equity, or $3,666.15.

ASSIGNMENTS OF ERROR

Keith assigns that the district court erred in (1) finding that the $30,000 annuity payment was income for purposes of calculating child support and (2) deducting "hypothetical real estate expenses" from the present fair market value of the home when calculating Keith and Sandra's equity in the home.

STANDARD OF REVIEW

[1] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001).

[2] 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).

ANALYSIS

ANNUITY

As previously noted, the 5-year, $30,000 annuity payment was received in full prior to the district court's decision in this case. The district court found that this $30,000, divided evenly over 5 years, was an income item of $500 per month. The court factored $500 per month into Keith's income to arrive at his child support obligation. The district court stated that it was relying on *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999), and further found that the $30,000 contemplated pain and suffering, disfigurement, disability, or the loss of postdivorce earning capacity. In *Parde*, we granted further review to clarify a conflict in the law regarding the extent to which an injured party's personal injury or workers' compensation award should be included in a marital estate. See *id*. We held that

> compensation for an injury that a spouse has or will receive for pain, suffering, disfigurement, disability, or loss of postdivorce earning capacity should not equitably be included in the marital estate. On the other hand, compensation for past wages, medical expenses, and other items that compensate for the diminution of the marital estate should equitably be included in the marital estate as they properly replace losses of property created by the marital partnership.

Id. at 109-10, 602 N.W.2d at 663. Here, the trial court properly considered *Parde* in determining whether the annuity payment should be included as part of the marital estate or excluded as indemnity for loss of postdivorce earning capacity. The court incorrectly believed, however, that the annuity payment could represent compensation for pain and suffering. The discussion of pain and suffering in *Parde* was included because the analytical approach was intended to apply to claims for both personal injury and workers' compensation.

Under the Nebraska Workers' Compensation Act, benefits payable to or on behalf of an employee may take the form of payment for medical, surgical, and hospital services, Neb. Rev. Stat. § 48-120 (Reissue 1993); indemnity benefits, Neb. Rev. Stat. § 48-121 (Reissue 1993); or death benefits, Neb. Rev. Stat. § 48-122 (Reissue 1993). Pain and suffering as a separate element

of damages is not recoverable in a workers' compensation case. *Turney v. Werner Enters.*, 260 Neb. 440, 618 N.W.2d 437 (2000).

The $30,000 annuity payment was made to Keith as a result of a workers' compensation settlement award. In addition to the annuity payments made at 5-year intervals, the settlement award separately provided for the payment of past and future medical expenses. Thus, the annuity payment could have been intended only to indemnify Keith for loss of future earning capacity. We conclude that the $30,000 annuity payment, therefore, was in lieu of income.

In our de novo review, we determine that the district court did not abuse its discretion in considering the $30,000 annuity payment to be income for purposes of determining Keith's child support obligation under the guidelines. See, also, *Becker v. Becker*, 6 Neb. App. 277, 573 N.W.2d 485 (1997); *Mehne v. Hess*, 4 Neb. App. 935, 553 N.W.2d 482 (1996).

Real Estate Commission

In determining that the marital home of Keith and Sandra had a present net equity of $7,332.31, the district court subtracted "hypothetical" real estate expenses of $6,720 from the marital home's present fair market value. Keith argues that these expenses should not have reduced the value of the marital home because they were not necessary or mandatory expenses.

Two exhibits received into evidence at the August 10, 2000, hearing formed the basis for the district court's calculation of the marital home's present net equity. One was a report from a certified residential real estate appraiser, which report stated that real estate sales charges in the amount of 8 percent of the marital home's present fair market value should be deducted to arrive at the home's present net equity. The other exhibit expressly deducted $6,720 of real estate sales charges from the marital home's present fair market value and listed the home's present net equity as $7,332.31. Both exhibits were offered by Keith at the hearing, and the district court accepted Keith's offer and received the exhibits into evidence without objection from any party.

[3] We have previously held that one may not introduce evidence and then maintain that it was error for the court to consider the evidence introduced by that party. *Lincoln Co. Sheriff's Emp.*

Assn. v. Co. of Lincoln, 216 Neb. 274, 343 N.W.2d 735 (1984). For that reason, Keith's assignment of error is without merit.

CONCLUSION

We determine that the district court did not abuse its discretion in including as income in determining Keith's child support obligation the $30,000 annuity payment received from the workers' compensation settlement.

As to the marital home, the only evidence adduced as to the value of the marital home was produced by Keith. Both of Keith's appraisals had deductions for sales charges. In our de novo review, we therefore conclude that Keith's assignment of error as to the district court's determination of the value of the marital home is without merit.

AFFIRMED.

THOMAS BOWLEY, APPELLANT AND CROSS-APPELLEE, V. W.S.A., INC., A MINNESOTA CORPORATION, AND THOMAS ADAMSON, AN INDIVIDUAL, APPELLEES AND CROSS-APPELLANTS.

645 N.W.2d 512

Filed June 7, 2002. No. S-01-097.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
3. **Libel and Slander: Damages: Proof.** Under Neb. Rev. Stat. § 25-840.01 (Reissue 1995), special damages in a libel action are damages that the plaintiff alleges and proves were suffered in respect to his or her property, business, trade, profession, or occupation as the direct and proximate result of the defendant's publication.
4. **Judgments: Directed Verdict.** When the record contains evidence about which reasonable minds could differ and when the record further sustains a finding for the plaintiff, the record precludes the entry of a directed verdict against the plaintiff.
5. **Directed Verdict: Appeal and Error.** The party against whom a motion for directed verdict is made is entitled to all reasonable inferences deducible from the evidence.
6. **New Trial: Verdicts: Damages.** Under Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2000), a verdict shall be vacated and a new trial granted on the application of the party

aggrieved where excessive damages, appearing to have been given under the influence of passion or prejudice, have been awarded.

7. **New Trial: Appeal and Error.** In reviewing a district court's order granting a new trial, the decision of the trial court will be upheld in the absence of an abuse of discretion.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded.

Robert E. O'Connor, Jr., for appellant.

Thomas A. Grennan and Donald P. Dworak, of Gross & Welch, P.C., for appellees.

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

CONNOLLY, J.

In this libel action, Thomas Bowley appeals from the district court's order granting a motion for a new trial. The appellees, W.S.A., Inc., and Thomas Adamson, cross-appeal. Adamson sent a letter to Bowley's employer, and Bowley was later terminated from his employment. W.S.A. and Adamson's motion for a directed verdict was overruled, and the jury found for Bowley and awarded damages in the amount of $150,000.

The court found that the jury awarded excessive damages and sustained W.S.A. and Adamson's motion for a new trial. Bowley contends that there was sufficient evidence to support the jury's award of damages. On cross-appeal, W.S.A. and Adamson contend that Bowley failed to prove that he was terminated because of the letter and that he failed to plead and prove special damages. Thus, W.S.A. and Adamson contend that the court erred in failing to grant their motion for a directed verdict.

We reverse, and remand because sufficient evidence was presented that showed the jury verdict was not a result of passion or prejudice.

BACKGROUND

Bowley filed a petition alleging a cause of action for libel per se and libel per quod. He alleged that after Adamson sent a letter to Bowley's employer, he was terminated from his employment and had difficulty obtaining new employment. He alleged that as a result, he suffered general and special damages.

At trial, Bowley testified that he was employed as a general manager for Harmon Glass (Harmon) from 1989 until September 1993. In September 1993, he was paid about $36,000, had various benefits, and received raises for performance. He did not have an employment agreement with Harmon and did not make any formal agreements with Harmon regarding confidentiality or trade secrets. Adamson was a chief executive officer of W.S.A., a division of a holding company that included Harmon. Thomas Hill was Bowley's direct supervisor at Harmon.

Bowley testified that in August 1993, Hill and Adamson came to the store he managed and informed him that it would be sold. The three men then met with Frank Charles Weaver II, the owner of another glass company, about selling the store to Weaver. Bowley testified that he had experienced problems with Weaver in the past. According to Bowley, Weaver complained to Bowley's supervisors when Bowley out-bid Weaver on contracts. Bowley had also stopped purchasing wholesale products from Weaver. According to Bowley, he did not think Weaver would offer him a job and he did not want to work for Weaver. He testified that the meeting did not lead to an agreement regarding the sale. He also stated that Adamson became upset because Weaver would not sign a purchase contract and that Adamson slammed his briefcase shut in disgust. Bowley said that after the meeting, he provided Weaver with information that was requested about the sale.

Bowley testified that after the meeting, he suggested that employees of Harmon not be immediately told about the sale. He said he did not tell any of the employees about the sale, but that some employees did overhear another person discuss it. Eventually, several employees found out about the possible sale.

Bowley testified that he had previously been offered a job with Harding Glass (Harding), a competitor of Harmon. The record shows that Hill knew that Bowley had been solicited by Harding and had no complaints with Bowley's seeking a job from Harding. Bowley contacted Harding about a position and met with Danny Grim, a vice president of Harding. During the interview process, Bowley took Grim and Bob Hardwick, another vice president of Harding, through the Harmon building and discussed the possibility of Harding's leasing the building.

He said that he did so with the permission of an interim manager at Harmon. He also told Grim and Hardwick about the negotiations between Harmon and Weaver and testified that he had cleared that information with Hill.

On September 1, 1993, Grim sent Bowley a letter offering him a job with Harding. The letter described the job position as "Regional Manager of Retail operations in Omaha" and listed a base salary of $37,700, a base bonus of $9,400, and a car allowance of $4,080. The letter listed benefits of vacation, profit sharing, 401K, and disability insurance. Bowley stated that his understanding was that he would oversee all of the retail stores in Omaha. Bowley then told Harmon that he was leaving to accept the offer at Harding. At the request of Harmon, he continued to work there for 2 more weeks.

Bowley started work at Harding on September 13, 1993. He stated that he met with Frederick W. Pierce III, the president of Harding. According to Bowley, Pierce told him that a shop known as the South 90th Street location was operating at an 8-percent profit margin and would be closed if it remained at 8 percent. Bowley said that Pierce told him that he was to work on that shop first and could do whatever it took to get the numbers up. Pierce did not discuss with him any change in his job title or job duties. He testified that while he worked for Harding, he was always paid as a regional manager.

The next night, Hill, Bowley's former supervisor at Harmon, called him and warned him that a letter was going to be sent to someone at Harding and that it was not going to paint him in a good light. On September 15, 1993, Pierce faxed him a copy of a letter that had been sent to him. The letter was from Adamson and was addressed to Bowley, with copies sent to Hill and Pierce. The letter stated:

> Dear Tom:
>
> I am very disappointed.
>
> A few weeks ago you asked me to trust you, which I did without hesitation. Now that trust has been broken several times by your continual attempts to undermine our efforts to sell/transition the Omaha operation.
>
> Perhaps you were mistreated in the past. I do not know. You never said you were.

> Perhaps you see this as a way to impress your new employer. Again, I do not know. I am not familiar with their method of operation or what they think of you.
>
> I do know that trust is an essential part of any business relationship, whether it is with a coworker, investor, supplier or customer. Are you a person that can be trusted, Tom? You should give it some thought—your future will depend on it.

Bowley testified that Pierce and Hardwick called him to discuss the letter and that he was on the telephone with them for 30 to 45 minutes discussing the letter. He discussed the letter again with both men about 4 weeks later. Bowley sent several letters to Adamson seeking a retraction and received no response.

According to Bowley, immediately after his employers received the letter, his duties were limited. He was told to oversee only a single shop and was told not to engage in any new construction projects or contact insurance companies. He stated that there was a change in the way he was treated after the letter was received and that he was excluded from meetings and lunches.

Bowley testified that Grim claimed that there were several issues that concerned him other than the letter. First, there was an issue regarding the use of scratch pads instead of inventory sheets. According to Bowley, he never used scratch pads, but had a problem with some of the employees doing so. Bowley stated that scratch pads were also used at all of the Omaha locations. Second, there was money missing from the cash drawer. Bowley testified that he accounted for it by showing Grim that there were two $100 bills placed underneath the drawer. Third, Grim questioned if sales had been raised. Bowley testified that he did a good job at Harding; that he increased sales by 25 percent; and that by organizing inventory, he realized an inventory gain of $5,000 for the month of November. Bowley also stated that he could not bring in new business because his duties had been limited and he was unable to call on customers. The record contains a letter sent by Bowley to Grim suggesting ways Harding's business could be improved. Bowley concedes that Grim did not mention the letter sent by Adamson at the termination meeting.

Bowley testified that after he was terminated from his employment at Harding, he was unable to find employment with a glass company, either as a manager or in sales. He first applied to the

top 10 or 12 stores and then applied to every glass company in the telephone book, which was about 50 shops. He never obtained employment as a manager, but did find work as a journeyman glazer. He stated that his current rate of pay is $15.50 per hour and that he has health insurance, but does not have paid vacations, paid holidays, a car allowance, or an employer-contributing pension plan.

In a motion in limine before trial, W.S.A. and Adamson sought to exclude evidence consisting of Bowley's tax returns and W-2 forms for the years 1993 to 2000. The documents were not allowed into evidence during trial. W.S.A. and Adamson later moved to strike Bowley's testimony regarding his income. The motion was overruled.

After Bowley testified, he moved to amend his pleadings to conform to the proof. The motion was sustained. Bowley presented no other evidence, and W.S.A. and Adamson moved for a directed verdict. The motion was denied.

Adamson testified that he had discussed confidentiality regarding the sale with Bowley and that it had been Bowley's suggestion to keep the sale secret. Adamson was concerned that his competitors would learn about the sale and that Harmon would lose customers, employees, and its telephone number. He stated that he sent the letter to Harding after Weaver had contacted him complaining that Harding was encouraging Bowley to interfere with the sale to Weaver. He said he sent a copy to Pierce, Harding's president, because he believed that Bowley's actions were motivated by Harding. Adamson conceded that Bowley did not have an employment or confidentiality contract with Harmon.

Weaver testified that he had expressed to Adamson the importance about confidentiality of the sale. He stated that confidentiality was discussed when he met with Bowley, Hill, and Adamson and stated that Bowley did not provide him with requested information after the meeting. He said that he would not have hired Bowley.

Weaver stated that he contacted Adamson about Bowley when he learned that two of Weaver's employees were going to work at Harding. He was "very hot" and told Adamson that his people were getting stolen.

Pierce testified that the letter had nothing to do with Bowley's termination. Hardwick testified that the letter had a positive effect on him and made him think that Harding may have picked up a good man and that Adamson was upset that he had lost him. Both stated that they generally were not involved in the termination of employees.

Grim testified that when he first hired Bowley, he was looking for someone to oversee the three Omaha stores. He initially gave Bowley one store to run and told Bowley that if he did well there, he would increase Bowley's level of responsibility. According to Grim, Bowley agreed to this. He stated that Bowley was paid a regular manager's pay.

Grim said that he learned that Bowley was using scratch pads instead of formal invoices and that he directed Bowley to use invoice sheets. He later learned that invoice forms were still not being used properly after he directed Bowley to do so. An employee of Harding also testified that Bowley did not use invoices properly. Grim stated that he asked Bowley on one occasion to explain how he was making the store profitable and that Bowley gave him no answer and instead complained that Harding had a bad reputation and that the employees were incompetent. Grim also stated that the cash register was long on money and that he suspected that some invoices were not being written up. Thus, he was concerned that the store was not accounting for cash properly. Grim stated that he terminated Bowley's employment from Harding because Bowley failed to follow company procedures and that the letter had nothing to do with it. On cross-examination, he admitted that Bowley had reported to him that employees were failing to use invoices properly and had expressed concerns that some employees might be stealing money from the company.

At the end of the testimony, W.S.A. and Adamson renewed their motion for a directed verdict and it was denied. The jury returned a verdict for Bowley and awarded damages in the amount of $150,000. W.S.A. and Adamson moved to set aside the verdict and moved for a new trial, arguing that there was no evidence that the letter caused Harding to terminate Bowley's employment and that the verdict was excessive. The district

court granted the motion for a new trial. Bowley appeals, and W.S.A. and Adamson cross-appeal.

ASSIGNMENTS OF ERROR

Bowley, rephrased, assigns that the district court erred in sustaining the motion for a new trial. On cross-appeal, rephrased, W.S.A. and Adamson assign that the district court erred in overruling their (1) motion for a directed verdict and (2) motion to strike testimony regarding Bowley's income.

STANDARD OF REVIEW

[1] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001); *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001).

[2] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001).

ANALYSIS

Motion for Directed Verdict

On cross-appeal, W.S.A. and Adamson contend that the court should have sustained their motion for a directed verdict because Bowley failed to prove that the letter caused special damages. W.S.A. and Adamson also contend that Bowley failed to plead and prove special damages.

[3] Special damages in a libel action are damages that the "plaintiff alleges and proves were suffered in respect to his or her property, business, trade, profession, or occupation as the direct and proximate result of the defendant's publication." Neb. Rev. Stat. § 25-840.01 (Reissue 1995).

[4] When the record contains evidence about which reasonable minds could differ and when the record further sustains a finding for the plaintiff, the record precludes the entry of a directed verdict against the plaintiff. *Rod Rehm, P.C. v. Tamarack Amer.*, 261 Neb. 520, 623 N.W.2d 690 (2001).

Here, Bowley alleged that after Adamson sent a letter to Harding, he was terminated from his employment and had difficulty obtaining new employment. He alleged that as a result, he suffered general and special damages. At trial, Bowley successfully moved to amend his petition to conform to the proof. Under these facts, we determine that he pled special damages.

[5] At trial, Bowley testified that he was treated differently immediately after his employers received the letter. Bowley also testified that he had difficulty in finding employment as a manager and that he earned less in his new employment. Bowley's duties were reduced, and he was excluded from meetings and lunches. His testimony contradicted evidence that Harding terminated his employment for reasons other than the letter. For example, Bowley contradicted Grim's testimony that Bowley improperly used invoice forms, that he improperly accounted for money, and that he failed to increase sales. Although W.S.A. and Adamson presented evidence that directly contradicted Bowley's testimony, this court does not reweigh the evidence. Instead, the party against whom a motion for directed verdict is made is entitled to all reasonable inferences deducible from the evidence. See *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001). The court concluded that the issue of liability was properly a question of fact for the jury. We agree. We determine that when all reasonable inferences are afforded to Bowley's case, the court was correct in overruling W.S.A. and Adamson's motion for a directed verdict.

Motion to Strike Testimony Regarding Income

W.S.A. and Adamson next contend that Bowley's testimony about his income was irrelevant and highly prejudicial because there was a lack of evidence that the letter caused any loss of income. Thus, W.S.A. and Adamson contend that the district court erred in failing to strike the testimony.

We have already determined that there was evidence that the letter caused Bowley to lose income. Evidence of Bowley's earnings before and after his employment was terminated was relevant to determining the amount of damages he incurred and was not unduly prejudicial. We determine that this assignment of error is without merit.

Motion for New Trial

Bowley contends that the jury's verdict was supported by the evidence and that the court erred in granting W.S.A. and Adamson's motion for a new trial.

[6,7] Under Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2000), a verdict "shall be vacated and a new trial granted on the application of the party aggrieved for any of the following causes affecting materially the substantial rights of such party: . . . (4) excessive damages, appearing to have been given under the influence of passion or prejudice." In reviewing the district court's order granting a new trial, the decision of the trial court will be upheld in the absence of an abuse of discretion. *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001).

Here, the jury was instructed that Bowley could recover both general and special damages, including loss of income for a reasonable period after termination. Bowley testified that he was unable to secure employment as a manager or in sales. At the time of trial, almost 7 years after Bowley was terminated from Harding, he was working in a position as a glazer, earning $15.50 per hour. The evidence showed that at Harding, Bowley earned $37,700 per year, along with a base bonus of $9,400 and a car allowance of $4,080. He also testified that he no longer had certain benefits such as paid vacation or a pension plan. When the income differential, lost bonus, and lost car allowance are considered over a period of 6 years 11 months—the amount of time between when Bowley's employment was terminated and trial—a jury could reasonably conclude that Bowley's lost income exceeded $130,000. When the additional value of benefits are included, an award of $150,000 is supported by the evidence. Under these circumstances, the jury's verdict does not appear to have been given under the influence of passion or prejudice. We conclude that the court was incorrect when it determined that there was insufficient evidence to support the jury verdict. Accordingly, the court abused its discretion when it sustained W.S.A. and Adamson's motion for a new trial.

CONCLUSION

We conclude that the district court was correct in overruling W.S.A. and Adamson's motion for a directed verdict and in

refusing to strike testimony regarding Bowley's income. We determine, however, that the district court abused its discretion when it sustained W.S.A. and Adamson's motion for a new trial. Accordingly, we reverse, and remand with instructions that judgment be entered in this cause.

REVERSED AND REMANDED.

GARY L. REICHERT, AN INDIVIDUAL, AND FRED REICHERT, JR., AN INDIVIDUAL, ALSO DOING BUSINESS AS MONUMENT JEWELERS AND REICHERT JEWELERS, INC., APPELLEES, V. RUBLOFF HAMMOND, L.L.C., APPELLANT.

645 N.W.2d 519

Filed June 7, 2002. No. S-01-128.

1. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
2. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Contracts: Intent.** When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract.
4. **Contracts: Parties.** The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.
5. **Breach of Contract: Words and Phrases.** A breach is a nonperformance of a duty.
6. **Breach of Contract: Leases.** When a lessor covenants in a lease for retail space to forebear from leasing space or allowing space to be leased to a competing store, the lessor breaches the covenant when it executes a contract to lease space to a competitor.
7. **Contracts: Intent.** A contract will not be construed to limit the remedial rights of the parties unless that intention is clearly expressed.
8. **Contracts: Breach of Contract: Stipulations.** Parties to a contract may override the application of the judicial remedy for breach of a contract by stipulating, in advance, to the sum to be paid in the event of a breach.
9. **Contracts: Breach of Contract: Stipulations: Damages.** Contracting parties have the right to privately bargain for the amount of damages to be paid in the event of a breach of contract, provided the stipulated sum is reasonable in light of the circumstances.

10. **Breach of Contract: Damages.** Agreed-upon damages can be so small as to be stricken as unconscionable in light of a breach of contract.
11. **Contracts: Liability: Damages.** When the parties to a contract are experienced business people, the damages are economic, and the parties had fair opportunity to consider the agreement, courts rarely find that liability limitations are unconscionable.
12. **Contracts: Appeal and Error.** Although a party may in retrospect be dissatisfied with a bargained-for provision, an appellate court will not rewrite a contract to provide terms contrary to those which are expressed.
13. **Contracts: Breach of Contract: Intent.** A court may not grant a permanent injunction where the parties clearly intend that the exclusive remedy in the event of a breach is the termination of the contract or a reduction in rents.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Reversed.

John F. Simmons, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellant.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellees.

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

CONNOLLY, J.

This is an appeal from a permanent injunction imposed by the district court against appellant, Rubloff Hammond, L.L.C. (Hammond), from leasing space to a competitor of appellees, Gary L. Reichert and Fred Reichert, Jr. (Reicherts). The court found that Hammond, the lessor, had intended that the Reicherts would have the exclusive right to operate fine jewelry stores in Monument Mall in Scottsbluff, Nebraska. The court further found that an " 'exclusive remedy' " provision in a commercial lease did not provide an adequate remedy at law or prevent it from giving injunctive relief. The exclusive remedy gave the Reicherts the right to terminate their lease agreement or reduce their rent by 50 percent for a specified period if Hammond breached the lease agreement.

We determine that Hammond breached the lease agreement by executing a lease with a competing store. However, because the exclusive remedy provision limited the Reicherts' rights to reduced rents or a termination of the lease agreements, the district court erred in granting the injunction.

BACKGROUND

In 1986, Fred Reichert opened Reichert Jewelers, Inc., in Monument Mall in Scottsbluff. In 1994, Fred Reichert learned that Ridco, Inc., a retail jewelry chain doing business as Riddles Jewelers (Riddles), sought to lease space in Monument Mall. In August 1994, the Reicherts reached a 4-year lease agreement with the owners for space to open a second store in Monument Mall, known as Monument Jewelers. The lease agreement was with Mid-America Realty Investments, Inc. (Mid-America), the predecessor in interest to Hammond. The minimum monthly rent over the term averaged $2,137.50 for 1,140 square feet plus 5.5 percent of gross receipts in excess of an average of $513,000. According to an affidavit from Fred Reichert, the lease was executed to prevent the owners from leasing space for a Riddles store. The Reicherts renewed their lease agreement for the Reichert Jewelers store space in 1997 for a term of 2 years, which expired in August 1999. The minimum monthly rent was $1,162.33 plus 5.5 percent of gross receipts in excess of $275,000.

Mid-America later sold its ownership of the mall to Hammond. Sometime in 1999, the mall manager for Hammond informed Fred Reichert that Ridco had again sought to lease space in Monument Mall for a Riddles store. In August 1999, the Reicherts and Hammond agreed to amend both lease agreements. The amendments extended the term for both leases to 10 years, or until July 2009.

Under the amendments, the minimum monthly rent for Reichert Jewelers during the first 5 years was $1,585—an increase in monthly rent of $422.67. However, the threshold for determining the 5.5 percentage rent increased by $150,000. The minimum monthly rent for Monument Jewelers for the first 5 years increased by $109.25 from its monthly rent at the end of the 1994 lease to $2,294.25. The threshold for determining its percentage rent decreased by about $23,800 compared to the final year under its 1994 lease. The combined changes increased the thresholds for both of the Reicherts' stores by approximately $126,200, from a total threshold of $799,400 to approximately $925,600.

Both amendments to the lease agreements contained the following provision:

> So long as Tenant is open and operating its business as provided for in the Lease . . . and is not otherwise in default under the Lease . . . then Landlord covenants and agrees that during the period commencing on August 1, 1999 and expiring on July 31, 2004, no space in the Shopping Center will be leased or allowed to be leased, other then [sic] Tenant's operation, for the primary business of the operation of a jewelry store selling fine jewelry. The foregoing restriction shall not apply to (i) "Anchor Tenants" . . . (ii) any tenant, its successor, assign or replacement, open and operating in the Shopping Center as of August 1, 1999 . . . .
>
> Landlord and Tenant acknowledge that in the event of a breach of this restriction, Tenant shall give Landlord written notice of such breach and Landlord shall have thirty (30) days from the date of said notice (or such longer period as may be reasonably required if Landlord is diligently attempting to remedy same) to remedy same. If Landlord fails to remedy such breach . . . Tenant shall have the rights set forth in the next paragraph as its sole and exclusive remedy because of such breach. . . .
>
> . . . Tenant shall have, as its sole and exclusive remedy under the Lease, the right to either (i) decrease annual fixed minimum rent by 50% during the period such store . . . is open and operating . . . or (ii) terminate the Lease . . . . If Tenant elects (i) above, then Tenant shall resume paying full fixed minimum rent on the date such Competing Store ceases violating the restriction. If such Competing Store continues to violate the restriction for 270 days after the date said Competing Store opened for business, then Tenant shall have the further right to terminate the Lease . . . no later than 290 days after the date the Competing Store opened for business . . . .

On September 15, 2000, Hammond executed a lease agreement with Ridco to lease space for a Riddles store. Three days later, the Reicherts filed a petition for declaratory judgment and a permanent injunction against Hammond. In its answer, Hammond alleged that the Reicherts were limited to the exclusive remedy provision in the lease agreements.

At trial, the Reicherts adduced evidence to show that Ridco had received a more favorable rent arrangement than the Reicherts, both in terms of minimum rent per square foot and percentage rent. The Ridco lease agreement also contained a premises use restriction. The restriction provided that Ridco could terminate its lease agreement if one of the existing jewelry stores in the mall departed and Hammond then leased space to more than two tenants for the operation of a jewelry store. The chief financial officer for Ridco admitted in a deposition that this provision indicated to Ridco that the demographics of the area would support only two jewelry stores in the mall.

The Reicherts also presented expert testimony that the economy of Scotts Bluff County had remained flat for many years and that in such an economy, Riddles' gross receipts would have a substantial negative impact on the Reicherts' sales volume.

In its order, the court found:

• Hammond intended to give the Reicherts an exclusive right of operation for fine jewelry stores in the mall through July 2004.

• Hammond reasonably knew that this right constituted an important economic lease provision to the Reicherts.

• Even if the Reicherts chose to reduce their rent by 50 percent for 9 months, they would still pay almost $27,000 more during that period than Ridco for approximately the same store space.

• The evidence showed that there was a flat economy in the area and that Ridco's lower rent gave it an unfair competitive advantage.

• Hammond and Ridco anticipated that the addition of a Riddles store would force the closure of one of the Reicherts' stores before July 2004.

• Although parties are free to contract for a particular remedy for a breach of contract, this case was an equitable action to prevent a breach, or further breach, of the lease agreements.

The court relied upon a 1925 case for its ruling. See *Nebraska Wheat Growers Ass'n v. Norquest*, 113 Neb. 731, 204 N.W. 798 (1925) (holding that liquidated damages provision did not provide adequate remedy at law or prevent injunctive relief). The court held the reduction in rent was an inadequate remedy at law and that the Reicherts would incur irreparable damage without injunctive relief. It permanently enjoined Hammond from leasing or

allowing to be leased space for the primary purpose of operating a fine jewelry store to any mall tenant other than the Reicherts, so long as the Reicherts continued to operate their stores and were not otherwise in default, through July 31, 2004.

ASSIGNMENTS OF ERROR

Hammond assigns that the district court erred in (1) enjoining it, (2) failing to read the lease provision as part of an integrated whole, (3) determining that the leasing of space to a competing jeweler is a violation of Hammond's obligation to the Reicherts, (4) giving no effect to the exclusive remedy provision of the contract, (5) determining that the additional rights given to the Reicherts in the event of Hammond's leasing space to a competing jeweler are exclusive only if they provide adequate recourse, and (6) determining that the Reicherts did not have an adequate remedy at law even if it correctly determined that Hammond breached its agreement.

STANDARD OF REVIEW

[1] The construction of a contract is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d 876 (2002).

[2] An action for injunction sounds in equity. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Village of Winslow v. Sheets*, 261 Neb. 203, 622 N.W.2d 595 (2001).

ANALYSIS

Hammond contends that it did not breach the lease agreements because the exclusive remedy provision qualifies its obligations under the lease agreements. Alternatively, Hammond argues that the court erred in failing to enforce the lease agreements of the parties as to their rights in the event of a breach.

The Reicherts contend that the court correctly determined that the exclusive remedy provision was inapplicable when an injunction is imposed to prevent a breach, or further breach, of a contract. They also contend that the court correctly determined that no adequate remedy at law existed and that, therefore, a permanent injunction should be entered against Hammond.

The first issue is whether Hammond promised, by the amendments to the lease agreements, to give the Reicherts the exclusive right to operate fine jewelry stores in the mall.

[3] When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract. *In re Estate of Jakopovic*, 261 Neb. 248, 622 N.W.2d 651 (2001).

Hammond argues that the lease agreements must be read as a whole. Because the exclusive remedy provision gave the Reicherts the right to reduce rents or terminate the lease agreements if Hammond leased space to a competitor, Hammond argues that its promise was modified to include that contingency. We disagree.

The first sentence of the provision in the amendments to the lease agreements in question provides:

> So long as Tenant is open and operating its business as provided for in the Lease . . . and is not otherwise in default under the Lease . . . then Landlord covenants and agrees that during the period commencing on August 1, 1999 and expiring on July 31, 2004, no space in the Shopping Center will be leased or allowed to be leased, other then [sic] Tenant's operation, for the primary business of the operation of a jewelry store selling fine jewelry.

This sentence states that the right to be the exclusive operators of jewelry stores in the mall is the benefit for which the Reicherts bargained. Hammond agreed by this provision to refrain from leasing space to a competing store, or allowing space to be leased to a competing store, so long as the Reicherts were open for business and not in default until July 31, 2004.

The provision did not reserve to Hammond the right to either perform its promise or provide an alternative performance, such as liquidated damages. Rather, the right to termination of the lease agreements or reduced rents inured to the Reicherts upon Hammond's breach. Thus, the purpose of the termination provision is most reasonably construed as providing incentive for Hammond to perform its promise.

[4] In addition, the implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract. *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000); *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995). Allowing parties to claim that they have not promised a performance because of a remedy provision for their breach would undermine this important doctrine of contract law. Parties generally bargain for performance, not nonperformance. The plain language of the contract supports the court's finding that the parties intended the lease to provide the Reicherts an exclusive right to operate a fine jewelry store.

[5,6] The second issue is whether the court correctly concluded that this was an action to prevent a breach of the exclusivity provision. A breach is a nonperformance of a duty. *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000). As discussed, Hammond agreed not to lease space or allow space to be leased to a competing store in the mall that operated for the primary purpose of selling fine jewelry. To "lease" is to "grant the possession and use of (land, buildings, rooms, movable property, etc.) to another in return for rent or other consideration." Black's Law Dictionary 900 (7th ed. 1999). Although the lease agreements provided Hammond with a 30-day opportunity to remedy the breach, the breach occurred when it executed a contract to lease space to Ridco for the operation of a jewelry store. The court erred in determining that this was an action to prevent a breach.

[7] As the trial court recognized, the parties stipulated to a particular remedy in the event of a breach. The court, however, relied upon *Nebraska Wheat Growers Ass'n v. Norquest*, 113 Neb. 731, 204 N.W. 798 (1925), to conclude that this provision

did not prevent the Reicherts from seeking injunctive relief. In that case, this court held that a liquidated damages clause was an inadequate remedy at law and did not preclude injunctive relief. However, the damages clause in *Nebraska Wheat Growers Ass'n* did not specify that it was the sole and exclusive remedy under the lease. A contract will not be construed to limit the remedial rights of the parties unless that intention is clearly expressed. See, *Roberts Constr. Co. v. State*, 172 Neb. 819, 824, 825, 111 N.W.2d 767, 770, 771 (1961) (holding that "extension of time" provision was not sole remedy for highway improvement contractor against State when contract "*in the absence* of a 'no-damage clause' or other provision to the contrary in the contract" (emphasis supplied)); 17A Am. Jur. 2d *Contracts* § 748 (1991).

In contrast, the remedy provision in the amendments to the lease agreements provided:

> In the event Landlord fails to proceed with all diligence to remedy such violation, then, upon the expiration of thirty (30) days from the date of Tenants notice, Tenant shall have, *as its sole and exclusive remedy under the Lease*, the right to either (i) decrease annual fixed minimum rent by 50% during the period such store . . . is open and operating . . . or (ii) terminate the Lease . . . .

(Emphasis supplied.)

[8,9] In the context of liquidated damages provisions, this court has held that "parties to a contract may override the application of the judicial remedy for breach of a contract by stipulating, in advance, to the sum to be paid in the event of a breach." *Kozlik v. Emelco, Inc.*, 240 Neb. 525, 535, 483 N.W.2d 114, 120-21 (1992); *Crowley v. McCoy*, 234 Neb. 88, 449 N.W.2d 221 (1989). "This court has consistently upheld the right of contracting parties to privately bargain for the amount of damages to be paid in the event of a breach of contract, provided the stipulated sum is reasonable in light of the circumstances." *Kozlik*, 240 Neb. at 535, 483 N.W.2d at 121. Other jurisdictions have held that a trial court erred in granting specific performance when an exclusive remedy clause limited the injured party's rights. See, *Doyle v. Ortega*, 125 Idaho 458, 872 P.2d 721 (1994); *Sun Bank of Miami v. Lester*, 404 So. 2d 141 (Fla.

App. 1981). This result is justified when the parties foresee the specific nonperformance and agree to an exclusive remedy in that event.

Here, the remedy provision in the amendments is not ambiguous and limits the Reicherts' rights for this particular breach to decreased rents or termination of the lease agreements. Just as Hammond is bound by the plain language of its covenant to forebear leasing space to a competing store, so the Reicherts must be held to the plain language of the exclusive remedy provision. No conflict exists between the two provisions, and effect may be given to both.

[10,11] The question of the reasonableness of a remedy generally addresses whether a liquidated damages clause is so great as to constitute a penalty. See *Kozlik, supra*. Agreed-upon damages can also be so small as to be stricken as unconscionable in light of the breach. See, *Purcell Tire & Rubber v. Executive Beechcraft*, 59 S.W.3d 505 (Mo. 2001); Restatement (Second) of Contracts § 356, comment *a*. (1981). When, however, the parties are experienced in business, the damages are economic, and the parties had fair opportunity to consider the agreement, courts rarely find that liability limitations are unconscionable. See *Purcell Tire & Rubber, supra*. Compare *Darr v. D.R.S. Investments*, 232 Neb. 507, 441 N.W.2d 197 (1989) (method set forth in partnership agreement for valuing retiring partner's interest was not unconscionable when evidence showed that partners were experienced businessmen with opportunity to read partnership agreement and to discuss it before signing).

[12] The right to terminate a lease agreement is an important bargaining tool and, in most cases, a significant economic benefit. See, generally, *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 254 Neb. 418, 576 N.W.2d 806 (1998). This benefit is demonstrated by Ridco's termination right in the restrictive use provision in its lease agreement with Hammond. Although the Reicherts may in retrospect be dissatisfied with this bargained-for provision, this court will not rewrite a contract to provide terms contrary to those which are expressed. See, *Kozlik, supra*; *Kansas-Nebraska Nat. Gas Co. v. Swanson Bros.*, 215 Neb. 398, 338 N.W.2d 774 (1983).

CONCLUSION

[13] The district court erred in granting a permanent injunction when the parties clearly intended that the exclusive remedy in the event of a breach would be the termination of the lease agreements or a reduction in rents.

REVERSED.

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

645 N.W.2d 777

Filed June 7, 2002. No. S-01-415.

1. **Postconviction: Proof: Appeal and Error.** A criminal 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. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Postconviction: Expert Witnesses: Appeal and Error.** The denial of a motion to appoint an expert witness in a postconviction action is reviewed for abuse of discretion.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
5. **Prosecutorial Misconduct: Appeal and Error.** A presumption of prosecutorial vindictiveness arises when the defendant is charged with a more serious offense after pursuing an appeal.
6. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
7. **Effectiveness of Counsel: Proof.** If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
8. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
9. **Effectiveness of Counsel: Proof.** In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
10. **Prosecuting Attorneys: Evidence: Due Process.** The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.

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

David T. Schroeder, of Kelly & Schroeder, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

HENDRY, C.J.

INTRODUCTION

Michael T. George brought a motion for postconviction relief pursuant to Neb. Rev. Stat. § 29-3001 (Reissue 1995), alleging that his convictions in 1993 for robbery and use of a weapon to commit a felony and his convictions in 1996 for first degree assault and use of a weapon to commit a felony were obtained in violation of his constitutional rights. After an evidentiary hearing, the district court denied George relief. George appeals.

FACTUAL BACKGROUND

On March 28, 1993, Tessa Taylor was working at Coffin's Corner convenience store in Hall County, Nebraska. While talking with a customer, William Ostrander, Taylor saw a man standing at the door to the store. The man pulled up his shirt, covering the bottom part of his face to the tip of his nose. Taylor was able to see the man's entire face briefly before he pulled up his shirt. The man then walked in and stabbed Ostrander in the stomach with a knife.

After a brief scuffle with Ostrander, the assailant approached the cash register. He attempted to open the register by banging on it with his knife. Eventually, he pointed the knife at Taylor and ordered her to open the cash register. Taylor could see the man, and the exposed part of his face, throughout the incident. She was approximately 1 to 2 feet away from him when she opened the cash register. After she opened the register, the man took approximately $200 in cash and left. Taylor called the police.

Ostrander was taken to the hospital where he underwent surgery to repair serious internal wounds caused by the stabbing.

Ostrander remained in the hospital for 1 week, but recovered from his injuries.

Taylor described the assailant to the investigating officers as a man approximately 5 feet 10 inches tall, with shoulder-length dark hair with a lot of gray, wearing blue jeans and a blue shirt. Ostrander later provided a similar description of the assailant to the officers. The police showed Taylor three photographic lineups consisting of six photographs each. Taylor picked out a photograph of George, which was included in one of the lineups, and stated that the photograph looked like the robber, but she would have to see a more recent photograph to be sure. The photograph of George was approximately 1 year old. Ostrander was also shown the same three lineups at the hospital, but was unable to conclusively identify anyone. He did, however, identify the photograph of an individual other than George as a " 'guy that looked something like the one that did it.' "

About 2 weeks after the incident, George came into Coffin's Corner to purchase cigarettes. Taylor was working at the time and recognized George as the assailant from March 28, 1993. Although frightened, Taylor looked at him carefully, memorized his license plate number, and called the police immediately after George left the store. The police thereafter arrested George and took a Polaroid photograph of him in his "street clothes." The "street clothes" George was wearing in this Polaroid photograph were similar to the clothing worn by the assailant during the stabbing and robbery.

The officers then showed a fourth photographic lineup separately to Taylor and Ostrander, which included the Polaroid photograph of George in "street clothes." The lineup consisted of six photographs, George's being the only Polaroid. Taylor identified George from this fourth lineup. Ostrander also picked out George's photograph from the fourth lineup, but was not completely certain in his identification.

George was charged with attempted second degree murder, a Class II felony, use of a weapon to commit attempted murder, robbery, and use of a weapon to commit the robbery. George's trial counsel was Jerry Fogarty.

At trial, Taylor testified she recognized George when he came into Coffin's Corner 2 weeks after the incident as the man who

stabbed Ostrander and robbed the store, and she identified him in court. Taylor stated she was positive George was the assailant, recognizing, among other things, his eyes and hair. Ostrander also made an in-court identification of George as the assailant, but acknowledged that he was not "100 percent sure." Finally, Taylor and Ostrander testified regarding the four photographic lineups and their respective identifications resulting from that procedure.

The jury was instructed on the elements of attempted second degree murder and "attempted manslaughter." The jury was also instructed, inter alia, on the elements of robbery and the elements related to the two weapons charges. The jury found George guilty of robbery, attempted manslaughter, use of a weapon to commit a robbery, and use of a weapon to commit attempted second degree murder. George was sentenced to a term of 16 years 8 months' to 50 years' imprisonment on the robbery charge, along with three additional consecutive sentences of 6 years 8 months' to 20 years' imprisonment for the remaining three convictions.

George appealed his convictions, asserting that (1) the conviction for attempted manslaughter was invalid in that attempted manslaughter was not a lesser-included offense of attempted second degree murder, (2) the conviction for use of a weapon to commit attempted second degree murder was invalid because he had been acquitted of attempted second degree murder, and (3) the sentences imposed were excessive. George's counsel on appeal was Harry Moore. In *State v. George*, 3 Neb. App. 354, 358, 527 N.W.2d 638, 642 (1995) (*George I*), the Nebraska Court of Appeals reversed George's conviction for attempted manslaughter, stating:

> The combination of the elements of the crime of criminal attempt with the elements of involuntary manslaughter creates a peculiar animal. The trial court instructed the jury that "[t]he elements of Attempted Manslaughter are: 1. That the defendant . . . engaged in conduct which constituted a substantial step to culminate in his commission of the crime of attempted manslaughter. 2. That he attempted to kill another without malice . . . unintentionally while in the commission of an unlawful act." A person cannot perform the same act intentionally and unintentionally at the same time. This instruction is a contradiction because a person

> cannot intentionally take a substantial step toward the commission of a crime when that crime is an unintentional crime. Thus, attempted manslaughter does not and cannot exist under current Nebraska law.

The court also determined that because George had been acquitted of attempted second degree murder, the conviction for use of a weapon to commit attempted second degree murder must also be reversed.

The court went on to note that

> this court cannot remand this cause for a retrial on the charge of attempted second degree murder or the use of a weapon to commit the underlying felony when the jury has already found George not guilty of attempted second degree murder. Furthermore, we cannot remand this cause for a retrial on the charge of attempted manslaughter because it does not statutorily exist. Therefore, we hereby reverse George's convictions under counts II and IV and vacate the sentences imposed for those convictions.

Id. at 361-62, 527 N.W.2d 643-44. George's convictions for robbery and use of a weapon to commit the felony of robbery were affirmed.

In 1996, Hall County Prosecutor Mark Young filed an information charging George with first degree assault, a Class III felony, and use of a weapon to commit first degree assault regarding the stabbing of Ostrander. George's trial counsel at the second trial was James Truell. Virtually the same evidence was adduced by the State at the second trial. Taylor again identified George in court as the robber. She stated that she was positive George was the person who attacked Ostrander and that she had recognized George when he came into the store 2 weeks after the incident. Ostrander identified George in court at the second trial as well, but again stated he was not "a hundred percent sure." Both Taylor and Ostrander again related to the jury the circumstances surrounding the four photographic lineups and their identifications as a result. George was found guilty of both charges and sentenced to two consecutive sentences of 6 years 8 months' to 20 years' imprisonment.

George appealed his convictions, asserting the trial court erred in (1) overruling George's motion to dismiss because there

was no credible eyewitness testimony produced by the State; (2) overruling George's motion to remove defense counsel; (3) receiving into evidence, over George's relevancy objection, the fourth photographic lineup; and (4) imposing excessive sentences. George's appellate counsel in his second appeal was Charles Maser. In a memorandum opinion, the Court of Appeals found all of George's claimed errors to be without merit and affirmed George's convictions and sentences. *State v. George*, 5 Neb. App. xxvii (No. A-96-861, Apr. 29, 1997) (*George II*).

On February 2, 2000, George filed a postconviction motion pursuant to § 29-3001, seeking to vacate his convictions for robbery and use of a weapon to commit robbery in *George I*, and first degree assault and use of a weapon to commit first degree assault in *George II.* George alleged, among other things, that he had received ineffective assistance of appellate and trial counsel during both his first and second trials. The court granted George's request for an evidentiary hearing and appointed counsel for George.

Postconviction counsel asserted that George received ineffective assistance of appellate counsel in *George I* and *George II*. Postconviction counsel alleged, inter alia, that appellate counsel in *George II* was ineffective in failing to raise on appeal trial counsel's failure to assert at trial the issue of prosecutorial vindictiveness. Postconviction counsel also alleged that appellate counsel in both *George I* and *George II* were ineffective in failing to raise on appeal trial counsels' failure to attempt suppression of the eyewitness identification evidence and trial counsels' failure to request an instruction regarding eyewitness testimony. Lastly, postconviction counsel alleged that the State had failed to disclose material evidence favorable to George in both *George I* and *George II.*

George also filed a motion in the postconviction proceedings requesting that the court authorize the appointment of an expert witness to testify on George's behalf regarding the reliability of eyewitness identification. The court denied the motion.

At the evidentiary hearing, Young testified that the decision to prosecute George for first degree assault and use of a weapon to commit first degree assault in *George II* was not made in retaliation for George's successful appeal in *George I*. He stated:

> I think I talked to both [Ostrander and Taylor] before the appellate court decision came out, warning them that I thought there was a strong likelihood that the Court of Appeals would find that the [attempted manslaughter] conviction was a nullity. And I discussed that with them so they wouldn't be surprised . . . .
>
> After the reversal, I went back and visited with both of them to get their input. . . .
>
> . . . They both indicated their willingness and belief that it was appropriate to undertake a second trial, and that entered somewhat into my decision-making process.
>
> Q. So the victims expressed to you some sort of feeling that if the case stayed where it was at after the appeal, that justice would not have been served?
>
> A. Yeah, yeah. Mr. Ostrander in particular strongly expressed that opinion to me.
>
> Q. And did you consider those opinions when making the decision or the recommendation to file the charge of first degree assault and use of a weapon?
>
> A. I did.
>
> Q. Was there any thought when the decision was made to file the — this new charges [sic], was there any thought or discussion that needed to be done to discourage Mr. George or others from filing — from exercising their right to appeal —
>
> A. No.
>
> Q. — convictions?
>
> A. No.
>
> Q. Did that play any part in your decision or your recommendation?
>
> A. None whatsoever.

Young also testified that shortly after the opinion was released in *George I*, he discussed the situation with his superior and believed that "there was some indication in the opinion that Mr. George could be retried on the crime of first-degree assault [because] first-degree assault was not a lesser included [offense] of attempted murder."

Trial counsel in *George I*, Fogarty, testified. He stated that he did not raise any issues concerning the photographic lineups

because "I don't think we had a strong case in that regard." Regarding the State's alleged failure to disclose exculpatory information, Fogarty testified, "I'm not really certain about any of this, since it's been so long, but . . . these documents here I've put out, Exhibits 28, 47, 46, and 36, are the ones that are I can't say for sure were [disclosed]." These exhibits consisted of investigative police reports attempting to ascertain whether any of George's acquaintances could verify his whereabouts on March 28, 1993. Fogarty also stated, "I'm not sure whether they were provided or not. They don't seem familiar to me at the present time. Some of the information was provided to me by other means."

Trial counsel in *George II*, Truell, also testified. He stated that he did not raise the issue of prosecutorial vindictiveness at trial because he did not believe the issue had any merit. Truell further testified that after he had read the transcript of the first trial, and in particular the witnesses' in-court identifications of George, he elected not to raise any issues concerning whether the photographic lineups were unduly suggestive. Regarding the State's alleged failure to disclose exculpatory evidence, Truell testified, "I don't recall seeing [exhibits] 34, 36, 39, 41, 44, 46, 47, 28, 30, and 31."

Finally, appellate counsel in *George II*, Maser, testified. He stated that he did not raise the issue of prosecutorial vindictiveness on appeal because he "didn't believe it applied . . . I didn't see any evidence from the record that there was any vindictiveness on the part of the State."

The district court denied George's motion for postconviction relief. The district court determined in its order that prosecutorial vindictiveness "is **not** presumed in this case since the charges in the second complaint and information are not more serious than those contained in the original complaint and information filed against the defendant." The court also concluded that George "failed to present proof of actual vindictiveness on the part of the prosecution" regarding the filing of charges in *George II*. The court further found that the photograph of George contained in the fourth photographic lineup "was not unduly suggestive" and that based on *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990), the juries in

both trials "were properly instructed on the evaluation of witness credibility."

Finally, the court concluded that George had failed to prove his assertion that the State did not disclose material evidence favorable to George during either the first or second trial. The court noted that "Fogarty did not recall seeing the actual exhibits but did recall being aware of the information contained therein." In addition, the court stated that "[a]lthough Truell testified he did not recall receiving the [police reports], Truell was not asked whether the prosecution had disclosed the contents of said [police] reports to him." The court found that the testimony of Fogarty and Truell did not show that prosecutors had failed to disclose the information contained in the exhibits. The court also found that the information contained in the police reports referenced by Fogarty and Truell contained merely "suspicions, speculations, and rumors," which did not constitute material evidence favorable to George. George appealed, and we moved this case to our docket pursuant to our authority to regulate the caseloads of this court and the Court of Appeals. Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

George asserts, rephrased and renumbered, that the district court erred in failing to find ineffective assistance of appellate counsel in that the court erroneously found (1) there was no presumption of prosecutorial vindictiveness in *George II*, (2) there was no actual prosecutorial vindictiveness in *George II*, (3) the photographic lineups admitted in *George I* and *George II* were not unduly suggestive, and (4) a jury instruction concerning the reliability of eyewitness evidence was not required in either *George I* or *George II*. George further asserts the district court erred in (5) finding that the prosecution in *George I* and *George II* did not fail to disclose material evidence favorable to George and (6) overruling George's motion made during postconviction proceedings to hire an expert witness.

STANDARD OF REVIEW

[1] A criminal 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. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

[2] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.*

[3] The denial of a motion to appoint an expert witness in a postconviction action is reviewed for abuse of discretion. *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989); *State v. Suggett*, 200 Neb. 693, 264 N.W.2d 876 (1978).

ANALYSIS

[4] At the outset, we recognize that because George had different counsel at trial and on appeal in *George I* and *George II*, issues not raised on direct appeal regarding the ineffective assistance of trial counsel are waived. See *Caddy, supra*. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *Id.* However, George is asserting the alleged ineffective assistance of appellate counsel in *George I* and *George II*, in failing to raise on appeal the issue of ineffective assistance provided by the respective trial counsels below. This postconviction action is George's first opportunity to raise any alleged ineffective assistance provided by appellate counsel regarding both direct appeals. We therefore address the merits of George's assignments of error.

Prosecutorial Vindictiveness

George asserts in his first assignment of error that under *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974), the district court erred in finding no presumption of prosecutorial vindictiveness in the filing of charges in *George II.* Whether George is entitled to a presumption of vindictiveness pursuant to *Blackledge* presents a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Hunt, supra*.

In *Blackledge*, the defendant was charged with misdemeanor assault in a prison administrative proceeding. He was found guilty and appealed his conviction. While that case was on appeal, the prosecutor indicted the defendant for felony assault. The defendant pled guilty to felony assault, but then appealed, asserting that

the felony charge was the result of prosecutorial vindictiveness and thus a violation of the defendant's constitutional rights.

[5] The Court held that the defendant had a due process right under the 14th Amendment to the U.S. Constitution to pursue his initial appeal of the misdemeanor conviction "without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." 417 U.S. at 28. The Court also noted that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.' " 417 U.S. at 27. The Court found that the facts in *Blackledge* gave rise to a presumption of prosecutorial vindictiveness because the defendant was charged with a more serious offense after pursuing an appeal. The Court further determined that the state failed to rebut this presumption, and reversed the felony conviction. *Id.*

In *George I*, George was first charged with attempted second degree murder, a Class II felony. In *George II*, he was charged with first degree assault, a Class III felony. He was not charged with a more severe crime in *George II.*

George, however, argues that we should compare the severity of "attempted manslaughter" with the severity of first degree assault. Because there is no crime of "attempted manslaughter" in Nebraska, it is not possible to make such a comparison. Under *Blackledge*, it is the "charge" in the first trial which is compared with the "charge" in the second trial. 417 U.S. at 28. See, also, *U.S. v. Rodgers*, 18 F.3d 1425 (8th Cir. 1994). George was never charged with attempted manslaughter, nor, under Nebraska law, could he have been charged with such a crime. There is no presumption of vindictiveness in this case. This assignment of error is without merit.

George asserts in his second assignment of error that even without the benefit of a presumption of vindictiveness, the district court erred in failing to find actual prosecutorial vindictiveness and, accordingly, that appellate counsel was not ineffective in failing to raise the issue in *George II.* See, *United States v. Goodwin*, 457 U.S. 368, 384, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982) ("[i]n declining to apply a presumption of vindictiveness, we of course

do not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish"); *Rodgers, supra* (defendant may demonstrate prosecutorial vindictiveness by proving through objective evidence that prosecutor's decision was intended to punish defendant for exercise of legal right, or by showing that circumstances of case give rise to presumption of vindictiveness).

[6-9] In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See, also, *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001). Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id.* The two prongs of this test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *Id.* The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. *Id.* In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001).

Young testified that his motivation for filing the charges in *George II* was Taylor and Ostrander's desire that George be held accountable for the stabbing of Ostrander. There is no indication in the record that Young's actions were motivated by a desire to punish George for exercising his right to appeal the decision in *George I*. The district court found no prosecutorial vindictiveness in *George II*, and our review of the record shows that this finding is not clearly erroneous. See *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001). Because there was no prosecutorial vindictiveness, George cannot show any prejudice which resulted from

Maser's failure to raise this issue on direct appeal. This assignment of error is also without merit.

PHOTOGRAPHIC LINEUP

George asserts in his third assignment of error that he received ineffective assistance of counsel in that his appellate counsel in both direct appeals failed to raise the issue of whether the eyewitness identifications from the photographic lineups were based on unduly suggestive lineups and should have been suppressed. George's argument regarding this assignment of error is that the "Polaroid picture of the defendant contained in [the fourth photographic lineup] is unduly suggestive because the other photos appear to be 35mm photos and the defendant is the only one wearing clothes matching the description given by the eyewitness." Brief for appellant at 19.

Even assuming for purposes of argument that the fourth photographic lineup was unduly suggestive, George has failed to show that he suffered any prejudice. The U.S. Supreme Court in *Strickland*, 466 U.S. at 695-96, stated:

> [A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . [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.

See, also, *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).

The record shows that Taylor identified George prior to viewing the fourth lineup. She testified at both trials that she recognized George as the assailant 2 weeks after the incident when he came into the store to buy cigarettes. She was "positive" it was him, because she recognized his eyes and hair, among other things.

Regarding her identification of George in the convenience store, Taylor testified at trial in *George I*:

> He came in and he wanted a carton of cigarettes. Where I was at the time was close to the cigarettes so I grabbed them off there and that's when I seen him. And my heart started beating really fast and I got really shaky and I couldn't

breathe. So I got a very good description of him and waited until he left the store and then said something to my sister that that was him. . . .

[Young:] Is the same person you saw on that afternoon in April the same person you saw the night of March 28 when you were robbed?

A. Yes, it is.

Q. Is that person in the courtroom today?

A. Yes, he is.

Q. Would you point him out and describe what he's wearing?

A. This man over here. He has a blue tie with a — like a gray shirt.

[Young]: Your Honor, may the record reflect the witness has identified the defendant?

[The Court]: It will so reflect.

Q. Are you absolutely sure that's the man who robbed you?

A. Yes, I am positive.

In *George II*, Taylor similarly testified at trial:

[Young:] When you saw the person who asked for the cigarettes, what did you know [sic]?

A I kept it to myself, but after he had left the store I told them that that was the man who robbed me.

Q Did you know that as soon as you saw him?

A Yes, I did.

Q Is there any doubt in your mind that that was the man who robbed you?

A No, there is not.

Q Is the man that you saw on March 28th and then again on April 16th here today?

A Yes, he is.

Q Could you point him out and describe what he's wearing?

A He's the defendant. He's wearing a light blue shirt and a tie with blue and brown in it.

[Young]: Your Honor, may the record reflect the witness has identified the defendant?

> [The Court]: The record will reflect that the witness has identified the defendant.
>
> . . . .
>
> Q What was your physical reaction when you saw him in [the convenience store]?
>
> . . . .
>
> A I got very shaky and I was having a hard time like breathing. I was just kind of — I was scared, but I didn't want to like — I don't know how to describe it.

Taylor was not shown the fourth photographic lineup until after she had already recognized George as the assailant upon seeing him when he entered the store 2 weeks after the initial incident. Given the facts of this case, George has failed to show a reasonable probability that the outcome of either *George I* or *George II* would have been different had the fourth photographic lineup, or identifications related to the fourth photographic lineup by Taylor or Ostrander, been suppressed. The district court's finding that there was no ineffective assistance of counsel is not clearly erroneous. This assignment of error is without merit.

Eyewitness Instruction

In his fourth assignment of error, George claims he received ineffective assistance of appellate counsel in both direct appeals when appellate counsel failed to assert that trial counsel should have requested a specific jury instruction concerning the reliability of eyewitness evidence. George argues the jury instructions at both trials were flawed in that "the trial court's instructions did not highlight the problems with eyewitness identification, the sole basis for conviction was eyewitness identification, [and] there is the possibility of misidentification." Brief for appellant at 21.

A similar claim was raised in *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990), in the context of a postconviction action. In *Sanders*, we held:

> [I]t is the jury's function to determine the credibility of the eyewitness. Sanders' jury was instructed on credibility, the State's burden of proof, and the substantive elements of the crimes involved. These instructions allowed the jury to properly evaluate the credibility of the witnesses' identification testimony. . . . Therefore, Sanders' attorney was not

> deficient in failing to request such a jury instruction [on eyewitness evidence reliability].

(Citations omitted.) 235 Neb. at 194, 455 N.W.2d at 116.

As in *Sanders*, the record here shows that in both trials, the jury was instructed on credibility, the State's burden of proof, and the substantive elements of the crimes for which George was convicted. The district court's finding that there was no ineffective assistance of counsel on this issue is not clearly erroneous. This assignment of error is without merit.

Brady Violation

[10] George contends in his fifth assignment of error that the district court erred in finding that the prosecution in *George I* and *George II* did not fail to disclose material evidence favorable to George. In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."

In its order, the district court found trial counsels' testimony, that they did not recall seeing certain exhibits, insufficient to show that the information contained in the exhibits was not disclosed. Fogarty, trial counsel in *George I*, testified that he was not sure which of the exhibits he received and that some of the information in the exhibits "was provided to me by other means." Truell testified only that he did not "recall seeing" the exhibits. The court also found that because the exhibits contained only "suspicions, speculations, and rumors," George had failed to show any prejudice which could have resulted from any alleged nondisclosure.

Upon our review of the record, we conclude the district court's finding that the prosecution did not withhold material evidence favorable to George during *George I* or *George II* is not clearly erroneous. This assignment of error is without merit.

Expert Witness

George asserts in his final assignment of error that the district court erred in overruling George's motion to appoint an expert witness concerning the reliability of eyewitness identification.

The denial of a motion to appoint an expert witness in a postconviction action is reviewed for abuse of discretion. *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989); *State v. Suggett*, 200 Neb. 693, 264 N.W.2d 876 (1978).

In *State v. Ammons*, 208 Neb. 812, 814-15, 305 N.W.2d 812, 814 (1981), we held that expert testimony on the reliability of eyewitness identifications was unnecessary, stating:

> The general rule is that expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, expert testimony may be admissible. . . . The accuracy or inaccuracy of eyewitness observation is a common experience of daily life. Such testimony would invade the province of the jury.

(Citations omitted.)

A review of this record discloses no circumstances which would distinguish this court's holding in *Ammons*. As such, the district court did not abuse its discretion in denying George's request for an expert witness. This assignment of error is without merit.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JARON DEAN, APPELLANT.

645 N.W.2d 528

Filed June 7, 2002. No. S-01-729.

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.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial of his or her rights

under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.

3. **Postconviction: Proof: Appeal and Error.** The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.
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 Nebraska or federal Constitution.
5. **Postconviction.** An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law.
6. ____. In considering a motion for postconviction relief, the district court need not grant an evidentiary hearing if the motion and the files and records of the case affirmatively show that the defendant is not entitled to relief.
7. **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 or her defense.
8. **Jury Trials: Waiver.** The decision to waive a jury trial is ultimately and solely the defendant's, and, therefore, the defendant must bear the responsibility for that decision.
9. **Effectiveness of Counsel: Jury Trials: Waiver.** Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance only when (1) counsel interferes with his or her client's freedom to decide to waive a jury trial or (2) the appellant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right.
10. **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.
11. **Postconviction.** Under the Nebraska Postconviction Act, the district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing.
12. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.

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

JaRon Dean, pro se.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

GERRARD, J.

I. NATURE OF CASE

Following a bench trial in 1993, JaRon Dean was found guilty of second degree murder and use of a firearm to commit a felony and sentenced to life imprisonment. This court affirmed Dean's convictions and sentences on direct appeal. See *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Dean subsequently filed this postconviction action, alleging, inter alia, ineffective assistance of counsel and police and prosecutorial misconduct. The district court reviewed the files and records in this case and denied Dean's motion for postconviction relief without conducting an evidentiary hearing. We affirm.

II. BACKGROUND

The facts surrounding the initial crime in this case are summarized below, but are set forth in greater detail in *State v. Dean, supra*. Following a dispute between Phillip Secret and Deron Haynes on October 22, 1992, a group of men including Secret and Dean surrounded a trailer inhabited by Haynes and repeatedly fired shots into a lighted section of the trailer. Witnesses and evidence indicated that Dean was present and armed with an AK-47 rifle. Police later found Haynes' body inside the trailer; the pathologist who performed the autopsy opined that Haynes' death resulted from a bullet fired from an AK-47 rifle.

While in custody, Dean, having been arraigned and appointed an attorney, asked to talk to Sgt. Gregory H. Sorensen. Sorensen confirmed that Dean was aware of his *Miranda* rights before talking with him. Dean and Sorensen discussed Haynes' murder: Dean asked about a plea bargain, stated that he did not know why he shot into the trailer but that he wanted to blame drug use for his actions, stated that he thought he was shooting high enough to miss anyone in the trailer, and stated that he thought the trailer was empty at the time of the shooting.

Dean pled not guilty to charges of first degree murder and use of a firearm to commit a felony. The district court's minutes reflect that Dean, with counsel present, waived his right to a jury trial. At Dean's bench trial, Sorensen repeated statements made by Dean during their conversation, after Dean unsuccessfully

attempted to suppress the statements made to Sorensen. The district court issued an order finding Dean guilty of second degree murder and use of a firearm to commit a felony. Dean received sentences of 25 years' to life imprisonment for the second degree murder count and 4 to 6 years' imprisonment on the firearm count, to be served consecutively. We affirmed the district court's order on appeal. See *id.* The same counsel represented Dean at trial and on direct appeal.

On June 19, 2000, Dean filed a verified motion to vacate and set aside the convictions and sentences, pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995). Dean's motion raised four primary issues: ineffective assistance of trial counsel, ineffective assistance of appellate counsel, denial of Dean's right to a jury trial, and prosecutorial and police misconduct. The State responded by filing a motion to deny evidentiary hearing and postconviction relief.

The district court held a hearing on March 16, 2001, at which the State appeared in court and Dean appeared pro se via telephone for consideration of the State's motion to deny Dean an evidentiary hearing. The State offered, and the court received in evidence, the complete bill of exceptions from the original trial and the court's minute entry from the initial proceedings through March 16. The court also took judicial notice of Dean's verified motion to vacate and set aside the convictions and sentences, and heard arguments of the parties. There was no testimony offered by either party, nor was this hearing purported to be an evidentiary hearing on Dean's motion for postconviction relief.

Thereafter, in an order issued on June 14, 2001, the district court concluded that Dean failed to demonstrate ineffectiveness of counsel or that his counsel's alleged ineffectiveness would have changed the outcome of the trial. Dean's motion alleged that counsel failed to properly question Sorensen, but the district court attributed counsel's decision to trial strategy within counsel's discretion and the standard of reasonableness. The district court also deemed trial counsel's decision to raise only certain issues on appeal to counsel's judgment, education, and expertise in trying and appealing cases of this nature. Finally, the district court determined that Dean waived his right to a jury trial on the record, which defeated Dean's allegation that his counsel did not

inform Dean of his right to a jury trial. The court concluded that Dean made no factual allegations that constituted a denial or infringement of Dean's due process rights. Thus, the district court denied Dean an evidentiary hearing and overruled Dean's motion for postconviction relief.

Further facts relating to Dean's assignments of error are set forth below as necessary.

III. ASSIGNMENTS OF ERROR

Dean assigns, consolidated and restated, that the district court (1) erred in denying Dean an evidentiary hearing by concluding that Dean was not denied ineffective assistance of counsel, as counsel (a) did not allow Dean to testify, (b) failed to inform Dean of his right to a jury trial, (c) failed to adequately question Sorensen, and (d) was ineffective in processing his appeal; (2) erred in failing to consider Dean's allegations of prosecutorial misconduct; (3) abused its discretion by not determining the merits of Dean's postconviction motion before hearing the State's motion to deny an evidentiary hearing and failing to list the portions of the record used by the court in concluding that Dean was not entitled to relief; and (4) erred in identifying three witnesses as sergeants of the Lincoln Police Department when only one witness was a police officer.

IV. 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. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

V. ANALYSIS

[2,3] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001). The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial. *Id.* Although Dean assigns that the district court erred in refusing to grant him an evidentiary hearing, his argument often centers on his entitlement to relief.

We will consider Dean's arguments in light of whether he should have received an evidentiary hearing.

[4-6] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Billups, supra.* 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.* See § 29-3001.

1. Ineffective Assistance of Counsel

[7] Dean raises four issues under his error assigning that he received ineffective assistance from his trial counsel: counsel refused to allow Dean to testify, did not inform Dean of his right to a jury trial, failed to adequately question Sorensen, and ineffectively processed Dean's appeal. 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 or her defense. *State v. Billups, supra.*

(a) Right to Testify

Dean argues that trial counsel violated Dean's right to testify by refusing to allow him to testify at trial. Dean alleges that counsel's refusal to let him testify violated his rights under the 5th, 6th, and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 11, of the Nebraska Constitution.

At trial, however, Dean voluntarily waived his right to testify. Dean's counsel requested an on-the-record conference outside the presence of the State's counsel and the district court for the purpose of a confidential attorney-client communication regarding Dean's right to testify. Following a private conversation on the record between Dean and his attorneys, Dean's counsel requested that the record of the private conversation be sealed until Dean waived the attorney-client relationship; the district court ordered the record sealed until further order.

The district court then advised Dean of his right to testify under oath, which would subject him to cross-examination. Dean waived his right to testify, freely and voluntarily, with knowledge and understanding of the consequences. Dean acknowledged that there were no threats, force, promises, or inducements used to get him to waive his right to testify. Dean further acknowledged that he had consulted with his attorney about whether or not to testify and that he still waived his right to testify. The district court accepted Dean's waiver, and Dean's counsel rested his case.

In considering a motion for postconviction relief, the district court need not grant an evidentiary hearing if the motion and the files and records of the case affirmatively show that the defendant is not entitled to relief. See, *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002); § 29-3001. The record affirmatively shows that Dean waived his right to testify. Therefore, the district court did not err in denying Dean an evidentiary hearing on this issue.

(b) Failure to Inform of Right to Jury Trial

Dean assigns that the district court erred in failing to grant an evidentiary hearing on the issue of whether Dean's counsel violated his right to a jury trial. Dean alleges that counsel never advised him of his constitutional right to a jury trial and that counsel allowed him to make an uninformed decision about a jury trial.

Dean pled not guilty to charges of first degree murder and use of a firearm to commit a felony at his arraignment on December 9, 1992, and trial was set for the jury term starting February 22, 1993. At the start of Dean's bench trial on July 26, the district court stated: "My notes show that on the 19th of July the defendant waived a jury and that we are now here for a bench trial." Dean's counsel agreed that that was his understanding. Dean admits that he waived his right to a jury trial on the record. At the hearing regarding the State's motion to deny Dean an evidentiary hearing, the judge's minutes were accepted into evidence without objection. The minutes reflect that on July 19, 1993, Dean appeared with his counsel and waived his right to a jury trial.

[8,9] The decision to waive a jury trial is ultimately and solely the defendant's, and, therefore, the defendant must bear

the responsibility for that decision. *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997). Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance only when (1) counsel interferes with his or her client's freedom to decide to waive a jury trial or (2) the appellant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right. *Id.*

The State argues that the district court's finding that Dean waived his right to a jury trial on the record is not clearly erroneous. We agree. Dean's motion merely alleges that "trial counsel did not explain to defendant his right to be tried by a Jury of his peers." The district court considered Dean's right to an evidentiary hearing based on the files and records before the court, and Dean did not allege specific advice from counsel as part of his motion for postconviction relief. The district court did not err in determining that the files and records affirmatively showed that Dean knowingly and intelligently waived his right to a jury trial.

(c) Failure to Adequately Question Witness

Dean argues next that counsel failed to adequately question Sorensen. The district court stated that Dean "has not set forth the specific questions that he wanted to have asked of the witness; therefore, he is only stating a conclusion." The State did not address Dean's allegations on this issue in its brief.

Dean's motion for postconviction relief claims that he informed trial counsel that Sorensen's testimony was false, and he offered counsel facts to discredit Sorensen with regard to Sorensen's alleged long-term relationship with Dean and Dean's statements made to Sorensen about Haynes' death. Dean alleges that counsel refused to use the information Dean offered, saying that it was not a good idea to question Sorensen's veracity. Dean asserts that counsel's failure to pursue these lines of questioning made counsel's assistance ineffective and prejudiced Dean's defense such that a different outcome would have occurred had counsel asked Sorensen the questions Dean requested.

Dean's motion for postconviction relief, however, does not specify the alleged falsities in Sorensen's testimony, but instead merely states, as a conclusion of fact, that Sorensen lied regarding

his past relationship with Dean and their conversation. An evidentiary hearing is not required when a postconviction motion alleges only conclusions of fact or law. *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

This court has consistently required that a defendant make specific allegations instead of mere conclusions of fact or law in order to receive an evidentiary hearing for postconviction relief. For example, in *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999), the defendant alleged that trial counsel was deficient in allowing comment upon the defendant's invocation of the right to remain silent, but we concluded that the defendant's motion did not state facts to support that conclusion—such as who made the comments, what comments were made, when the comments were made, and how the comments violated his rights. In *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992), the defendant claimed ineffective assistance of counsel because counsel raised only frivolous issues on appeal, but this court determined that the defendant should not receive an evidentiary hearing because the motion merely stated the bald conclusion that his counsel presented frivolous arguments, rather than informing the court what those arguments were, or alleging facts from which the court could determine the frivolity of the issues presented on direct appeal. Finally, in *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989), the defendant alleged that counsel was ineffective in failing to procure witnesses or utilize available evidence in the defendant's favor, but this court concluded that because the defendant did not specify what witnesses could have been procured or evidence adduced, the trial court need not conduct an evidentiary hearing.

As in the cases cited above, Dean did not include in his motion the specific questions that he wanted counsel to ask Sorensen, nor did Dean specifically delineate the evidence he expected to adduce or the matters upon which he alleges Sorensen lied. In particular, Dean did not allege how his counsel's performance was deficient in cross-examining Sorensen or how different questioning or strategy by counsel would have changed the outcome of his original trial. Because Dean did not set forth sufficient facts to support his bald conclusion that trial counsel was ineffective in questioning Sorensen, the

district court did not err in denying Dean an evidentiary hearing on this ground.

(d) Ineffective Processing of Appeal

Dean assigns that the district court erred in failing to grant him an evidentiary hearing on the allegation that counsel was ineffective in processing Dean's appeal. Dean claims that counsel did not raise any of the issues that he wanted to appeal and that Dean did not know the contents of the appeal until it was filed. Dean alleges that he indicated to counsel which issues he wanted to address on appeal, but counsel did not return his calls and filed an appellate brief without Dean's notice or approval. Dean states that he met with counsel once after the conviction and prior to the appeal, but the two did not meet again, despite counsel's promise to do so.

The State cites *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984), for the proposition that it is counsel's province to select issues to be raised on appeal, while the defendant's role in the appeal is limited to an indication that he or she wishes to file an appeal. In *Williams*, the defendant argued ineffective assistance of counsel because counsel appealed some, but not all, of the issues the defendant requested. The defendant in *Williams* proclaimed 13 errors to be considered on appellate review of his conviction and sentence, 33 errors in his postconviction appeal, and 12 assignments of error on direct appeal. See *id.* This court concluded that counsel "selectively and effectively argued all material questions pertinent to Williams' conviction and sentence." *Id.* at 550, 352 N.W.2d at 544.

Dean, however, did not state in his motion for postconviction relief the errors that he wished to appeal; therefore, the district court lacked the information to evaluate the viability of the errors allegedly not appealed by Dean's counsel. *Williams* establishes that the failure to raise issues suggested by the defendant is not ineffective assistance of counsel per se, but *Williams* does not stand for the proposition that the strategic decisions of appellate counsel are not subject to examination.

In the instant case, however, it is not necessary to conduct this analysis—Dean's motion for postconviction relief does not state the specific assignments of error that he wished to present on

appeal. Without such, Dean presented the district court with a mere conclusion. As stated above, an evidentiary hearing is not required when a postconviction motion alleges only conclusions of fact or law. *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002). We have already noted our precedent of requiring defendants to set forth specific allegations of fact in order to receive an evidentiary hearing. See, *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999); *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992); *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989). Because Dean did not specifically set forth errors that counsel should have assigned on appeal, his claim of ineffective assistance fails on this ground, and the district court did not err in denying Dean an evidentiary hearing on this issue.

2. Police and Prosecutorial Misconduct

Dean argues that the district court failed to consider his claims of police and prosecutorial misconduct in eliciting the testimony of Keith Williams and Gregory Pool. Williams testified at the earlier trial of Leonard Anderson, Jr., while Pool testified at Dean's trial; Williams, Anderson, and Pool were all present at Haynes' shooting. At Dean's trial, the court received the bill of exceptions from Anderson's trial into evidence. Dean claims that the prosecuting attorney, "in cahoots with the police department," intimidated and coerced Williams and Pool into testifying against Dean. Brief for appellant at 20. Dean presented the affidavits of Williams and Pool with his motion for postconviction relief as evidence that the prosecution allegedly intimidated them into perjuring themselves.

Williams' affidavit stated that his testimony at Anderson's trial was a byproduct of police intimidation and that he "[could] not testify that he ever saw [Dean]" at the scene of Haynes' murder. Williams' affidavit further asserted that his mental capacity at the time of Haynes' shooting was "befogged" due to "a heavy and incessant smoking of marijuana." Pool's affidavit stated that although he testified at Dean's trial that Dean was next to him firing an AK-47 rifle at the time of Haynes' shooting, he actually could not remember the incident due to his intoxication at the time and the darkness of the area. Pool's affidavit asserts that his trial testimony was tainted by coercion and he "could not and

can not testify under oath that he saw [Dean] firing an AK-47 rifle" into Haynes' trailer.

The State claims that contrary to Dean's allegations otherwise, the district court made a determination on the police and prosecutorial misconduct issue in its order:

> The Defendant has not set forth the specific questions that he wanted to have asked of the witness; therefore, he is only stating a conclusion. The questions which Defendant says counsel should have asked of various police officers were in fact asked. The Defendant's counsel effectively cross-examined Sergeants [sic] Sorensen, Williams and Pool.

As opposed to the language in the order above, Dean's motion did not claim that counsel should have asked Williams and Pool specific questions, but that Williams and Pool were coerced into false testimony by the police and prosecutors. However, as explained below, a determination by the district court in this regard is unnecessary.

[10] At the time of trial, Dean could have cross-examined Williams and Pool regarding the information asserted in their affidavits, or this purported issue could have been raised in a posttrial motion or on appeal. Nowhere in his motion for postconviction relief does Dean assert that the affidavits of Williams and Pool provide evidence that Dean could not have known or elicited at the time of trial. 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. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). Because Dean does not allege that he could not have raised this issue at trial or on direct appeal, he again merely states a conclusion of fact, which does not provide a sufficient basis for the granting of an evidentiary hearing. See *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

Dean correctly notes that the district court did not specifically address the police and prosecutorial misconduct allegation. We, however, find this error to be harmless. See *State v. Morrow*, 237 Neb. 653, 660, 467 N.W.2d 63, 68 (1991) ("it is harmless error when a correct order is entered, although for an incorrect reason"). We determined above that Dean's request for an evidentiary hearing on the issue of police and prosecutorial misconduct is without merit. Despite the district court's failure to address this

particular issue, it concluded generally that Dean did not make any factual allegations that demonstrate a denial or infringement of his due process rights. Absent a specific allegation by Dean that he did not know of the alleged prosecutorial misconduct at the time of trial or direct appeal, the district court did not clearly err in denying Dean an evidentiary hearing on this ground.

3. District Court's Procedure in Considering Dean's Motion

Dean assigns two errors, consolidated for appeal, claiming that (1) the district court abused its discretion by allowing the State to file a motion to deny Dean an evidentiary hearing prior to determining that Dean was not entitled to postconviction relief and (2) the district court erred by not listing the portions of the record used in reaching its decision.

[11,12] Dean argues that the district court's procedural handling of his postconviction motion denied Dean his rights to file an amended petition, receive an evidentiary hearing, and be represented by counsel. Under the Nebraska Postconviction Act, the district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing. See *State v. Flye*, 201 Neb. 115, 266 N.W.2d 237 (1978). Thus, we examine the district court's procedure in this circumstance under an abuse of discretion standard. A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001).

When a postconviction 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. *State v. Billups, supra*. Section 29-3001 allows for the denial of an evidentiary hearing if the court determines to its satisfaction from the files and records of the case that the prisoner is not entitled to relief. It is not unusual for a court to hold a hearing to determine which files and records the court may

review prior to considering the State's motion to deny a prisoner an evidentiary hearing. The district court's procedures did not unfairly deprive Dean of a substantial right, and we find no abuse of discretion in the manner in which the court conducted the hearing at issue.

Dean further argues that the district court erred in not listing the portions of the files and records used to make its determination to deny Dean relief, citing *State v. Fugate*, 180 Neb. 701, 144 N.W.2d 412 (1966), in support of his argument. In *Fugate*, 180 Neb. at 704, 144 N.W.2d at 414, this court directed:

> [I]n an appeal from an order denying an evidentiary hearing upon a motion filed under the Post Conviction Act, the files and records of the district court which were considered by the district judge in ruling upon the motion shall accompany the transcript filed in this court. The transcript in such a case shall contain a certificate of the district judge identifying the files and records as those which were considered in ruling upon the motion.

At the hearing on the State's motion to deny Dean an evidentiary hearing, the district court received into evidence the files and records of Dean's case. The certified bill of exceptions of the hearing identifies the records as the complete bill of exceptions of Dean's case, from the first hearing through the conclusion of Dean's trial, a copy of the judge's minutes from the first date through the March 16, 2001, hearing, and Dean's motion for postconviction relief and attached affidavits. The district court based its decision to grant the State's motion to deny Dean an evidentiary hearing on a review of the exhibits, i.e., the files and records of the case, admitted at the hearing.

We have before us the evidence adduced at the hearing on the State's motion to deny an evidentiary hearing for our consideration of Dean's appeal. Dean did not object to any of the exhibits received in evidence by the court on March 16, 2001. Dean's claim on appeal is without merit. The district court did not abuse its discretion in its procedure for reviewing the files and records in this case.

Finally, we have reviewed Dean's remaining assignment of error and determine that it is without merit.

VI. CONCLUSION

We, therefore, conclude that the district court did not err in refusing to grant Dean an evidentiary hearing on the allegations in his motion for postconviction relief. The judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.

RICHARD A. BILLINGSLEY, APPELLEE AND CROSS-APPELLANT, V. BFM LIQUOR MANAGEMENT, INC., DOING BUSINESS AS BRANDEIS FOOD MANAGEMENT AND BRANDEIS CATERING, INC., APPELLANTS AND CROSS-APPELLEES.

645 N.W.2d 791

Filed June 14, 2002. No. S-01-171.

1. **Judgments: Res Judicata: Collateral Estoppel.** The applicability of the doctrines of res judicata and collateral estoppel is a question of law.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
5. **Equity: Jurisdiction: Appeal and Error.** An appellate court's review of the trial court's exercise of equity jurisdiction is de novo on the record, with independent conclusions of fact and law.
6. **Judgments: Res Judicata.** Under res judicata, a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action.
7. **Judgments: Collateral Estoppel.** Under collateral estoppel, when an issue has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.
8. **Actions: Res Judicata: Collateral Estoppel.** It is essential that there be a prior action to invoke application of res judicata and collateral estoppel in a subsequent case.
9. **Actions: Res Judicata.** In order to invoke the doctrine of res judicata, there must have been a decision on the merits in the prior action.
10. **Fair Employment Practices: Discrimination: Employer and Employee.** In order for two distinct entities to "collapse" into a single employer for purposes of Nebraska's age discrimination act, the two businesses must have (1) interrelated operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.

11. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
12. ____: ____. The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.
13. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict 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.
14. **Fair Employment Practices: Discrimination: Jury Trials: Equity.** In an age discrimination case, when the district court considers the plaintiff's request for equitable relief, the district court cannot reject the jury's findings on whether the plaintiff was the victim of age discrimination, but it nevertheless retains discretion to consider all the circumstances in the case when it determines what equitable relief, if any, may be appropriate.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Jeffrey A. Silver for appellants.

Robert V. Broom, of Broom, Johnson & Clarkson, for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

In his fifth amended petition filed in the district court for Douglas County, Richard A. Billingsley alleged he had been discriminated against in the workplace on the basis of age. Billingsley sought damages, unpaid wages, equitable relief, and attorney fees pursuant to Nebraska's Act Prohibiting Unjust Discrimination in Employment Because of Age (age discrimination act), Neb. Rev. Stat. §§ 48-1001 to 48-1010 (Reissue 1998), and the Nebraska Wage Payment and Collection Act (wage payment act), Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 1998). The named defendants were BFM Liquor Management, Inc.,

doing business as Brandeis Food Management, and Brandeis Catering, Inc.

Following trial, the jury awarded Billingsley $59,963.93 in damages on his age discrimination claim and $4,469.88 on his unpaid wage claim. An appeal was taken. Because the district court had not ruled on Billingsley's request for equitable relief, the purported appeal was dismissed for lack of a final, appealable order. *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000). Thereafter, the district court considered Billingsley's requested equitable relief. The district court denied Billingsley's request for front pay or reinstatement. The district court awarded Billingsley attorney fees and postjudgment interest. BFM Liquor Management, Inc., and Brandeis Catering, Inc., appeal, and Billingsley cross-appeals. We affirm.

II. STATEMENT OF FACTS

This is the second appearance of this case in this court. See *Billingsley, supra*. We repeat the facts recited in *Billingsley* which are necessary to this opinion.

Billingsley was employed by BFM Liquor Management, Inc., which also does business as Brandeis Food Management (BFM), and Brandeis Catering, Inc. (BCI), businesses determined by the district court as a matter of law to be a "common enterprise" under § 48-1002 of the age discrimination act. The record reflects that in 1993 and 1994, BFM employed over 25 people. In those same years, defendants claim BCI employed fewer than 25 people. Billingsley was hired on August 24, 1988, to develop BFM's catering operations on the premises of the Ak-Sar-Ben coliseum in Omaha. Subsequently, an offsite catering company was separately incorporated as BCI, and Billingsley was given additional responsibilities. Billingsley testified that during his tenure with defendants, he never received an oral or written reprimand, and that he had always performed his duties satisfactorily. As defendants' catering operations grew, more people were hired to assist Billingsley.

Tom Wolf was hired in June 1993 to assist Billingsley with the sales of catering engagements. Helmuth Dahlke, Billingsley's supervisor, informed Billingsley of the decision to hire Wolf. Wolf's employment arrangement was such that he was to be paid

a commission on the sales of catering events he arranged. At that time, Wolf was 30 years of age.

In December 1993, Billingsley negotiated an employment agreement by which he would be paid, in addition to his salary, 3 percent of the gross monthly sales of BFM's off-premises catering and 2 percent of the gross monthly sales of BFM's onsite catering. Billingsley claims that he never received any of his commission after this agreement was finalized in January 1994. This employment agreement was in effect at the time of Billingsley's notice of termination of employment on May 23, 1994.

On May 19, 1994, Billingsley attended a management meeting called by Dahlke. At this meeting, Billingsley was given a new organizational chart for BFM's operations at Ak-Sar-Ben, pursuant to which he was informed that he would no longer report to Dahlke and that his supervisor would now be Dave Henningsen. Billingsley testified that Dahlke had a desire to give defendants a "younger image" and had on occasion instructed management to terminate the employment of employees because they were "old" and "useless" and hire employees who were "younger and prettier." Other witnesses who were BFM employees during the same timeframe as Billingsley testified at trial that they were aware of Dahlke's desire to give defendants a "younger image."

On Friday, May 20, 1994, a large catering event took place on the premises of Ak-Sar-Ben, after which the dishes and preparation materials were piled in a hallway at Ak-Sar-Ben and were not cleaned on the evening of that event. Because Billingsley was the supervisor of catering, he was contacted by Henningsen when it was discovered on May 22 that the materials from the May 20 catering event were not properly cleaned up. Billingsley was asked to drive to Ak-Sar-Ben to clean up the mess on May 22. Dan Bice, who worked directly under Billingsley, testified that it was Bice's responsibility to make sure that the materials from the Friday catering event were cleaned in a timely fashion. Bice further testified that it was common practice to wait until the following Monday to clean materials from a large catering event held on Fridays when that Friday event was large and there were other catering events scheduled for that same weekend.

When Billingsley failed to appear at Ak-Sar-Ben on May 22, 1994, Sharon Smith, the then chief executive officer for Douglas County Racing and Douglas Recreation Corporation, which ran the Ak-Sar-Ben property, informed Henningsen and Dahlke that if Billingsley did not care enough to clean up the mess, he was not to be on the premises of Ak-Sar-Ben at all. Dahlke testified that this was the final incident in a process building up to his decision to terminate Billingsley's employment. Billingsley was notified by Dahlke of his termination of employment on May 23; Dahlke said Billingsley's position had been eliminated. Defendants' records, however, reveal that Billingsley was replaced by Wolf, who was younger than 40 years of age.

On March 10, 1995, Billingsley filed a petition in the district court. For his first three causes of action, Billingsley alleged wrongful discharge, breach of contract, and tortious interference with business relations, respectively. For his fourth cause of action, Billingsley sought an accounting for all profits made by BCI. After twice sustaining defendants' demurrer to Billingsley's first three causes of action and twice allowing him to amend his petition, on August 1, the district court sustained defendants' third demurrer to the first three causes of action alleged in Billingsley's third amended petition. Although not evident in the record in *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000), the transcript in the instant appeal shows that the district court dismissed Billingsley's wrongful discharge, breach of contract, and tortious interference claims, each without leave to amend. As of August 1, the only claim remaining in Billingsley's third amended petition was his accounting cause of action.

After hiring new counsel, Billingsley filed a motion seeking leave to file a fourth amended petition on January 30, 1996. The motion was sustained on February 7. In his fourth amended petition, Billingsley added three new causes of action. For his first cause of action, Billingsley alleged, inter alia, that defendants had discriminated against him in employment on the basis of age in violation of the age discrimination act. In his second and third causes of action, Billingsley sought unpaid wages under the wage payment act. Billingsley requested backpay and other damages he had suffered due to defendants' actions. His

petition also contained a prayer for reinstatement or front pay in lieu thereof, attorney fees, and "further relief as the Court may deem just, proper, and equitable." In his fourth amended petition, Billingsley abandoned his separate cause of action for an accounting.

On March 28, 1997, Billingsley moved to file a fifth amended petition. On April 8, the district court sustained Billingsley's motion to amend. The fifth amended petition amended the fourth amended petition by correcting the name of one of the corporate defendants and by correcting allegations relating to Billingsley's bonus agreement with BFM. Otherwise, Billingsley's fourth amended petition remained unchanged.

The fifth amended petition (petition) is the operative petition for purposes of trial and of this appeal. On May 28, 1997, defendants filed an answer in which they denied the allegations contained in Billingsley's petition and affirmatively alleged, inter alia, that due to the district court's order of August 1, 1995, dismissing three causes of action as they had been pled, Billingsley's petition was barred by res judicata and collateral estoppel.

The 4-day jury trial began on August 17, 1998. The record contains approximately 800 pages of testimony from 17 witnesses and approximately 76 exhibits. To the extent they are necessary, further facts and rulings from the trial are incorporated in our analysis below. The parties stipulated prior to trial that the district court would reserve ruling on Billingsley's request for equitable relief until after the jury determined the lawfulness of the discharge and the amount of damages, if any, Billingsley should be awarded with respect to these legal issues.

During the jury instruction conference held near the conclusion of the trial, the district court determined as a matter of law that pursuant to § 48-1002, BFM and BCI were a "common enterprise," sharing employees and employing over 25 people, and that both entities met the statutory definition of an "employer" under the age discrimination act which defines an employer as "any person having in his or her employ twenty-five or more individuals." See § 48-1002(2).

Defendants moved for a directed verdict, claiming, inter alia, that Billingsley had failed to demonstrate that his termination

from employment was based on age discrimination and not some other legitimate reason. The district court denied defendants' motion for directed verdict, and the case was submitted to the jury.

On August 24, 1998, the jury found that defendants had discriminated against Billingsley because of his age and awarded him damages of $59,963.93. The jury also awarded Billingsley $4,469.88 on his claim for unpaid wages. Billingsley filed a motion seeking an order regarding equitable relief and attorney fees. The motion was scheduled for hearing on September 16.

On September 15, 1998, defendants appealed the jury award prior to the district court's having ruled on Billingsley's claims for equitable relief and attorney fees. Billingsley filed a cross-appeal. We dismissed the appeal for lack of jurisdiction. *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000). In *Billingsley*, we concluded that the jury verdict was not a final, appealable order because neither the equitable relief sought by Billingsley nor the attorney fees issue had been determined by the district court.

Following our dismissal of the purported appeal, the district court held a hearing on August 24, 2000, on Billingsley's claims for equitable relief and attorney fees, as well as his request for postjudgment interest. In an order filed December 14, the district court ruled on these claims as follows:

> Based upon the over 4-year gap between Richard Billingsley's termination of employment, and his trial, and based upon the jury's computation of his wage claim and his age claim . . . the Court is persuaded that the verdicts which the jury reached were inclusive not only of Richard Billingsley's legal claims, but those matters which are included within Billingsley's pending request for equitable relief, save the claim for an attorney's fee and post-judgment interest running from the date of the jury's award.

The district court thus denied Billingsley equitable relief of either front pay or reinstatement and set a hearing date on Billingsley's request for attorney fees and postjudgment interest.

On January 5, 2001, the district court held a separate hearing on Billingsley's request for attorney fees and postjudgment interest. In an order filed January 10, the district court awarded

Billingsley attorney fees and postjudgment interest. Judgment was entered.

Defendants appealed the district court's judgment. Billingsley filed a cross-appeal.

III. ASSIGNMENTS OF ERROR

Defendants assign several errors, three of which we discuss. Defendants claim that the district court erred in (1) not finding that Billingsley's claims as set forth in the petition were barred by res judicata and collateral estoppel due to the dismissal of the first three causes of action in Billingsley's third amended petition, (2) concluding that although BCI had fewer than 25 employees, BFM and BCI were to be treated as a common enterprise and thus employers within § 48-1002, and (3) failing to find that Billingsley "failed to sustain his burden of proof because of Defendants' articulation of legitimate nondiscriminatory reasons for [Billingsley's] termination from employment so that no reasonable jury could have returned a verdict for [Billingsley]."

Billingsley assigns two errors on cross-appeal, one of which we discuss. Billingsley claims, restated, that the district court erred in failing to award equitable relief.

IV. STANDARDS OF REVIEW

[1-3] The applicability of the doctrines of res judicata and collateral estoppel is a question of law. *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002); *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002). Similarly, statutory interpretation presents a question of law. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, 263 Neb. 544, 641 N.W.2d 55 (2002). On questions 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).

[4,5] A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). An appellate court's review of the trial court's exercise of equity jurisdiction is de novo on the record, with independent

conclusions of fact and law. *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000).

V. ANALYSIS

1. Appeal

(a) Claims Not Barred by Doctrines of Res Judicata and Collateral Estoppel

Defendants argue that the district court erred in not determining that Billingsley's claims under the age discrimination act and under the wage payment act were barred by the doctrines of res judicata and collateral estoppel. There is no merit to this assignment of error.

Defendants specifically assert that on August 1, 1995, when the district court dismissed Billingsley's common-law causes of action for wrongful termination, breach of contract, and tortious interference from his third amended petition without leave to amend such claims, Billingsley's statutory claims for age discrimination and unpaid wages subsequently pled in his fifth amended petition were subsumed within that dismissal and that their assertion was barred by res judicata and collateral estoppel. Because, as detailed below, res judicata and collateral estoppel are limited in their application to subsequent actions, defendants' reliance on these doctrines within the course of the same action is misplaced.

In connection with this assignment of error, defendants contend that when the dismissal order was not vacated by the district court, Billingsley was precluded from subsequently amending his petition to add his statutory claims. In this regard, defendants note that before a district court can enter orders directing the course of a previously dismissed case, it must vacate the dismissal and reinstate the case. See *Murray Constr. Servs. v. Meco-Henne Contracting*, 10 Neb. App. 316, 633 N.W.2d 915 (2001). Defendants' reliance on *Murray Constr. Servs.* is misplaced. The instant appeal involves but one case which was not previously dismissed. Furthermore, the August 1, 1995, dismissal order was limited to three common-law causes of action pled in the third amended petition, which causes of action were not amended by either the fourth or fifth amended

petitions. The fourth amended petition raised statutory causes of action in the pending action for the first time.

In connection with defendants' argument based on res judicata and collateral estoppel, we note that in its August 1, 1995, order, the district court dismissed from Billingsley's third amended petition the three common-law causes of action of wrongful termination, breach of contract, and tortious interference, without leave to amend. The parties agree that the order of August 1 was not vacated. When Billingsley sought and was granted leave to file his fourth amended petition, the petition did not replead the dismissed common-law causes of action, but, rather, added three completely new statutory causes of action: one for age discrimination under §§ 48-1001 to 48-1010 and two for wage payment under §§ 48-1228 to 48-1232. The fifth amended petition repeated the causes of action alleged in the fourth amended petition. Thus, although the common-law wrongful termination, breach of contract, and tortious interference causes of action were dismissed without leave to replead, the district court's order of dismissal did not encompass causes of action subsequently asserted in the same case under statutory provisions involving age discrimination and unpaid wages.

[6,7] Res judicata refers to claim preclusion, while collateral estoppel refers to issue preclusion, two different concepts, although the two terms are often used together. *Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 230 N.W.2d 99 (1975). We have stated that under res judicata, "a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action." *Woodward v. Andersen*, 261 Neb. 980, 987, 627 N.W.2d 742, 749 (2001). Under collateral estoppel, when an issue has been determined by a final judgment, that issue cannot again be litigated between the same parties in a "future lawsuit." *Id.* at 987-88, 627 N.W.2d at 749.

[8,9] We take this opportunity to state that although it was apparent from the discussion of the facts of our previous opinions, we have not always explicitly referred to the requirement that for res judicata and collateral estoppel to apply, the potential application is restricted to subsequent lawsuits. See, e.g., *City of Kearney v. Johnson*, 222 Neb. 541, 385 N.W.2d 427 (1986); *Hickman, supra*. However, it is essential that there be a

prior action to invoke application of these doctrines in the subsequent case. See *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993) (stating that for application of res judicata and collateral estoppel, successive lawsuits are required). See, also, *Wicker v. Vogel*, 246 Neb. 601, 603, 521 N.W.2d 907, 909 (1994) (stating that res judicata is inapplicable when parties are "involved in but one action"); *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 320, 343 N.W.2d 903, 905 (1984) (collateral estoppel may apply to pending action so long as identical issue was decided in "prior action"). As to res judicata, it is required that there must have been a decision on the merits in the prior action. See *Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001) (stating that because court's decision that it lacked jurisdiction to enter order was not resolution on merits of claim, res judicata did not apply).

The doctrines of res judicata and collateral estoppel bar the relitigation of certain issues in a subsequent lawsuit. In the instant case, there has been no former lawsuit reaching final judgment as to the statutory age discrimination and wage payment issues tried pursuant to the fifth amended petition. Because there is no prior action, neither res judicata nor collateral estoppel is applicable to this case in the manner proposed by defendants. See, *Wicker v. Vogel, supra*; *In re Application of City of Lincoln, supra*.

We conclude that Billingsley was not precluded by the doctrines of res judicata and collateral estoppel from amending his petition to add his statutory causes of action. Accordingly, there is no merit to this assignment of error.

(b) Defendants Are Common Enterprise for Purposes of "Employer" Under § 48-1002

For their next assignment of error, defendants assert that the district court erred when it determined, as a matter of law, that BFM and BCI were a "common enterprise" which shared employees and employed over 25 people, thus subjecting both BFM and BCI to the age discrimination act. Defendants focus on the fact that in 1993 and 1994, BCI had fewer than 25 employees on its payroll and, standing alone, was not an "employer" within the meaning of § 48-1002. Billingsley worked for BFM and BCI,

and the record shows that, as a matter of law, BFM and BCI were a "common enterprise." Therefore, both defendants were subject to the age discrimination act and there is no merit to this assignment of error.

The issue raised in this assignment of error presents the question of statutory interpretation of whether the employees of technically separate entities may be combined for the purpose of meeting the statutory definition of an "employer" under § 48-1002. Statutory interpretation presents a question of law. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, 263 Neb. 544, 641 N.W.2d 55 (2002). On questions 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).

Under the age discrimination act, it is an unlawful employment practice for an employer "[t]o refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to his terms, conditions, or privileges of employment, otherwise lawful, because of such individual's age, when the reasonable demands of the position do not require such an age distinction." § 48-1004(1)(a). The prohibitions under the age discrimination act are "limited to the employment of individuals who are at least forty years of age but less than seventy years of age." § 48-1003. The age discrimination act defines an "employer" governed by the act as "any person having in his or her employ twenty-five or more individuals." § 48-1002(2).

This court has previously stated that when applying the provisions of the Nebraska age discrimination act, it will look to federal decisions interpreting the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 to 634 (1994), for guidance in construing the Nebraska age discrimination act. See *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993) (stating that while federal protection is provided to all individuals who are at least 40 years of age, this court, as general rule, in other respects conforms its reading of Nebraska's age discrimination act to reading of ADEA). An employer is defined under the ADEA as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or

more calendar weeks in the current or preceding year." 29 U.S.C. § 630(b).

Under the ADEA, the federal courts have recognized that "in the context of separate corporate entities, a court may calculate the number of employees by reference to the parent's employment rolls if the two distinct entities 'collapse' into a single employer." *Darden v. DaimlerChrysler North American Holding*, 191 F. Supp. 2d 382 (S.D.N.Y. 2002). See, also, Annot., 137 A.L.R. Fed. 551, 567 (1997) ("[c]ourts may consider two ostensibly separate business entities to be a single 'employer' for ADEA purposes if the facts indicate that the two are an 'integrated enterprise' ").

[10] According to the *Darden* opinion, two distinct entities " 'collapse' " into a single employer if the two businesses have "(1) interrelated operations, (2) centralized control of labor relations, (3) common management and (4) common ownership or financial control." 191 F. Supp. 2d at 395. We believe the approach recited in *Darden* is sensible under the Nebraska age discrimination act and adopt the four-part test outlined therein.

In the instant case, the record reflects that both BFM and BCI operated under the control of Alan Baer & Associates. The record further reflects that BFM and BCI shared employees and that they had an economic relationship with respect to these shared employees. Another Alan Baer & Associates business, Strategic Staff Management, would oversee various human resource issues for both businesses. BFM and BCI shared similar management personnel, including Dahlke. Indeed, during the trial, Dahlke testified that he was employed by Alan Baer & Associates and that during the course of his employment, the positions he held with BFM and BCI had "been the same, basically . . . I'm on the board of directors, and I'm probably a vice president or a treasurer or a secretary."

Based upon our review of the record in this case, we conclude that BFM and BCI shared interrelated operations, had centralized control of labor relations, shared a common management, and shared a common ownership or financial control, and therefore, they may be collapsed to make one employer. Accordingly, we conclude that the district court did not err in determining that BFM and BCI were a "common enterprise" and, therefore, were

employers under the age discrimination act. Defendants were subject to the terms of the age discrimination act. We conclude there is no merit to this assignment of error.

(c) District Court Properly Denied Defendants' Motion for Directed Verdict

For their next assignment of error, defendants claim that the district court failed to find that Billingsley "failed to sustain his burden of proof because of Defendants' articulation of legitimate nondiscriminatory reasons for [Billingsley's] termination from employment so that no reasonable jury could have returned a verdict for [Billingsley]." We interpret this assignment to mean that defendants assign as error the district court's denial of their motion for a directed verdict. We conclude that the district court did not err in overruling defendants' motion for a directed verdict, and accordingly, we find this assignment of error to be without merit.

[11-13] A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000); *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *McLain*, *supra*; *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999). The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *McLain*, *supra*; *Alexander v. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997). In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict 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. *McLain, supra*; *Lackman, supra*.

Defendants argue that they adduced evidence of legitimate nondiscriminatory reasons as to why Billingsley's employment was terminated and that, therefore, no reasonable jury could have returned a verdict for Billingsley. In cases arising under the age discrimination act, we have held that

> "although the ultimate burden of persuasion by a preponderance of the evidence at all times remains with the plaintiff, the method of proof is for the plaintiff to prove a prima facie case; if the plaintiff succeeds in so doing, the defendant has the burden of articulating some legitimate, nondiscriminatory reason for its action. Should the defendant succeed in so doing, the plaintiff must establish by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."
>
> . . . See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). (As recently clarified in *St. Mary's Honor Center v. Hicks*, [509] U.S. [502], [113] S. Ct. [2742], 125 L. Ed. 2d 407 (1993), *McDonnell Douglas Corp.* allocates the burden of production and the order for the presentation of the evidence; the ultimate burden of persuasion, however, rests on the plaintiff.)

Humphrey v. Nebraska Public Power Dist., 243 Neb. 872, 878, 503 N.W.2d 211, 217 (1993) (quoting *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988)).

We have stated that to establish a prima facie case of age discrimination, the plaintiff must establish that (1) he or she was in the protected group, (2) he or she was subjected to an adverse employment action, (3) he or she was qualified for the position, and (4) the person who received the position was outside of the protected group. *Humphrey, supra*. The ultimate issue is whether age was a determining factor in the employer's decision. *Id.*

In *Humphrey*, the plaintiff claimed on appeal that the trial court erred in not directing a verdict in his favor on his claim of

age discrimination. We reviewed the record and determined that the evidence was in dispute and presented an issue as to whether the employer had articulated legitimate, nondiscriminatory reasons for its decisions or whether those reasons were merely pretextual. We concluded that because of the dispute in the record, the trial court did not err in denying the plaintiff's motion for directed verdict. In *Humphrey*, we stated:

> The evidence was not such that reasonable minds could draw but one conclusion . . . . Because it is the prerogative of the jury, as the trier of fact, to resolve conflicts in the evidence and to determine the weight and credibility to be given to testimony of witnesses . . . the evidence clearly presented a submissible issue for the jury. The trial court thus properly denied Humphrey's motion for directed verdict . . . .

243 Neb. at 881-82, 503 N.W.2d at 219.

In the instant case, as in *Humphrey*, there was a conflict in the evidence. Although defendants introduced evidence of a legitimate, nondiscriminatory reason for Billingsley's termination, namely, performance issues, Billingsley introduced evidence from which a jury could determine that those reasons were merely pretextual. Billingsley's evidence included testimony that Dahlke stated an employee should be fired because "he's old. He's useless. He looks bad for the corporate image. . . . Get rid of that old man." Additionally, testimony indicated that Dahlke "wanted an entire new face-lift that would allow a younger look to the entire department" and employment decisions were made in accordance with this stated objective.

A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). Our review of the record shows that the evidence in this case created an issue for the jury as to whether defendants had articulated legitimate, nondiscriminatory reasons for their decision to terminate Billingsley or whether those reasons were merely pretextual. As such, we conclude that the district did not err in denying the defendants' motion for directed verdict and submitting the case to the jury.

2. BILLINGSLEY'S CROSS-APPEAL: EQUITABLE CLAIMS

On cross-appeal, Billingsley claims as his first assignment of error that the district court erred in denying him equitable relief on his age discrimination claim. Billingsley sought equitable relief in the form of front pay or reinstatement. We conclude that this assignment of error is without merit.

[14] We noted in *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000), that an age discrimination claimant was entitled to have a jury determine the lawfulness of the employer's conduct and the amount of claimed past damages and, thereafter, to have the district court consider any request for equitable relief. Because in *Billingsley*, the district court had not yet ruled on Billingsley's request for equitable relief prior to the appeal, we dismissed the appeal for lack of a final, appealable order. In setting forth this procedure for handling legal and equitable claims in an age discrimination case, we quoted with approval from *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093 (8th Cir. 1982), in which the U.S. Court of Appeals for the Eighth Circuit stated that in an age discrimination case,

> "[a]fter the jury trial on the foregoing damages issues, the district court should reconsider [the plaintiff's] request for equitable relief . . . .
>
> . . . Although the court below retains its discretion to consider all the circumstances in this case when it determines what equitable relief may be appropriate, it cannot base its decision on its own factual findings that conflict with those expressly made by the jury."

Billingsley v. BFM Liquor Mgmt., 259 Neb. 992, 1001, 613 N.W.2d 478, 485 (2000). Accordingly, in an age discrimination case, when the district court considers the plaintiff's request for equitable relief, the district court cannot reject the jury's findings on whether the plaintiff was the victim of age discrimination, but it nevertheless retains discretion to consider all the circumstances in the case when it determines what equitable relief, if any, may be appropriate.

In the instant case, following this court's dismissal of *Billingsley, supra*, the district court considered Billingsley's request for equitable relief. After a hearing on Billingsley's equitable claims, the district court entered an order in which it

granted Billingsley's request for attorney fees and postjudgment interest, but denied him the relief of reinstatement or front pay. The district court explained its decision as follows:

> Based upon the over 4-year gap between Richard Billingsley's termination of employment, and his trial, and based upon the jury's computation of his wage claim and his age claim . . . the Court is persuaded that the verdicts which the jury reached were inclusive not only of Richard Billingsley's legal claims, but those matters which are included within Billingsley's pending request for equitable relief, save the claim for an attorney's fee and post-judgment interest running from the date of the jury's award.

Although the district court's opinion is somewhat unclear, we interpret this order to be a ruling that "[b]ased upon . . . his trial," Billingsley had not established that he was entitled to the relief of reinstatement or front pay. According to the order, the district court considered the jury's findings that defendants had terminated Billingsley on the basis of his age, and the district court was aware of the damages the jury had awarded Billingsley as a result of this unlawful discrimination. It thus appears that the district court "consider[ed] all the circumstances in this case" and then determined, in its discretion, that under the evidence, no equitable relief in the form of reinstatement or front pay was appropriate. See *Gibson*, 695 F.2d at 1101. Under our de novo standard of review, see *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000), we cannot say that the district court erred in its decision on Billingsley's claim for equitable relief. Accordingly, we find no merit to this assignment of error in Billingsley's cross-appeal.

3. Remaining Assignments of Error

We have considered defendants' and Billingsley's remaining assignments of error, and we conclude they are without merit.

VI. CONCLUSION

For the reasons stated above, we affirm the decision of the district court.

Affirmed.

RAYMOND REISIG, APPELLANT, V. ALLSTATE INSURANCE COMPANY, A CORPORATION, APPELLEE.

645 N.W.2d 544

Filed June 14, 2002. No. S-01-424.

1. **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.
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. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed.
5. **Records.** Once an adequate request has been made by an appellant, the preparation of the bill of exceptions becomes an internal court matter, and it is the duty of the court reporter to properly fulfill the request.
6. **Insurance: Contracts.** Under Nebraska law, a court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous.
7. **Insurance: Contracts: Intent: Appeal and Error.** An appellate court reviewing an insurance policy must construe the policy as any other contract and give effect to the parties' intentions at the time the contract was made.
8. **Contracts.** A contract must be construed as a whole, and if possible, effect must be given to every part thereof.
9. ____. When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
10. **Insurance: Contracts.** The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
11. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
12. **Insurance: Contracts.** An ambiguous insurance policy will be construed in favor of the insured.

Appeal from the District Court for Kimball County: KRISTINE R. CECAVA, Judge. Reversed and remanded for further proceedings.

Dave Eubanks, of Van Steenberg, Mullin, Pahlke, Smith, Snyder, Petitt & Eubanks, P.C., for appellant.

John M. Burns and James W. Nubel, of Burns Law Firm, for appellee.

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

HENDRY, C.J.

INTRODUCTION

Raymond Reisig filed a declaratory judgment action against Allstate Insurance Company (Allstate), seeking a declaration that the injuries he sustained as a passenger in an uninsured vehicle were covered under the uninsured motorists coverage endorsement (uninsured motorists endorsement) of his Allstate insurance policy. The Kimball County District Court sustained Allstate's motion for summary judgment and dismissed Reisig's declaratory judgment action. Reisig appeals.

FACTUAL BACKGROUND

The evidence presented at the summary judgment hearing, which was not disputed by either party, revealed the following facts: On February 26, 1998, Reisig was a passenger in a 1985 Chevrolet pickup truck driven by its owner, Emigdio Pruneda. As Pruneda was driving southbound on Highway 71, he lost control of the vehicle on an ice-covered portion of the highway approximately 9 miles north of Kimball, Nebraska. The vehicle went off the road and rolled over into the ditch. Reisig claimed he sustained injuries as a result of the accident.

Pruneda and his vehicle were uninsured at the time of the accident. Pruneda had failed to pay the premium on his insurance policy, and as a result, his insurance had been canceled as of January 12, 1998.

Reisig had a "Business Auto" insurance policy issued by Allstate, which was in effect at the time of the accident. Reisig's policy provided automobile liability coverage and contained an uninsured motorists endorsement. Both the insurance policy and the uninsured motorists endorsement listed "Raymond C. Reisig DBA Wild West Auction" as the named insured.

The portion of Reisig's insurance policy providing for automobile liability coverage stated:

> **SECTION II - LIABILITY COVERAGE**
>
> **Coverage**
>
> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".
>
> . . . .
>
> **1. Who Is An Insured**
>
> The following are "insureds":
>
> **a.** You for any covered "auto".
>
> **b.** Anyone else while using with your permission a covered "auto" you own, hire or borrow . . . .

Reisig's coverage for uninsured motorists was enumerated on the declarations sheet of the policy. The number "07" appeared next to "UNINSURED MOTORISTS" on the declarations sheet which, according to the policy's "**Description Of Covered Auto Designation Symbols**," signified "Specifically Described 'Autos.' " The "Specifically Described 'Autos' " were those " 'autos' " described in the policy's "**SCHEDULE OF COVERED AUTOS YOU OWN.**" The schedule described six vehicles, none of which were Pruneda's Chevrolet pickup truck.

The uninsured motorists endorsement contained in the policy provided, in pertinent part:

> **THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**
>
> **NEBRASKA UNINSURED AND UNDERINSURED MOTORISTS COVERAGE**
>
> For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in, Nebraska, this endorsement modifies insurance provided under the following:
>
> BUSINESS AUTO COVERAGE FORM
> GARAGE COVERAGE FORM
> MOTOR CARRIER COVERAGE FORM
> TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

. . . .

LIMIT OF INSURANCE

$ $300,000

. . . .

A. Coverage

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle" or "underinsured motor vehicle". The damages must result from "bodily injury" sustained by the "insured" caused by an "accident". The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle" or "underinsured motor vehicle".

. . . .

B. Who Is An Insured

1. You.

2. If you are an individual, any "family member".

3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, loss or destruction.

4. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

C. Exclusions

This insurance does not apply to any of the following:

. . . .

3. "Bodily injury" sustained by:

a. You while "occupying" or when struck by any vehicle owned by you that is not a covered "auto" for Underinsured Motorists Coverage under this Coverage Form[.]

On March 26, 1999, Reisig filed a declaratory judgment action against Allstate. Reisig claimed that he incurred $55,000 in damages for medical treatment and $10,000 for lost wages, salary, profits, and time. He also claimed general damages for pain and suffering, permanent disability, and lost earning capacity. Reisig requested a declaration that (1) the vehicle he was in at the time

of the accident was an uninsured vehicle, (2) the uninsured motorists endorsement of his insurance policy provides coverage for the injuries he sustained in the accident, and (3) he sustained special damages of $60,000 and general damages up to the $300,000 policy limit of the uninsured motorists endorsement.

On December 22, 2000, Allstate filed a motion for summary judgment. On January 16, 2001, a hearing was held on the motion. Allstate argued that the entire uninsured motorists endorsement should be interpreted in the context of the phrase "For a covered 'auto,' " which appears in the first sentence of the endorsement. Allstate maintained that, so interpreted, the definition of an insured under the uninsured motorists endorsement was not simply "You," but, rather, "For a covered 'auto' . . . You." Brief for appellee at 3. Allstate asserted there was no discernible difference between this definition of an insured and the definition of an insured in the liability coverage provisions of the policy as "You for any covered 'auto.' " Allstate contended that summary judgment should be granted since Reisig was not occupying a "covered 'auto' " at the time of his accident which, according to Allstate, was required under both the liability coverage provisions and the uninsured motorists endorsement.

On March 12, 2001, the district court granted summary judgment in favor of Allstate. Analyzing Reisig's insurance policy, the court focused on the "limiting language" in the first sentence of the uninsured motorist endorsement, which began with the phrase, "For a covered auto." The court agreed with Allstate that such language was consistent with the "original base policy" which "limits coverage to the insured when in a covered auto." The court concluded that Reisig was not covered under the policy, and thus, he could not recover for his injuries. The court then dismissed Reisig's declaratory judgment action. Reisig appeals.

ASSIGNMENT OF ERROR

Reisig assigns, rephrased, that the district court erred in sustaining Allstate's motion for summary judgment and dismissing his declaratory judgment action.

STANDARD OF REVIEW

[1] 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).

[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.*; *Tighe, supra.*

ANALYSIS

[4,5] Before analyzing Reisig's claims, we first note that a copy of Reisig's insurance policy was not included in the original bill of exceptions for this appeal. It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed. *Harders v. Odvody*, 261 Neb. 887, 626 N.W.2d 568 (2001); *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001). However, it is also the rule that once an adequate request has been made by an appellant, the preparation of the bill of exceptions becomes an internal court matter, and it is the duty of the court reporter to properly fulfill the request. *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998); *Shuck v. Jacob*, 250 Neb. 126, 548 N.W.2d 332 (1996); *State v. Slezak*, 230 Neb. 197, 430 N.W.2d 533 (1988). See, also, Neb. Ct. R. of Prac. 5 (rev. 2001).

Reisig filed with his notice of appeal a "Request for Bill of Exceptions," which asked the court reporter to include the "Hearing on Defendant's Motion for Summary Judgement held on January 16th, 2001, excluding argument of counsel, but including any and all exhibits offered at the time of the hearing on Motion for Summary Judgement, whether or not received into evidence." It was clear from the transcription of the January 16, 2001, hearing that Reisig's insurance policy was included as an attachment to an exhibit offered at the hearing.

Since Reisig was entitled to have all exhibits from the hearing on January 16, 2001, included in the bill of exceptions, we issued an order instructing the court reporter to complete the bill of exceptions. This court has now received the complete bill of exceptions, which includes the insurance policy at issue in this appeal. We thus proceed to address Reisig's assignment of error.

Reisig argues that the district court erred in sustaining Allstate's motion for summary judgment and dismissing his declaratory judgment action. Specifically, he asserts that the district court erred in concluding that the introductory phrase ("For a covered 'auto' ") when read together with the definition of an insured ("You") in the uninsured motorists endorsement was consistent with the "You for any covered 'auto' " definition of an insured in the liability coverage provisions. Reisig contends that the uninsured motorists endorsement simply defines an insured as "You," and thus, since it is undisputed that he is the named insured, his injuries should be covered under the policy. Unlike the district court, Reisig contrasts the definition of an insured under the uninsured motorists endorsement ("You") with the definition of an insured under the liability coverage portion of the policy ("You for any covered 'auto' "). He asserts that the insurance policy provides broader coverage under its uninsured motorists coverage provisions than it does under its liability coverage provisions.

Allstate maintains that the insurance policy limits Reisig's coverage to "any covered 'auto' " for both liability coverage and uninsured motorists coverage. It asserts "[t]he clear language of the commercial policy limited coverage to scheduled autos. As Mr. Reisig was not in a vehicle listed on the schedule at the time of the accident he is not entitled to recover under the commercial policy." Brief for appellee at 1. Allstate relies on the first sentence of the uninsured motorists endorsement which begins with the phrase "For a covered auto." Allstate argues that the "restrictive language obviously limits defendant's risk to listed vehicles and is in keeping with the language in the rest of the policy." Brief for appellee at 3. Allstate concludes that "[t]here can be found no legal difference between the contractual language, 'You for any covered "auto" ' as found in the commercial policy, and 'For a covered "auto" ' 'You.' as found in the endorsement." *Id.*

[6-12] Under Nebraska law, a court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous. *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001). An appellate court reviewing an insurance policy must construe the policy as any other contract and give effect to the parties' intentions at the time the contract was made. See *id.* The contract must be construed as a whole, and if possible, effect must be given to every part thereof. See *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 254 Neb. 418, 576 N.W.2d 806 (1998). When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Cincinnati Ins. Co., supra.* The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. *Id.* A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001). An ambiguous insurance policy will be construed in favor of the insured. *Id.*

Reisig's insurance policy defines an insured in its liability coverage provisions as "You for any covered 'auto.' " Regarding uninsured motorists coverage, the declarations sheet contains a notation referring to "Specifically Described 'Autos,' " and the uninsured motorists endorsement contains the phrase "For a covered 'auto' " in its first sentence. However, the uninsured motorists endorsement includes a statement at the very top of the first page which reads, in boldfaced, capital letters, "**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**" The endorsement then defines an insured as "You." In light of these provisions in the policy, it is not clear whether "You" stands alone or if it is somehow similarly restricted to "a covered 'auto' " as it is under the liability coverage. It is apparent that the definition of an insured as "You" in the uninsured motorists endorsement, when considered in combination with the endorsement's introductory phrase ("For a covered 'auto' "), its boldfaced warning ("**THIS**

ENDORSEMENT CHANGES THE POLICY"), the definition of an insured for purposes of liability coverage ("You for any covered 'auto' "), and the declarations sheet's notation (referring to "Specifically Described 'Autos' "), is a word which "has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings." See *Tighe*, 261 Neb. at 999, 628 N.W.2d at 675. For this reason, we determine that the uninsured motorists endorsement is ambiguous. Since an ambiguous insurance policy is construed in favor of the insured, we will construe the language of the insurance policy in favor of Reisig. See *id*.

Allstate asserts that the phrase "For a covered 'auto' " in the first sentence of the uninsured motorists endorsement modifies every term that follows, including the definition of an insured as "You." It argues that the definition of an insured should effectively be read as " 'For a covered "auto" ' . . . 'You.' " Brief for appellee at 3. However, part B, paragraph 3, of the uninsured motorists endorsement also defines an insured as "Anyone else 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto.' " If the "covered 'auto' " limitation modifies the entire endorsement as Allstate asserts, it would be unnecessary to add the specific "covered 'auto' " limitation to paragraph 3. It would, in effect, make the limitation incorporated within paragraph 3 superfluous.

Similarly, the "**Exclusions**" in part C, paragraph 3a, of the uninsured motorists endorsement would also be rendered superfluous under Allstate's interpretation. Part C, paragraph 3a, excludes uninsured motorists coverage for bodily injuries sustained by "You while 'occupying'. . . any vehicle owned by you that is not a covered 'auto'. . . ." If, as Allstate asserts, the uninsured motorists endorsement provides coverage to the insured "You" only in those instances involving a "covered auto," it would be unnecessary for Allstate to include part C, paragraph 3a, specifically excluding coverage for the insured while in a *noncovered auto* which the insured owns. Construing the contract as a whole and in favor of Reisig, we find Allstate's interpretation of the uninsured motorists endorsement unpersuasive.

This court is not alone in its determination. In *Bushey v. Northern Assurance*, 362 Md. 626, 766 A.2d 598 (2001), the Maryland Court of Appeals was presented with similar arguments

based on an uninsured motorists endorsement identical to the endorsement in Reisig's policy. In *Bushey*, the issue was whether the uninsured motorists endorsement provided coverage for the daughter of the named insured, a "family member" under part B, paragraph 2, who was not riding in a "covered auto" at the time she sustained bodily injury. The insurer in *Bushey* argued, as Allstate does in the present case, that the uninsured motorists endorsement restricted coverage to only those instances involving a "covered auto." In response, the court stated:

> [The insurer's] reading of the policy, under which the entire Endorsement is limited by its introduction to a "covered 'auto' " renders Part B, ¶ 3 redundant. If, regardless of relationship to the named insured, all claimants for [uninsured/underinsured] benefits must have been occupants of a " 'covered auto,' " it becomes totally unnecessary to specify in Part B, ¶ 3 that payment of those benefits for "anyone else," *i.e.,* other than the named insured or a "family" member of the named insured, depended on " 'occupying' a covered 'auto.' " Similarly, it would have been unnecessary to exclude from "[b]odily injury" in Part C, ¶ 3.b an injury sustained by a family member in "any vehicle owned by that family member that is not a covered 'auto,' " if occupying any non-covered auto, in and of itself, would exclude coverage."

Id. at 636, 766 A.2d at 603. The court found that the policy language of the uninsured motorists endorsement unambiguously provided coverage if the daughter fit within the policy's definition of a "family member." The court stated that "[t]he references to covered autos in the general structure of the policy on which [the insurer] relies at best create an ambiguity." *Id.*

In *Stoddard v Citizens Ins. Co. of America*, 249 Mich. App. 457, 643 N.W.2d 265 (2002), the Michigan Court of Appeals interpreted an uninsured motorists endorsement identical to the endorsement in Reisig's policy. As in *Bushey*, the issue in *Stoddard* was whether the uninsured motorists endorsement provided coverage for a "family member" under part B, paragraph 2, who was not riding in a "covered auto" at the time she sustained bodily injury. The appellant in *Stoddard* appealed from the lower court's order, which granted summary disposition in

favor of the insurer based on the finding that "the accident did not involve the vehicle covered under [the insurer's] policy." 249 Mich. App. at 459, 643 N.W.2d at 266.

The insurance policy in *Stoddard* mirrors Reisig's policy in that the same symbol, "07," which signifies "Specifically Described 'Autos,' " appears next to the uninsured motorists category on the declarations sheets of both policies. Even with such exclusions in the policy, the court in *Stoddard* stated, "Reading the definitions and exclusions to the uninsured motorist coverage of the policy, we find that it unambiguously provides coverage in circumstances beyond those involving the covered auto, including the accident at issue." *Id.* at 464, 643 N.W.2d at 269. The court then proceeded to interpret the uninsured motorists endorsement, stating:

> Under the definition of an "insured," the policy specifically limits liability for persons other than the named insured and family members to anyone " 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto.' " If the policy contemplated uninsured motorist liability only when the claim involved the covered auto, as defendant contends, it would be unnecessary to otherwise limit liability for guests to those occupying the covered auto. Defendant's reading of the policy renders part B, ¶ 3 redundant. There would be no reason to distinguish between situations involving the named insured and family members as opposed to other persons. Clearly, the policy was intended to follow the named insured and family members when they were not occupying the covered auto and sustained injury from an uninsured motorist.
>
> Likewise, if the uninsured motorist coverage applied only when the covered auto was involved there would be no need for the "owned vehicle exclusion" in part C, limiting liability in circumstances where the named insured or a family member was not occupying the covered automobile, but was in another *owned* vehicle that was not a covered auto under the policy.

Id. The court concluded that "[e]ven if the terms of the policy were considered ambiguous with regard to the covered auto limitation, the result is the same." *Id*. at 466, 643 N.W.2d at 270.

In addition, as noted previously, the first page of Reisig's uninsured motorists endorsement contains a heading in boldfaced, capital letters, stating, "**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**" The heading provides notice that the terms of the uninsured motorists coverage may differ from those in the original insurance policy. This policy language is consistent with Reisig's contention that the definition of an insured in the uninsured motorists endorsement is not the same as the definition of an insured for purposes of liability coverage. See, also, *Estate of Rosato v. Harleysville Mut. Ins.*, 328 Pa. Super. 278, 289 n.3, 476 A.2d 1328, 1334 n.3 (1984) (calling attention to heading's express statement, " 'THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY,' " in determining that uninsured motorists endorsement's definition of "insured" mandated coverage although liability coverage's definition of "insured" did not).

Concluding that the Allstate policy is ambiguous and therefore construing it in favor of Reisig, we determine as a matter of law that Reisig's insurance policy does not limit Reisig's uninsured motorists coverage solely to those instances involving "a covered 'auto.' " The district court thus erred in granting Allstate's motion for summary judgment and dismissing Reisig's appeal.

CONCLUSION

For the foregoing reasons, we reverse the district court's judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
BERNARD D. LONG, APPELLANT.

645 N.W.2d 553

Filed June 14, 2002. No. S-01-662.

1. **Convictions: Evidence: 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. **Records: Rules of the Supreme Court.** The procedure for preparation of a bill of exceptions is regulated by the rules of practice prescribed by the Nebraska Supreme Court.
3. **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 or her defense.
4. ____: ____. 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.
5. **Juries: Discrimination.** An attack on the use of peremptory challenges on grounds under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), must be made prior to the jury's being sworn.
6. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
7. **Juries.** When a timely objection under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), is made, a trial court is required to inquire into the reasons behind the peremptory strike.
8. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question.
9. **Trial: Evidence: Motions to Suppress.** The State may properly argue and introduce evidence relating to a defendant's attempt to suppress evidence or otherwise avoid a fair adjudication of a dispute.
10. **Trial: Rules of Evidence.** Neb. Rev. Stat. § 27-403 (Reissue 1995) permits a trial court to exclude relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice.
11. **Trial: Rules of Evidence: Appeal and Error.** A trial court must balance the probative value of evidence against the prejudicial factors listed in Neb. Rev. Stat. § 27-403 (Reissue 1995), and an appellate court will uphold the trial court's decision in this regard in the absence of an abuse of discretion.
12. **Trial: Evidence: Testimony.** If a defendant has authorized an attempt of a third person to suppress testimony, evidence of such conduct is admissible against the defendant.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Deborah D. Cunningham for appellant.

Don Stenberg, Attorney General, and Samuel J. Bethune for appellee.

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

WRIGHT, J.

NATURE OF CASE

Bernard D. Long (Long) was convicted of first degree murder and use of a weapon to commit a felony. He was sentenced to life imprisonment and a consecutive sentence of 5 to 10 years' imprisonment. Long appeals.

SCOPE OF REVIEW

[1] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

FACTS

On May 2, 2000, Long's brother Roland Long (Roland) was shot by Keith Fox, a member of the South Family Bloods, a gang located primarily in South Omaha. Roland was a suspected member of the 37th Avenue Crips, a rival gang of the South Family Bloods. Long, Terrence Nelson, and Christopher Grant witnessed Roland's shooting. Long testified that after the shooting, he purchased a gun on the street for $100.

On May 3, 2000, Long, Grant, Nelson, and Lenny Moss visited Roland at the hospital. Upon leaving the hospital, the four drove on Saddle Creek Road to Military Avenue. At 72d Street and Military Avenue, they noticed a vehicle next to them which was driven by McHenry Norment, a South Family Bloods gang member. When Norment observed the parties in the Long vehicle, he brandished a semiautomatic handgun. The Long vehicle

then turned at Templeton Drive and continued toward Fort Street and into a Runza restaurant's drive-through exit, proceeding out the entrance.

At that moment, Norment's vehicle was caught in heavy traffic on Fort Street. Long then jumped out of his vehicle and began firing toward Norment's vehicle. He fired 14 shots before he jumped back into the vehicle. Norment died from a gunshot wound to the head.

Claiming that the vehicle had overheated, Nelson stopped at 56th Street and Camden Avenue. The four occupants left the vehicle. Moss ran one way, and the other three ran toward the home of Grant's mother, Tamyra Wilson. Long was carrying the gun but dropped it along the way. It was later discovered in the bushes behind a house located on Fort Street.

The three men told Wilson that their vehicle had broken down. When the police subsequently arrived, the men were arrested. Long was interviewed at the police station and initially denied being at the scene.

The police found two spent shell casings and a semiautomatic handgun on the floor of Norment's vehicle. A gunpowder test showed powder on Norment's hands.

At trial, Moss testified that Long had stated he was going to "get" the South Family gang. Moss thought that when the group left the hospital, they were planning to buy orange clothing so they could blend in with South Family gang members.

Nelson and Grant denied that there was talk of revenge. Nelson said he heard shots from Norment's vehicle before Long got out of his vehicle. Grant stated that he saw Norment fire his gun before Long returned fire.

Long testified that Norment pointed a gun at him and that he felt like he was about to lose his life. He said everything happened quickly, and it seemed as if he fired only six bullets.

Long also stated that he did not get along well with Moss, and on cross-examination, Long admitted to writing a letter to his brother Darnell Long (Darnell) in which he instructed Darnell to call Moss. Long's objection to the introduction of the contents of the letter was overruled. Over the renewed objection of his attorney, Long admitted that he had asked Darnell to get Moss to drink an alcoholic beverage before trial so Moss would not be

able to testify. Long claimed that Moss lied about everything and that Moss was upset with Long because of Long's prior involvement with Moss' girl friend.

The jury found Long guilty of first degree murder and use of a weapon to commit a felony. Long's motion for new trial was overruled, and the district court sentenced him to life imprisonment on the first degree murder charge and 5 to 10 years' imprisonment on the use of a weapon to commit a felony charge, the sentences to be served consecutively. Long timely appealed.

ASSIGNMENTS OF ERROR

Long assigns as error that trial counsel provided ineffective assistance by failing to timely object to the composition of the jury based on *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Long asserts that the district court erred in overruling his motion in limine and in permitting cross-examination of Long concerning a letter written by him. Long also claims there was insufficient evidence to sustain a verdict of guilty beyond a reasonable doubt.

ANALYSIS

Ineffective Assistance of Counsel

Long claims that his trial counsel was ineffective because counsel failed to raise a *Batson* challenge prior to the impaneling of the jury. After the jury was sworn, Long's trial counsel made a *Batson* challenge as to two members of the jury panel. Without conducting an evidentiary hearing, the district court overruled the motion because the jury had been sworn and the panel excused.

Following the jury verdict and in the absence of the trial judge, the State attempted to make a record in the presence of Long, Long's counsel, and the court reporter as to the State's race-neutral reasons for dismissing the two jurors. The State claimed that it had dismissed one of the jurors because the juror's nephew had been shot in the head in a drive-by shooting and the person responsible was released on a technicality. The juror's brother had worked with gangs and was acquainted with defense counsel.

The second juror was stricken because he lived in the Crips' territory, and Long was affiliated with the Crips. The juror was

employed by an organization that worked with gang members. He had had two brothers killed in Kansas City and said he was upset with the prosecution for not notifying him of the trial. He had a brother who was a sheriff's deputy, who he felt was overzealous. This juror also worked for a watchdog organization that observed police actions, and he reported that he had been attacked by a police officer. The State also claimed that this juror sat with his arms crossed during the prosecution's questioning but not when the defense was speaking.

In this court, Long filed a motion to strike this evidence from the record, and we overruled the motion without prejudice. We now conclude that this evidence is not properly a part of the record and that, therefore, it should be stricken from the bill of exceptions.

[2] The procedure for preparation of a bill of exceptions is regulated by the rules of practice prescribed by this court. *Shuck v. Jacob*, 250 Neb. 126, 548 N.W.2d 332 (1996). Neb. Ct. R. of Prac. 5A(2) (rev. 2000) states in relevant part:

> Upon the request of the court or of any party, either through counsel or pro se, the official court reporter shall make a verbatim record of anything and everything said or done by anyone in the course of trial or *any other proceeding*, including, but not limited to, any pretrial matters; the voir dire examination; opening statements; arguments, including arguments on objections; any motion, comment, or statement made by the court in the presence and hearing of a panel of potential jurors or the trial jury; and any objection to the court's proposed instructions or to instructions tendered by any party, together with the court's rulings thereon, and any posttrial proceeding.

(Emphasis supplied.)

According to Black's Law Dictionary 1221 (7th ed. 1999), a "proceeding" is defined as "1. [t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." (Emphasis omitted.) What occurred outside the presence of the trial judge was not a proceeding in the course of the trial, and therefore, it should not be included in the bill of exceptions. The fact that it was recorded by a court reporter does not make it a proceeding.

The recording by the court reporter establishes only that the transcription is an accurate recording of what occurred.

The defendant must make a timely *Batson* challenge, or the State may waive the timeliness of the objection. See *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999). If the State waives the timeliness of the challenge, the parties must make an evidentiary record before the court prior to the time the evidence is presented to the jury.

In *State v. Nelson*, 189 Neb. 144, 201 N.W.2d 248 (1972), we stated that a defendant should not be allowed to speculate on the verdict and then challenge the selection of the panel after the verdict. The same rationale applies to the State. The State cannot refuse to waive the timeliness of Long's *Batson* challenge and then, after the verdict, attempt to establish that it was justified in striking the jurors in question. Therefore, we will not consider the information that was presented after the jury verdict.

[3,4] We next address the claim of ineffective assistance of counsel. 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 or her defense. *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002). 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. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

[5] The question is whether Long's trial counsel was deficient in failing to make a *Batson* challenge prior to impaneling the jury. In *Myers*, 258 Neb. at 306, 603 N.W.2d at 385, we stated:

> In *State v. Covarrubias*, 244 Neb. 366, 507 N.W.2d 248 (1993), *questioned on other grounds, State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995), we held that an attack

> on the use of peremptory challenges on *Batson* grounds must be made prior to the jury's being sworn. We reasoned that in Neb. Rev. Stat. § 25-1601.03(4) (Reissue 1995), the Legislature provided that one of the purposes of chapter 25, article 16, is to ensure that no citizen is excluded from jury duty because of discrimination based upon race, color, religion, sex, national origin, or economic status. Neb. Rev. Stat. § 25-1637(1) (Reissue 1995) provides that a motion for relief based on the ground of substantial failure to comply with chapter 25, article 16, must be made before the jury is sworn to try the case. Thus, we concluded that a defendant's objection to the use of peremptory strikes on *Batson* grounds should also be made prior to the swearing in of the jury or before any objections are waived.

In failing to make a timely *Batson* challenge, Long's trial counsel failed to preserve the issue of whether the State used improper peremptory strikes. However, this does not automatically mean that trial counsel was deficient for failing to make a *Batson* challenge prior to the impaneling of the jury. Counsel's reasons for failing to make a *Batson* challenge would need to be examined.

[6] Determining under what circumstances an attorney would be deficient in failing to make such a challenge is difficult. However, such determination becomes unnecessary if Long was not prejudiced by his counsel's failure to make a timely objection. The two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

In *Ex Parte Yelder*, 575 So. 2d 137 (Ala. 1991), *cert. denied* 502 U.S. 898, 112 S. Ct. 273, 116 L. Ed. 2d 225, the court determined that prejudice could be presumed when counsel failed to make a *Batson* objection. It reasoned that "[i]f an outcome-determinative test is used, then no black appellant could prove prejudice unless he relied on the very assumption that *Batson* condemns." *Ex Parte Yelder*, 575 So. 2d at 139.

[7] However, in *Davidson v. Gengler*, 852 F. Supp. 782 (W.D. Wis. 1994), the court noted that unlike the other circumstances in which prejudice is presumed, the failure to raise a *Batson*

objection did not suggest such a high probability of prejudice. When a timely *Batson* objection is made, a trial court is required to inquire into the reasons behind the peremptory strike. Assuming prejudice would create the unwarranted presumption that all *Batson* objections have merit. The court stated that a defense lawyer could fail to make a *Batson* challenge knowing that he had automatically secured grounds for a new trial for his client should the trial result in a guilty verdict. The court stated that the inquiry into whether prejudice exists depends upon whether there exists a reasonable probability that the makeup of the jury would have been different.

[8] A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). We conclude that the record before us is not sufficient for us to determine whether counsel's performance was deficient or whether Long was prejudiced by counsel's failure to make a *Batson* challenge. For that reason, we decline to address Long's ineffective assistance of counsel claim.

Motion in Limine

Long alleges that the district court abused its discretion in overruling his motion in limine and thereby allowing the State to cross-examine him about the contents of the letter he wrote to his brother. Long had been advised by the court that if he testified and the motion in limine was overruled, he would be cross-examined regarding the contents of the letter. Long's attorney objected to admission of the letter on the bases that it was not relevant and that the probative value was outweighed by the prejudicial value. The motion in limine was overruled. Over objection, the State was permitted to cross-examine Long about the letter. The State never offered the letter as an exhibit; therefore, it is not part of the record. Although the jury requested to see the letter, it was not shown to them.

Long admitted that he wrote the letter to his brother Darnell and that the letter asked Darnell to pick up Moss on the morning of the trial and get him to drink an alcoholic beverage so that

Moss would be unable to testify. Long claimed that he did not want Moss to come to court and "lie on me like he always do."

Long claims the letter is relevant only if he was charged with obstruction of justice or witness tampering. He claims that use of the letter created an inference that he was a bad person and that the resulting prejudice was not harmless.

[9] The State argues that the letter was relevant as to Long's credibility and to show that he was aware of his own guilt. In *State v. DeGroot*, 230 Neb. 101, 430 N.W.2d 290 (1988), the defendant sent a letter to a witness asking the witness to testify falsely about an alibi. The witness testified he would have been lying if he had testified as the defendant had requested. We found no abuse of discretion in the trial court's finding that the evidence was relevant. The State may properly argue and introduce evidence relating to a defendant's attempt to suppress evidence or otherwise avoid a fair adjudication of a dispute. *Id.*

In this case, Long asked his brother to take action so that Moss could not testify against him. The evidence was relevant to show Long's attempt to suppress evidence or otherwise avoid a fair adjudication of his guilt. See *id.*

[10,11] Neb. Rev. Stat. § 27-403 (Reissue 1995) permits the trial court to exclude relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). However, the fact that evidence is prejudicial is not enough to require exclusion, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party. It is only the evidence that has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403. *State v. Decker, supra*. The trial court must balance the probative value of the evidence against the prejudicial factors listed in § 27-403, and an appellate court will uphold the trial court's decision in this regard in the absence of an abuse of discretion. *State v. Decker, supra*.

[12] Generally, evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible

against the defendant. *State v. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995).

We conclude that the district court did not abuse its discretion in overruling Long's motion in limine and allowing cross-examination of Long concerning the letter.

Insufficient Evidence

Long asserts that there was insufficient evidence to support a finding of guilt beyond a reasonable doubt. 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. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

Long's assertion that Norment pointed a gun toward the occupants of Long's vehicle when the parties were at 72d Street and Military Avenue is supported by the evidence. However, Long left that threatening situation unharmed, and the State offered ample evidence from which a jury could determine that Long did not act in self-defense.

When Norment's vehicle was stopped in traffic, Long left his vehicle and fired 14 shots. Several witnesses testified that the first shots they heard came from the direction in which Long was standing. Long, Grant, and Nelson were the only witnesses who testified that Norment was the first to fire. There was also testimony that Long wanted revenge for the shooting of his brother Roland.

Whether Long was acting in self-defense was a question of fact for the jury to resolve. An appellate court does not resolve conflicts in the evidence. Accordingly, we find that the evidence was sufficient to sustain the convictions.

CONCLUSION

We decline to address Long's first assignment of error because a sufficient record is not present. Long has failed to show that the remaining assignments of error have merit. We therefore affirm the judgments of conviction and the sentences imposed.

Affirmed.

STATE OF NEBRASKA, APPELLEE, V. OFELIA GAMEZ-LIRA, APPELLANT.

645 N.W.2d 562

Filed June 14, 2002. No. S-01-805.

1. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
2. **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.
3. **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.
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. **Judgments: Appeal and Error.** 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.
6. **Postconviction: Appeal and Error.** A motion for postconviction relief is not a substitute for an appeal.
7. ____: ____. A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal, no matter how the issues may be phrased or rephrased.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Affirmed.

James G. Kube, of Stratton, Ptak & Kube, P.C., for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

This case arises from a denial of postconviction relief by the district court for Madison County. Appellant, Ofelia Gamez-Lira, pled guilty to issuing a bad check, a Class IV felony. She

was sentenced to an indeterminate term of incarceration of 1 to 3 years, and she was ordered to pay restitution in the amount of $2,124.15, along with the costs of prosecution. Gamez-Lira filed a motion for postconviction relief alleging that her sentence was unconstitutional. The trial court denied Gamez-Lira's motion. We affirm.

BACKGROUND

Between June 12 and August 12, 2000, Gamez-Lira obtained services or merchandise approximately 31 times by issuing or passing a check knowing that she had no account with the drawee at the time or knowing that she did not have sufficient funds in or credit with the drawee for payment thereof. The original information charged Gamez-Lira with three Class IV felonies. The information was amended to one Class III felony charge of issuing a bad check. Gamez-Lira eventually pled guilty to one count of issuing a bad check, a Class IV felony.

The trial court accepted Gamez-Lira's plea of guilty and scheduled a presentence investigation. The record does not reflect that Gamez-Lira filed a motion to quash, plea in abatement, or demurrer; nor does the record reflect that she filed a direct appeal in this case. Gamez-Lira served 156 days' imprisonment while awaiting sentencing. The trial court sentenced her to an indeterminate term of incarceration of 1 to 3 years, with credit given for time served. Gamez-Lira was ordered to pay restitution in the amount of $2,124.15 within 2 years following her release from incarceration, along with the costs of prosecution.

Gamez-Lira filed a motion for postconviction relief alleging that a sentence of imprisonment was illegal. She noted article I, § 20, of the Nebraska Constitution states that " '[n]o person shall be imprisoned for debt in any civil action on mesne or final process' " and argued that there is no exception for fraud. Therefore, according to Gamez-Lira, the penalty of imprisonment based upon the issuance of a bad check for the payment of a civil debt violated article I, § 20. The trial court denied the motion.

ASSIGNMENTS OF ERROR

Gamez-Lira alleges that the trial court erred in (1) finding that under Neb. Rev. Stat. § 28-611 (Reissue 1995) "incarceration is a constitutional form of punishment in light of the

constitutional language," (2) failing to find that she was being incarcerated unconstitutionally, and (3) denying her motion for postconviction relief.

STANDARD OF REVIEW

[1] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

[2] 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. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002).

[3] 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*, 263 Neb. 310, 640 N.W.2d 1 (2002).

[4] 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. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002).

ANALYSIS

[5] Despite Gamez-Lira's failure to file a direct appeal, the trial court concluded that she may proceed under a motion for postconviction relief. We disagree. We do, however, agree with the ultimate decision of the trial court denying Gamez-Lira's motion for postconviction relief. 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. Parmar, supra.*

[6] Neb. Rev. Stat. § 29-3001 (Reissue 1995) states that a postconviction action is available to a prisoner on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment of a court void or voidable under the state or federal Constitution. However, a motion for

postconviction relief is not a substitute for an appeal. *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000).

[7] A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal, no matter how the issues may be phrased or rephrased. See, *State v. El-Tabech, supra*; *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999). We hold that Gamez-Lira is procedurally barred from raising her assignments of error. Each assigned error was of the type that could have been raised by direct appeal. Because they were not so raised, we determine that Gamez-Lira is barred from raising them at this time on a motion for postconviction relief. See *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001).

CONCLUSION

For the reasons discussed above, which differ from those stated by the trial court, we affirm the holding of the trial court denying Gamez-Lira's motion for postconviction relief. We determine that Gamez-Lira is procedurally barred from raising her assignments of error.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
PHILLIP J. SPADY, APPELLANT.

645 N.W.2d 539

Filed June 14, 2002. No. S-01-970.

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. **Sentences.** Commutation of punishment is substitution of a milder punishment known to the law for the one inflicted by the court.
3. ____. A commutation is a substitution of a lesser or partial punishment.
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. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.

6. **Constitutional Law: Criminal Law: Statutes.** A penal statute must be construed so as to meet the constitutional requirements if such can reasonably be done.
7. **Constitutional Law: Statutes: Proof.** The burden of establishing a statute's unconstitutionality is on the party claiming it to be unconstitutional.
8. ____: ____: ____. The unconstitutionality of a statute must be clearly established before a court may declare it void.

Appeal from the District Court for Platte County, ROBERT R. STEINKE, Judge, on appeal thereto from the County Court for Platte County, FRANK J. SKORUPA, Judge. Judgment of District Court reversed, and cause remanded with directions.

Mark M. Sipple, of Sipple, Hansen, Emerson & Schumacher, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for amicus curiae Nebraska Criminal Defense Attorneys Association.

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

WRIGHT, J.

NATURE OF CASE

Phillip J. Spady filed a motion to set aside his conviction pursuant to Neb. Rev. Stat. § 29-2264 (Cum. Supp. 2000). The Platte County Court held that the statute is unconstitutional and denied the motion. Spady appealed to the Platte County District Court, which affirmed the county court's determination. Spady appeals. The issue presented is whether § 29-2264 is in violation of Neb. Const. art. II, § 1, the separation of powers clause.

SCOPE 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. Kubin*, 263 Neb. 58, 638 N.W.2d 236 (2002).

FACTS

Spady was convicted in the Platte County Court of violating a protection order, a Class II misdemeanor, and he was sentenced to

6 months' probation, which he successfully completed. Pursuant to § 29-2264, Spady petitioned for an order setting aside the conviction. Following a hearing, the court determined that § 29-2264 is unconstitutional and dismissed Spady's petition. The court found that the statute purported to grant a commutation power to the judiciary, in violation of the Nebraska Constitution.

Spady appealed to the Platte County District Court, which entered an order finding that § 29-2264 is unconstitutional for the reason that the statute constitutes a pardon or a "partial pardon." The court stated that if the petition were to be granted, the conviction would be nullified and all civil disabilities and disqualifications imposed against Spady as a result of the conviction, other than certain exceptions set forth in § 29-2264(5), would be removed. The district court affirmed the county court's order dismissing Spady's petition.

ASSIGNMENTS OF ERROR

Spady assigns four errors relating to the constitutionality of § 29-2264. He asserts that the district court erred in dismissing his petition, in finding § 29-2264 unconstitutional, in finding that the terms and provisions of § 29-2264 result in the grant of a pardon, and in making any finding based on what it considered a " 'partial pardon.' "

ANALYSIS

Whether a statute is constitutional is a question of law, and this court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Kubin, supra*.

Section 29-2264 provides:

> (1) Whenever any person is placed on probation by a court and satisfactorily completes the conditions of his or her probation for the entire period or is discharged from probation prior to the termination of the period of probation, the sentencing court shall issue an order releasing the offender from probation, and such order shall in all felony cases restore the offender's civil rights.
>
> (2) Whenever any person is convicted of a misdemeanor or felony and is placed on probation by the court or is sentenced to a fine only, he or she may, after satisfactory fulfillment of the conditions of probation for the entire period

> or after discharge from probation prior to the termination of the period of probation and after payment of any fine, petition the sentencing court to set aside the conviction.
>
> . . . .
>
> (4) The court may grant the offender's petition and issue an order setting aside the conviction when in the opinion of the court the order will be in the best interest of the offender and consistent with the public welfare. The order shall:
>
> (a) Nullify the conviction; and
>
> (b) Remove all civil disabilities and disqualifications imposed as a result of the conviction.

In determining that § 29-2264 is unconstitutional, both the county court and the district court relied on *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994), in which we held that Neb. Rev. Stat. § 29-2308.01 (Reissue 1989) violated the separation of powers clause of the Nebraska Constitution. Section 29-2308.01 provided that a court which imposed a sentence for a criminal offense could reduce the sentence within 120 days after the sentence was imposed, when probation was revoked, or when the court received a mandate from an appellate court. We stated: "[A] sentencing court which chooses to substitute a milder punishment for the sentence it had originally imposed does the very thing which defines an act of commutation." *Philipps*, 246 Neb. at 616, 521 N.W.2d at 917. The statute was held unconstitutional and unenforceable because it purported to grant commutation power to the judiciary, in violation of Neb. Const. art. IV, § 13, which entrusts such power to the Board of Pardons. The statute gave the courts the power to change a sentence after it had been imposed, which in effect was a commutation.

[2,3] In this case, the county court found that § 29-2264 purported to grant a commutation power, in violation of the Nebraska Constitution. "Commutation of punishment is substitution of a milder punishment known to the law for the one inflicted by the court." *Lincoln v. Sigler*, 183 Neb. 347, 349, 160 N.W.2d 87, 88 (1968). A commutation is "a substitution of a lesser or partial punishment." *Lupo v. Zerbst*, 92 F.2d 362, 364 (5th Cir. 1937), *cert. denied* 303 U.S. 646, 58 S. Ct. 645, 82 L. Ed. 1108 (1938). See, also, *Hagelberger v. United States*, 445 F.2d 279 (5th Cir. 1971), *cert. denied* 405 U.S. 925, 92 S. Ct.

971, 30 L. Ed. 2d 797 (1972); *Rawls v. United States*, 331 F.2d 21 (8th Cir. 1964). We conclude that § 29-2264 is not a commutation statute because it does not substitute a milder punishment.

The district court held that § 29-2264 constituted a pardon or, "at the very least, a partial pardon" and that the statute violated the separation of powers clause of the Nebraska Constitution. Neb. Const. art. II, § 1, provides for three distinct "departments" of government: legislative, executive, and judicial. "[N]o 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." *Id.* Neb. Const. art. IV, § 13, provides that the Board of Pardons, which is composed of members of the executive branch, "shall have power to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment." See, also, Neb. Rev. Stat. § 83-1,126 (Reissue 1999).

In *Campion v. Gillan*, 79 Neb. 364, 371-72, 112 N.W. 585, 588 (1907), quoting *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 8 L. Ed. 640 (1833), we defined a pardon as " 'an act of grace, proceeding from the power intrusted [sic] with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.' " It is a declaration on record by the chief magistrate of a state or county that a person named is relieved from the legal consequences of a specific crime. See *Biddle v. Perovich*, 274 U.S. 480, 47 S. Ct. 664, 71 L. Ed. 1161 (1927). A pardon is also defined as "[t]he act or an instance of officially nullifying punishment or other legal consequences of a crime." Black's Law Dictionary 1137 (7th ed. 1999).

Pursuant to § 29-2264(4), if a court sets aside a conviction, it is required to nullify the conviction and remove all civil disabilities imposed as a result. This is a power expressly delegated to the Board of Pardons. See Neb. Const. art. IV, § 13. However, the statute also exempts certain civil disabilities from restoration. Section 29-2264(5) provides:

> The setting aside of a conviction in accordance with the Nebraska Probation Administration Act shall not:

(a) Require the reinstatement of any office, employment, or position which was previously held and lost or forfeited as a result of the conviction;

(b) Preclude proof of a plea of guilty whenever such plea is relevant to the determination of an issue involving the rights or liabilities of someone other than the offender;

(c) Preclude proof of the conviction as evidence of the commission of the misdemeanor or felony whenever the fact of its commission is relevant for the purpose of impeaching the offender as a witness, except that the order setting aside the conviction may be introduced in evidence;

(d) Preclude use of the conviction for the purpose of determining sentence on any subsequent conviction of a criminal offense;

(e) Preclude the proof of the conviction as evidence of the commission of the misdemeanor or felony in the event an offender is charged with a subsequent offense and the penalty provided by law is increased if the prior conviction is proved;

(f) Preclude the proof of the conviction to determine whether an offender is eligible to have a subsequent conviction set aside in accordance with the Nebraska Probation Administration Act; or

(g) Preclude use of the conviction as evidence of commission of the misdemeanor or felony for purposes of determining whether an application filed or a license issued under sections 71-1901 to 71-1905 or 71-1908 to 71-1917 or a certificate issued under sections 79-806 to 79-816 should be denied, suspended, or revoked.

[4] 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*, 263 Neb. 141, 638 N.W.2d 839 (2002). Section 29-2264 does not act as a pardon. The party is not exempted from the punishment imposed for the crime. Section 29-2264 may be applied only in limited circumstances. For example, a conviction cannot be set aside unless the person has been placed on probation or is sentenced to a fine only. An order setting aside a

conviction may be introduced in later court proceedings against a defendant. The existence of the conviction may be used to impeach the defendant as a witness. The conviction may be used to determine sentence enhancement with regard to a subsequent conviction and may be used to determine whether the defendant is eligible to have a subsequent conviction set aside. The conviction may also be used to determine whether the defendant is eligible for a foster care license or a teaching certificate. Thus, § 29-2264 does not nullify all of the legal consequences of the crime committed because certain civil disabilities enumerated above are not restored, as occurs when a pardon is granted.

Whether § 29-2264 is in effect a pardon and therefore unconstitutional is a question of law. Accordingly, we are obligated to reach that conclusion independent of the decision reached by the court below. See *State v. Kubin*, 263 Neb. 58, 638 N.W.2d 236 (2002).

[5-8] In our analysis, we are governed by certain legal principles. A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996). A penal statute must be construed so as to meet the constitutional requirements if such can reasonably be done. *Id.* The burden of establishing a statute's unconstitutionality is on the party claiming it to be unconstitutional. *Id.* The unconstitutionality of a statute must be clearly established before a court may declare it void. *Id.*

We conclude that § 29-2264 does not result in the granting of a pardon. Nor does it allow a court to grant a "partial pardon." The court is permitted to set aside convictions, but certain civil disabilities are exempted from restoration. Thus, § 29-2264 does not infringe upon the power expressly delegated to the Board of Pardons and does not violate the separation of powers clause of the Nebraska Constitution.

CONCLUSION

For the reasons set forth herein, we conclude that § 29-2264 is constitutional and is not in violation of article II, § 1, of the Nebraska Constitution. Therefore, the judgment of the district court which affirmed the dismissal by the county court is

reversed, and the cause is remanded to the district court with directions to remand to the county court for further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

CAROLINE GREER BROCKMAN, APPELLEE, V. TODD DEAN BROCKMAN, APPELLANT.

646 N.W.2d 594

Filed June 21, 2002. No. S-00-1082.

1. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or 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: Appeal and Error.** In child support cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Rules of the Supreme Court: Child Support.** Under the Nebraska Child Support Guidelines, paragraph D, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities.
5. ____: ____. Earning capacity may be used as a basis for an initial determination of child support under the Nebraska Child Support Guidelines where there is some evidence that the parent is capable of realizing such capacity through reasonable effort.
6. **Legislature: Alimony: Child Support.** The Legislature has long given specific statutory authorization for a court, in an appropriate case, to require sufficient security to be given for the payment of alimony and child support awards.
7. **Child Support.** Reasonable security for payment of child support under Neb. Rev. Stat. § 42-371(6) (Cum. Supp. 2000) should be invoked only when extraordinary circumstances require it.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Michael Gallner for appellant.

Caroline Greer Brockman, pro se.

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

GERRARD, J.

NATURE OF CASE

Todd Dean Brockman appeals from the order of the district court dissolving his marriage to Caroline Greer Brockman and ordering him to pay child support. The primary issue presented in this appeal is whether the district court erred in ordering Todd to set aside part of a lump-sum workers' compensation settlement as security for his child support obligation.

BACKGROUND

Todd and Caroline were married on November 7, 1987, and had three children, who were 12, 11, and 7 years old, respectively, at the time of trial. Todd and Caroline separated in May 1998, and Caroline filed a petition for legal separation on June 8. Eventually, Todd filed a cross-petition for dissolution of marriage, which was joined by Caroline. The case went to trial on March 22, 2000.

CAROLINE'S INCOME

Caroline testified at trial that she has multiple sclerosis, which affects her ability to secure employment and prevents her from working. Caroline stated that it had "been a long time" since she had been employed full time. Caroline testified that she and the children each received $94 per month from Social Security due to Todd's disability and received aid to dependent children payments of $62 per month. Caroline stated that she and the children received $418 per month in food stamps. Caroline testified that she had applied for disability benefits, but, at the time of trial, her eligibility for benefits was the subject of an appeal. Caroline stated that sometimes her family helped her make up the difference between her income and expenses.

TODD'S INCOME

Todd testified that he had received workers' compensation benefits for a 1993 back injury. Todd was found by the Iowa Workers' Compensation Commission to have a 25-percent permanent whole body disability. The record contains a contested

case settlement in which Todd settled his workers' compensation case for a lump-sum payment of $130,000. After the payment of attorney fees and outstanding medical expenses, Todd was to receive $63,665.33. The record also contains checks, drawn on the trust account of Todd's attorney, which show disbursal of the lump-sum award. After Todd's attorney fees and medical bills were paid, Todd received a check in the amount of $62,618.71. The settlement released Todd's employer from all future liability for Todd's work-related injury, including liability for future medical expenses.

Todd also testified that he received, before child support was deducted, $713 per month in Social Security benefits. The record also contains pay stubs for a job with Anderson Drywall, Inc., which Todd held between February and September or October 1999. Todd earned $10 per hour as regular wages and $15 per hour for overtime. While Todd's hours varied during his employment, Todd averaged between 30 and 40 hours per week and often worked overtime. Todd testified that he left this job because he reaggravated his back injury in October 1999. Todd's final paycheck was dated September 9, 1999—8 days after the date on the $62,618.71 check to Todd from his workers' compensation settlement.

The record indicates that on September 30, 1999, Todd had approximately $38,000 remaining from his workers' compensation settlement. Todd testified that he had spent approximately $24,000 in 1 month on medical and other expenses. Todd testified that he was not working based on medical instructions, that he was still seeing doctors, that there was no surgery that could help his condition, and that his medication cost approximately $200 per month. No independent evidence was presented to substantiate Todd's testimony in this regard, or to account for the $24,000 that had been spent in September 1999. When cross-examined on that issue, Todd testified that the money was expended because "I had other people I owed money to that supported me."

District Court Judgment

After trial, the district court entered an ex parte order on May 17, 2000, which prohibited Todd from disposing of his assets. The entry of a final decree of dissolution was delayed for some time, as Todd discharged his counsel and refused to approve the

proposed decree. Finally, the district court entered a final decree of dissolution on September 14, 2000.

The district court ordered Todd to pay child support to Caroline in the amount of $541.31 per month. The district court's calculation of Todd's child support obligation is based on a gross income for Todd of $1,733.33 per month, or $400 per week, and a gross income for Caroline of $183 per month. The district court further stated that

> [Todd] was injured in a work-related accident which was recently settled. The settlement is in payment for benefits calculated at 2,085 weeks in the future. Given [Todd]'s children's ages, he has a child support obligation that will run for 622 weeks in the future. [Todd]'s lump sum settlement is subject to the payment of child support, to the extent of 30% of the award.

The district court ordered that

> [Todd] shall put the sum of $19,085.61 from the net proceeds of [Todd]'s worker's [sic] compensation claim in a Certificate of Deposit with the children as beneficiary to fund his obligation to pay child support. If [Todd] fails to may [sic] his child support payments then [Caroline] can invade the Certificate of Deposit to make the child support payments; This Document will act as sufficient authority to enable the bank to give the money directly to Caroline Brockman. If [Todd] does make the child support payments then at the last child's majority [Todd] would be awarded the money plus the interest.

ASSIGNMENTS OF ERROR

Todd assigns that the district court erred in (1) including Todd's workers' compensation award as child support, (2) requiring Todd to hold his workers' compensation award in trust to secure his child support obligations, and (3) calculating the amount of child support to be paid in that it found Caroline's earning capacity to be zero and included Todd's workers' compensation award in its calculation.

STANDARD OF REVIEW

[1-3] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the

trial court will be affirmed in the absence of an abuse of discretion. *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (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. *Crawford v. Crawford*, 263 Neb. 37, 638 N.W.2d 505 (2002). In child support cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

ANALYSIS

Consideration of Lump-Sum Award

Todd's first assignment of error is that the district court erred in "including [Todd]'s workers [sic] compensation award as child support." Todd's arguments supporting this assignment of error are not entirely clear. However, those arguments, as best we can interpret them, are without merit.

Todd first contends that the district court erred in that it "both deviated from the child support guidelines and attempted to apply them in the same case." Brief for appellant at 15. There is no basis in the record for Todd's claim that the district court deviated from the child support guidelines. The child support order entered by the district court is consistent with the amount prescribed by table 1 of the Nebraska Child Support Guidelines (Guidelines), and there is no indication in the court's findings that a deviation from the Guidelines was considered. See *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001) (reason for deviation shall be contained in findings of decree and worksheet 5 of Guidelines should be filed in court file).

Todd also argues that the district court's order erroneously treated his workers' compensation award as income. However, it is well established that a workers' compensation award, to the extent that it compensates for lost earning capacity, may be considered as income under the Guidelines. See, generally, *Pawlusiak*

v. Pawlusiak, ante p. 1, 645 N.W.2d 773 (2002); *Becker v. Becker*, 6 Neb. App. 277, 573 N.W.2d 485 (1997). See, also, *In re Marriage of Swan*, 526 N.W.2d 320 (Iowa 1995).

Moreover, Todd's argument is premised on a misunderstanding of the district court's order. The district court did not determine that Todd's workers' compensation award was to be treated as income; instead, the district court simply determined that the award was available to satisfy Todd's child support obligation. The calculations made by the district court are not consistent with basing Todd's income on either his workers' compensation award or his Social Security benefits; rather, it is evident that the district court determined Todd's earning capacity based on his earnings from Anderson Drywall. While it would have been preferable had the district court specifically stated the basis for its income calculations on the record, a determination of Todd's earning capacity based on his Anderson Drywall earnings is the only conclusion consistent with the evidence.

The district court determined Todd's gross income, for child support purposes, to be $1,733.33, which is equal to a weekly gross income of $400 annualized and divided by 12. See Guidelines, paragraph D (explaining formula for determining monthly income). The apparent basis for this determination is Todd's earnings at Anderson Drywall, where Todd was paid $10 per hour and often worked 40 or more hours per week.

[4,5] Under the Guidelines, paragraph D, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. *Wagner v. Wagner*, 262 Neb. 924, 636 N.W.2d 879 (2001). Earning capacity may be used as a basis for an initial determination of child support under the Guidelines where there is some evidence that the parent is capable of realizing such capacity through reasonable effort. See *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000).

In this case, Todd's pay stubs from Anderson Drywall provide evidence that Todd is capable of earning $400 per week in gross income. While Todd testified that he was no longer working because of injury, the district court was not required to credit this testimony, particularly where no evidence was presented to corroborate this claim. In any event, Todd has not assigned error

relating to the basis on which the district court actually determined his earning capacity. See *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001) (error must be assigned and argued to be considered by appellate court), *modified* 262 Neb. 663, 641 N.W.2d 624. The district court's determination of Todd's income is supported by the record and does not constitute an abuse of discretion. Consequently, Todd's assignment of error is without merit.

Security for Child Support Obligation

[6,7] As noted above, the district court ordered Todd to set aside part of his workers' compensation award as security for his child support obligation. Todd argues that this was error. The Legislature has long given specific statutory authorization for a court, in an appropriate case, to require sufficient security to be given for the payment of alimony and child support awards. See *Lacey v. Lacey*, 215 Neb. 162, 337 N.W.2d 740 (1983). Neb. Rev. Stat. § 42-371(6) (Cum. Supp. 2000) provides with reference to child support payments that "[t]he court may in any case, upon application or its own motion, after notice and hearing, order a person required to make payments to post sufficient security, bond, or other guarantee with the clerk to insure payment of both current and any delinquent amounts." However, reasonable security for payment of child support under § 42-371(6) should be invoked only when extraordinary circumstances require it. See, *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997); *Lacey, supra*; *Muller v. Muller*, 3 Neb. App. 159, 524 N.W.2d 78 (1994).

In this case, Todd was given notice and hearing on this issue well prior to the entry of the decree. Caroline filed a motion prior to trial seeking to have Todd post security for his child support obligation pursuant to § 42-371.

Based on the evidence presented at trial, we conclude that the district court's order was not an abuse of discretion. The record reflects that Todd ceased employment after settling his workers' compensation case and had spent approximately $24,000 within 1 month of receiving the settlement proceeds. The remaining proceeds of the workers' compensation settlement were the only funds available to secure Todd's child support obligation. Given

the possibility, supported by the record, that Todd would exhaust the settlement proceeds and then be unwilling or unable to pay his child support, we conclude that the district court did not abuse its discretion in ordering Todd to set aside a portion of the settlement proceeds as security for his child support obligation. Compare *Casselman v. Casselman*, 204 Neb. 565, 284 N.W.2d 7 (1979) (order requiring security proper where much of defendant's security could be lost through foreclosure proceedings). Todd's assignment of error is without merit.

Calculation of Child Support

Todd assigns that the district court erred in that it found "[Caroline]'s earning capacity to be zero and included [Todd]'s compensation award in its calculation." As the facts set forth above make clear, neither of the factual premises of this assignment of error is correct. The district court's calculation of child support was based on income for Caroline determined to be $183 per month, and not zero as Todd suggests. Furthermore, as set forth above, the district court did not base its calculation of child support on Todd's workers' compensation award.

In support of this assignment of error, Todd offers several brief arguments, not all of which are within the scope of his assignment of error. To the extent that Todd's arguments extend beyond his assignment of error, we do not consider them. See *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001) (errors argued but not assigned will not be considered on appeal).

Todd contends that Caroline's income should have included food stamps and disability payments. First, food stamps are means-tested public assistance benefits that are excluded from income pursuant to paragraph D of the Guidelines. See, *Hartman v. Hartman*, 261 Neb. 359, 622 N.W.2d 871 (2001); *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). Thus, the district court did not err by excluding food stamps from Caroline's income.

Second, Todd argues that it was inequitable to count his disability benefits as income while not counting Caroline's. As noted above, the district court did not base its estimate of Todd's earning capacity on his Social Security benefits. Moreover, the record does not reflect that Caroline was receiving—or entitled

to receive—disability benefits; to the contrary, the record indicates that Caroline was not receiving disability benefits and that her eligibility for such benefits was in controversy. The district court did not err by not considering Caroline's potential to obtain disability benefits. That future contingency is left to be determined, if and when appropriate, in a subsequent proceeding to modify child support.

CONCLUSION

For the foregoing reasons, Todd's assignments of error are without merit. We, therefore, affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY D. LEANNA, APPELLANT.

646 N.W.2d 263

Filed June 21, 2002. No. S-00-1260.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded for further proceedings.

Thomas J. Garvey for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

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

WRIGHT, J.

This appeal arises from the denial of a motion to set aside a conviction pursuant to Neb. Rev. Stat. § 29-2264 (Cum. Supp. 2000). The Sarpy County District Court denied the motion, finding that § 29-2264 is unconstitutional as a violation of Neb. Const. art. II, § 1. Jeffrey D. Leanna appeals.

Leanna filed an application to set aside a conviction on October 16, 2000, after he completed all terms and conditions of probation

related to a 1997 conviction for burglary, a Class III felony. The district court entered an order denying the motion to set aside, finding that it did not have authority to grant the motion.

The issues raised in this appeal are identical to those in *State v. Spady, ante* p. 99, 645 N.W.2d 539 (2002). It is therefore unnecessary to restate the analysis in this opinion.

In *Spady*, we concluded that § 29-2264 is constitutional and is not in violation of article II, § 1. For the reasons set forth in *Spady*, the judgment of the district court which denied Leanna's motion to set aside the conviction is reversed, and the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KELLY M. HOGAN, APPELLANT, V. GARDEN COUNTY, NEBRASKA, A NEBRASKA POLITICAL SUBDIVISION, APPELLEE.

646 N.W.2d 257

Filed June 21, 2002. No. S-01-079.

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 a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
4. **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, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law.

5. **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 such party's entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
6. **Summary Judgment.** If a genuine issue of fact exists, summary judgment may not properly be entered. The foregoing presupposes that an evidentiary proceeding is conducted on the motion for summary judgment.
7. **Trial: Records: Waiver.** All evidentiary proceedings require the presence of a court reporter who shall make a verbatim record of the proceedings, and such recording may not be waived by the court or the parties.
8. **Summary Judgment: Evidence.** In connection with a motion for summary judgment, the proponent of the evidence must mark and offer the exhibit into evidence.
9. **Summary Judgment: Records: Appeal and Error.** The only issue which will be considered on appeal of a summary judgment, absent the bill of exceptions, is the sufficiency of the pleadings to support the judgment.

Appeal from the District Court for Garden County: PAUL D. EMPSON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Kelly M. Hogan, pro se.

Philip E. Pierce, of Pierce Law Office, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Kelly M. Hogan appeals the decision of the district court for Garden County overruling his motion for partial summary judgment; granting the motion for summary judgment filed by Garden County, Nebraska; and dismissing Hogan's petition with prejudice. No hearing or other evidentiary proceeding was conducted on the cross-motions for summary judgment, and there is no bill of exceptions which, in the proper course, would record the evidence offered, received, and available to the trial court for consideration. Because there was no evidence to support the decision of the district court and material allegations in the parties' pleadings were controverted, the record on appeal does not support the order granting the county's motion for summary judgment. Accordingly, we affirm that portion of the district

court's order which overruled Hogan's motion for partial summary judgment, and we reverse that portion of the district court's order that granted the county's motion for summary judgment and remand the cause for further proceedings.

STATEMENT OF FACTS

Issues related to the instant appeal were previously before the appellate courts. See, *Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997); *Hynes v. Hogan*, 4 Neb. App. 866, 553 N.W.2d 162 (1996). In November 1994, Hogan was elected to the office of Garden County Attorney. On March 21, 1995, Hogan's opponent in the election, Eugene J. Hynes, filed a complaint for Hogan's removal from office, alleging that Hogan resided outside of Garden County, in violation of Neb. Rev. Stat. § 23-1201.01 (Supp. 1993), and that therefore, Hogan was guilty of official misconduct and his office should be declared vacant. Following trial, the district court found Hogan in violation of § 23-1201.01 and determined his actions constituted official misconduct. Thereupon, the district court declared the office of Garden County Attorney to be vacant. The Nebraska Court of Appeals reversed the district court's judgment removing Hogan from office, and upon further review, this court affirmed in relevant part the decision of the Court of Appeals. See, *Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997); *Hynes v. Hogan*, 4 Neb. App. 866, 553 N.W.2d 162 (1996).

On January 3, 1997, Hogan reassumed the position of Garden County Attorney and continued in that position until November 16, 1998, when he resigned. On November 20, Hogan filed the instant action against the county in the Garden County District Court. In his petition, Hogan alleged, inter alia, that as Garden County Attorney, he was entitled to a specified salary and to benefits for each of the years 1995 through 1998; that he had performed all of the conditions and requirements of his employment; that the county ceased paying him his salary and benefits during the period of time when he was removed from office; and that he was entitled to receive from the county his unpaid salary and benefits. On May 5, 1999, the county filed its "Answer and Affirmative Defense and Setoff," in which it, inter alia, denied each of the above allegations.

On September 27, 1999, the county moved for summary judgment, seeking judgment in its favor and the dismissal of Hogan's petition. On October 20, Hogan filed a motion for partial summary judgment, seeking an order that the county was liable for his unpaid salary and benefits. It is undisputed that no hearing or other evidentiary proceeding was actually held on the cross-motions for summary judgment. It is also undisputed that neither party formally offered evidence. Evidently, the parties submitted written arguments in the form of briefs to the district court. In their briefs on appeal, the parties refer to affidavits attached to the county's motion for summary judgment. The parties posit that these affidavits form the basis for the district court's decision. There is no bill of exceptions with respect to the consideration and disposition of the cross-motions for summary judgment.

In an order filed December 20, 2000, the district court overruled Hogan's motion for partial summary judgment, granted the county's motion for summary judgment, and dismissed Hogan's petition with prejudice. Hogan appeals.

ASSIGNMENT OF ERROR

On appeal, Hogan assigns seven errors which can be restated as one. Hogan claims, restated, that the district court erred in overruling his motion for partial summary judgment and granting the county's motion for summary judgment and dismissing the petition with prejudice.

STANDARDS OF REVIEW

[1-3] 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. *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001). Although the denial of a motion for

summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb. 129, 629 N.W.2d 534 (2001).

ANALYSIS

[4-6] With respect to our evaluation of the correctness of the district court's rulings, we are confronted in this appeal with the fundamental problem that no hearing or other evidentiary proceeding was conducted on the cross-motions for summary judgment and that there is no bill of exceptions with respect to the district court's determinations of these motions. This court has stated that 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, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law. *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 such party's entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Id.* If a genuine issue of fact exists, summary judgment may not properly be entered. *Id.* The foregoing presupposes that an evidentiary proceeding is conducted on the motion for summary judgment.

[7] In *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 141, 525 N.W.2d 219, 221 (1995), this court stated that "all evidentiary proceedings shall require the presence of a court reporter who shall make

a verbatim record of the proceedings, and such recording may not be waived by the court or the parties." Indeed, Neb. Ct. R. of Official Ct. Rptrs. 3 (rev. 2000) provides in part as follows: "The official reporter shall be charged with making a verbatim record of all proceedings in such court in accordance with Neb. Ct. R. of Prac. 5." Neb. Ct. R. of Prac. 5A(1) (rev. 2000) provides: "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."

[8] In connection with a motion for summary judgment, we have recently repeated the requirement that the proponent of evidence must mark and offer the exhibit into evidence. *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002). "Unless the [evidence] 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." *Id.* at 520-21, 641 N.W.2d at 37. Where the nature of the proceeding requires evidence, the making of an evidentiary record by means of a court reporter in the trial court cannot be waived. *Gerdes, supra.*

As summarized above, no hearing or other evidentiary proceeding was held on the parties' respective summary judgment motions, and there is no bill of exceptions which in the proper course would memorialize the evidence offered, received, and considered by the district court. Although reference is made to affidavits in support of the county's summary judgment motion, the parties concede that the affidavits were not offered or received into evidence by the district court. Due to the failure of the parties to offer the evidence on the record, the district court had no evidence before it when it considered the parties' summary judgment motions. See, *Altaffer, supra*; *Gerdes, supra*.

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). Because no evidence was offered by

the parties or received by the district court, there was no evidence upon which the district court could render its decision.

[9] In order to receive consideration on appeal, any affidavits or other evidence 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. *Altaffer, supra*; *Rath v. Selection Research, Inc.*, 246 Neb. 340, 519 N.W.2d 503 (1994); *Keystone Ranch Co. v. Central Neb. Pub. Power & Irr. Dist.*, 237 Neb. 188, 465 N.W.2d 472 (1991). In *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998), we stated that the only issue which will be considered on appeal of a summary judgment, absent the bill of exceptions, is the sufficiency of the pleadings to support the judgment. Our consideration of this appeal is therefore limited to an examination of the pleadings; if they are sufficient to support the judgment, we will not reverse the district court's decision. See, *id.*; *Stromsburg Bank v. Nuttelman*, 218 Neb. 687, 358 N.W.2d 746 (1984).

In Hogan's petition seeking the payment of salary and benefits, he alleged, inter alia, that as Garden County Attorney, he was entitled to a specified salary and to benefits for each of the years 1995 through 1998; that he had performed all of the conditions and requirements of his employment; that the county ceased paying him his salary and benefits during the period of time when he was removed from office; and that he was entitled to receive from the county his unpaid salary and benefits. For relief, Hogan sought, inter alia, his unpaid salary and employment benefits. In its answer, the county denied these allegations which are allegations pertaining to material facts. Accordingly, based upon the pleadings, there exist genuine issues of material facts.

In view of the existence of genuine issues of material facts, the district court properly overruled Hogan's motion for partial summary judgment. The district court erred, however, in granting the county's motion for summary judgment. See, *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). The portion of the district court's order granting the motion for summary judgment by the county is reversed, and the cause is remanded for further proceedings.

CONCLUSION

In the instant case, there was no evidence offered or admitted into evidence upon which the district court could render its decision on the parties' cross-motions for summary judgment. Based upon the pleadings, genuine issues of material facts exist, thereby precluding summary judgment for either party. Accordingly, we affirm that portion of the district court's judgment which overruled Hogan's motion for partial summary judgment, and we reverse that portion of the district court's order which granted the county's motion for summary judgment and dismissed the petition with prejudice. The cause is remanded for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

PENN CAL, L.L.C., AND MICHAEL HUXEN, INDIVIDUALLY, APPELLEES, V. PENN CAL DAIRY, A TEXAS PARTNERSHIP, AND JIM HUFFMAN, INDIVIDUALLY, APPELLEES, AND GLEN SIMONTON, INDIVIDUALLY, APPELLANT.

646 N.W.2d 601

Filed June 21, 2002. No. S-01-226.

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. **Courts: Contempt.** The district courts of this state have the inherent power to enforce compliance with court orders and judgments through contempt proceedings.
3. **Courts: Contempt: Foreign Judgments: Debtors and Creditors.** Given the district court's inherent power to punish individuals for contempt of its orders, a Nebraska district court has the inherent power to punish a judgment debtor for his contempt of a foreign judgment which had been properly registered under the Nebraska Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. § 25-1587.01 et seq. (Reissue 1995) in the district court.

Appeal from the District Court for Red Willow County: JOHN J. BATTERSHELL, Judge. Reversed and remanded for further proceedings.

Maurice A. Green, of Green Law Offices, P.C., for appellant.

G. Peter Burger, of Burger & Bennett, P.C., for appellee Jim Huffman.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellant, Glen Simonton, obtained a judgment against appellee Jim Huffman in the Erath County District Court, 266th Judicial District, Erath County, Texas (Texas judgment). Pursuant to the Nebraska Uniform Enforcement of Foreign Judgments Act (UEFJA), Neb. Rev. Stat. §§ 25-1587.01 to 25-1587.09 (Reissue 1995), Simonton registered the Texas judgment in Nebraska, in the Red Willow County District Court. Thereafter, Simonton moved the district court for an order finding Huffman in contempt of court due to his failure to comply with the Texas judgment. Following a show cause hearing on Simonton's contempt motion, the district court concluded that under the UEFJA, failure to comply with the terms of a registered foreign judgment was not subject to its contempt power, because the judgment had not been issued by that district court in the first instance. The district court dismissed the contempt proceedings. Simonton appeals. We reverse the district court's order and remand the cause for further proceedings.

STATEMENT OF FACTS

The relevant facts are not in dispute. Penn Cal, L.L.C., and Michael Huxen sued Penn Cal Dairy, Huffman, and Simonton in the Erath County District Court, 266th Judicial District, Erath County, Texas. The nature and course of the Texas proceedings are not in the record before this court. However, according to the Texas judgment, Simonton became a judgment creditor of Huffman. On June 4, 1999, the district court for Erath County, Texas, issued the Texas judgment, which provided, inter alia, as follows:

> JIM HUFFMAN is ordered to execute that certain unsecured promissory note, attached to the **"Mutual Release, Compromise and Settlement Agreement"** as Exhibit "A" which note is dated October 1, 1998, in the original principle sum

> of $353,000.00, payable to PENN-CAL, L.L.C., a Texas Limited Liability Company/MICHAEL HUXEN/GLEN SIMONTON. JIM HUFFMAN is ORDERED to deliver said note to Plaintiff, MICHAEL HUXEN . . . no later than ten (10) days from the date of this judgment.

On October 13, 2000, Simonton filed an authenticated copy of the Texas judgment with the district court for Red Willow County, Nebraska, in accordance with § 25-1587.03, which provides as follows:

> A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state may be filed on or after January 1, 1994, in the office of the clerk of any court of this state having jurisdiction of such action. The clerk shall treat the foreign judgment in the same manner as a judgment of a court of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of this state and may be enforced or satisfied in like manner.

Huffman filed no objection or other response to the filing of the authenticated foreign judgment.

On December 7, 2000, Simonton filed a motion for citation to issue, seeking an order "commanding [Huffman] to appear in Court and show cause, if any he may have, why he should not be held in contempt of Court by failing to obey the [June 4, 1999] Order." On the same date, the district court entered its show cause order and ordered Huffman to appear in court on January 3, 2001. Huffman filed an "answer" to the motion on December 28, 2000, in which he alleged, inter alia, that the district court did not have "subject matter jurisdiction to try proceedings alleging contempt of the [order contained in the Texas judgment]."

On January 3, 2001, Huffman and Simonton appeared before the Red Willow County District Court on Simonton's contempt motion and Huffman's "answer" thereto. Before addressing the merits of the motion, the district court indicated that it wished to address certain legal issues and directed the parties to submit briefs on the issue of whether the district court had the authority to enforce a foreign judgment registered under the UEFJA through contempt proceedings.

After receiving the parties' briefs, the district court entered an order on February 6, 2001, in which it determined that Simonton had duly filed an authenticated copy of the Texas judgment with the district court, that 30 days had passed with no objection, and that therefore, the registration of the judgment was "final." With respect to the issue of whether the district court could enforce compliance with the Texas judgment through contempt proceedings, the district court stated:

> [T]he effect of registration of a foreign judgment, although it makes the judgment the same as and subject to the same conditions as a domestic judgment . . . does not make the judgment subject to the contempt of court powers of this Court because the judgment was not issued by this Court, because although the order becomes domesticated, it is still not an order of this Court.

The district court further stated that "only the tribunal whose order has been violated or proceeding interfered with has the power to punish contempt." The district court concluded that it did not have the authority to issue a citation for contempt against Huffman. Accordingly, the district court found that the December 7, 2000, show cause order was improvidently granted and ordered the matter dismissed. Simonton appeals.

ASSIGNMENT OF ERROR

On appeal, Simonton assigns one error. Simonton claims, restated, that the district court erred in dismissing the contempt proceedings against Huffman based upon its conclusion that under the UEFJA, it was unable to use its contempt power to enforce an authenticated and registered foreign judgment.

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. *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

ANALYSIS

Section 25-1587.03 provides that an authenticated copy of a foreign judgment, filed in a district court of this state, "has the

same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of this state and may be enforced or satisfied in like manner." The UEFJA is silent as to the specific issue of whether the orders contained in a registered foreign judgment may be enforced through contempt proceedings conducted by the court in which the judgment is registered. We note, however, that courts in other jurisdictions have concluded, albeit without discussion, that foreign judgments registered in their states pursuant to their versions of the UEFJA may be enforced through contempt proceedings. See, e.g., *Behr v. Behr*, No. C8-95-428, 1995 WL 497337 (Minn. App. Aug. 22, 1995) (concluding trial court did not abuse discretion in using civil contempt to enforce registered foreign judgment); *Wilder v. Wilder*, 93 Misc. 2d 247, 402 N.Y.S.2d 559 (1978) (determining contempt authority available remedy to enforce registered foreign judgments).

[2] It is well settled that the district courts of this state have the inherent power to enforce compliance with court orders and judgments through contempt proceedings. We have stated:

> [C]ourts have the inherent power to do those things reasonably necessary for the administration of justice in the exercise of their jurisdiction [and] courts are charged with the duty of guarding their proceedings against everything which interferes with the orderly administration of justice, and . . . the power to punish for violation of its orders or judgments is inherent in every court having common-law jurisdiction. . . . [T]he power to punish for contempt is incident to every judicial tribune, derived from its very constitution, without any expressed statutory aid and inherent in all courts of record.

(Citations omitted.) *State v. Davidson*, 260 Neb. 417, 429, 618 N.W.2d 418, 428 (2000). See, also, *Tyler v. Heywood*, 258 Neb. 901, 906, 607 N.W.2d 186, 190 (2000) (noting "longstanding and well-established rule" of inherent power of district courts to punish for contempt).

Pursuant to § 25-1587.03, the Texas judgment, when duly authenticated and filed in a district court in this state, is to be treated "in the same manner as a judgment of a court of this state . . . and may be enforced or satisfied in like manner." Hoffman

does not challenge the authentication or the manner of filing of the Texas judgment in the Red Willow County District Court. Pursuant to the UEFJA, the Texas judgment is to be treated in the same manner as if it were initially a judgment of this state.

[3] Given the district court's inherent power to punish individuals for contempt of its orders, see *State v. Davidson, supra*, and *Tyler v. Heywood, supra*, the Red Willow County District Court had the inherent power to punish Huffman for his contempt of the Texas judgment which had been properly registered under the UEFJA in the Red Willow County District Court. Based on our interpretation of the UEFJA, the district court erred as a matter of law in concluding that it did not have the authority under the UEFJA to enforce the order contained in the Texas judgment through contempt proceedings and in dismissing the contempt proceedings.

CONCLUSION

Under the UEFJA, the district court has the authority to enforce the order contained in the Texas judgment registered under the UEFJA through its contempt power. Its conclusion to the contrary was error as a matter of law. We reverse the district court's February 6, 2001, order dismissing the contempt proceedings and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ARMEDA MALONE AND STEPHEN KRANTZ, APPELLEES, V. AMERICAN BUSINESS INFORMATION, INC., APPELLANT.

647 N.W.2d 569

Filed June 21, 2002. No. S-01-227.

1. **Directed Verdict: Evidence: Appeal and Error.** When a motion for a directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
2. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.

3. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
4. **Directed Verdict.** The party against whom a motion for directed verdict is made is entitled to all reasonable inferences deducible from the evidence.
5. **Employer and Employee: Contracts: Wages.** Under either an at-will employment relationship or a contractual arrangement that allows employer modification at will, an employer can alter the terms of compensation, provided the employer has given notice of the alteration to the employee and the employee thereafter continues his or her employment.
6. **Employer and Employee: Wages.** Even in an at-will employment relationship, the employer cannot unilaterally alter the amount of compensation for work that has already been rendered or for commissions that have already accrued.
7. **Contracts: Appeal and Error.** Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision.
8. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
9. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
10. **Jury Instructions: Appeal and Error.** On appellate review, jury instructions must be read together; they must be read conjunctively, rather than separately in isolation.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Patrick M. Flood, of Hotz, Weaver, Flood & Breitkreutz, for appellant.

Michael P. Dowd, of Dowd & Dowd, for appellees.

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

GERRARD, J.

Appellees, Armeda Malone and Stephen Krantz, filed suit against their former employer, American Business Information, Inc. (ABI), now known as Info USA, Inc., to recover commissions owed pursuant to the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. § 48-1228 et seq. (Reissue

1998). A jury awarded Malone and Krantz their requested amounts of commission, and the district court entered judgment pursuant to the jury verdicts. ABI now appeals.

I. FACTUAL BACKGROUND

Malone and Krantz began working for ABI as national account managers in 1998. Joseph Szczepaniak, president of ABI's consumer CD-ROM division, induced Malone to leave her previous employment by offering a more favorable commission agreement, despite a lower base salary at ABI. Similarly, ABI recruited Krantz with an offer of a lucrative commission agreement.

Upon joining ABI, Malone and Krantz signed identical 1998 sales commission plans (1998 Commission Plan). Both Malone and Krantz testified that ABI's tiered commission structure depended upon the net quantities shipped from ABI to distributors, based on the distributors' point of sale (POS) reports or direct sales. The 1998 Commission Plan provided, in pertinent part:

Annual Paid Revenue	Commission %
0 - $800,000	2%
$800,000 - $1,200,000	8%
over $1,200,000	15%

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1. All commissions are based on paid sales only.
2. All commissions are paid on a quarterly basis and are calculated on cumulative paid year-to-date sales as of the end of each quarter.
3. All earned commissions will be paid at the end of the following month.
4. Commissions are based on performance and any disputes will be settled by senior management.
5. Commission and bonus plans are subject to change at management's discretion.
6. For team commissions or bonuses, the assigned team members are subject to change.

Malone and Krantz testified that ABI did not advise them that it could retroactively modify the commission agreement without notice; Malone and Krantz each understood that the plan only allowed for prospective change following notice.

For the first two quarters of 1998, Malone and Krantz reported directly to Marci Vitous, ABI's director of retail sales. William Hippen, vice president of retail sales, supervised Vitous. Vitous wrote Hippen a letter dated March 9, 1998, requesting confirmation that "commissions for the tier 1 group, including myself, would be paid based on the data collected from the distributors' POS reports." Hippen replied via e-mail: "Yes, this is correct." ABI accordingly paid commissions for the first quarter of 1998 to Malone and Krantz with no underpayment. Szczepaniak, the president of Malone and Krantz' division, signed each commission report.

In accordance with this method of calculation, Hippen sent an e-mail to a potential sales representative during the second quarter of 1998, describing how ABI calculated commissions: "[A]ll commissions in the retail channel are paid on net 'sell-in' at distribution and/or direct. Distribution 'sell-in' information is derived from POS reports provided by each distributor."

Hippen testified that at the end of the second quarter, Malone's and Krantz' calculated commissions included reserves. Hippen incorporated reserves into the commission calculations by estimating that a number of products would be returned and stated that he implemented reserves so the employees receiving commissions would not be overpaid and have to repay ABI if the products were returned. Malone testified that she was not informed until September 1998 that reserves would be withheld from her commissions.

ABI's CD-ROM division, in which Malone and Krantz worked, underwent management changes in 1998: Vitous and Hippen left the division; Steven Malone became director of sales, replacing Vitous and Hippen; and Steven Malone reported to Bruce Lowry, who became vice president of the consumer products division, replacing Szczepaniak.

Malone and Krantz accepted and cashed their second quarter commission checks. Malone testified that in September 1998, she received a memorandum and second quarter commission calculations from Lowry and discovered that her second quarter commission included reserves. After receiving Lowry's memorandum in September, Malone and Krantz made inquiries with Steven Malone, their direct supervisor, about reconciling their

second-quarter commissions and paying their third-quarter commissions; they did not receive commission calculation sheets for the third or fourth quarter of 1998.

Steven Malone testified that he initially compiled the third-quarter commission numbers based on POS reports; however, upon presenting these figures to Lowry, Steven Malone testified that Lowry told him "you got to learn how to fuck these people." Lowry denied making that statement. Steven Malone testified that after finding that the commission figures were unacceptable to Lowry, he "bumped the level of reserves" held against the national account managers, utilizing several variables, some of which he found "ridiculous."

Steven Malone reassured Malone and Krantz in November 1998 that the underpayment of their second-quarter commissions and their third-quarter commissions were forthcoming, but Malone and Krantz did not receive these commissions within 30 days of the end of the quarter as required by the 1998 Commission Plan. Around December 14, 1998, Lowry advised Steven Malone that ABI would pay commissions due from the third and fourth quarters of 1998; on December 15, Lowry informed Steven Malone that the commissions would not be approved and that a new model to determine commissions would be implemented.

On December 15, 1998, Steven Malone informed Malone that commissions were going to be changed, and Malone objected to a retroactive change to the commission plan. On December 16, Malone sent a letter to the executive chairman of Info USA, formerly known as ABI, demanding her third-quarter commission. Krantz sent a similar e-mail to the executive chairman and other ABI management on December 17, demanding payment of his third-quarter commissions.

Internal auditor Julie Engel testified that Steven Malone asked her around January 1999 to recalculate commissions based on paid sales, i.e., cash ABI actually received from its sales. Engel recalculated commissions of all national account managers, including Malone and Krantz, for all four quarters of 1998. Lowry sent Krantz a letter on December 23, 1998, claiming that Krantz owed ABI $15,197.73 after the recalculation of commissions for the third quarter.

Malone and Krantz no longer work for ABI. They both claim that ABI owes unpaid commissions from 1998, and each calculated their respective amounts based on POS reports provided by ABI. Krantz adduced evidence that ABI owed him $108,802 in unpaid commissions. Malone presented evidence that ABI owed her $75,350 in unpaid commissions.

II. PROCEDURAL BACKGROUND

Malone and Krantz filed an amended petition against ABI to recover damages owed under the Nebraska Wage Payment and Collection Act, § 48-1228 et seq. Malone and Krantz alleged that ABI failed and refused to pay commissions earned in 1998, in violation of the contractual 1998 Commission Plan. Malone and Krantz prayed for, inter alia, the commissions for 1998 to which they are entitled and reasonable attorney fees in an amount not less than 25 percent of the total recovery.

At trial, ABI moved for a directed verdict at the close of Malone and Krantz' case in chief, and again at the close of its own case; the district court overruled both motions. The jury found in favor of Malone for the sum of $75,350, and in favor of Krantz for the sum of $108,802. The district court entered judgment accordingly and awarded Malone and Krantz attorney fees pursuant to § 48-1231. ABI now appeals.

III. ASSIGNMENTS OF ERROR

ABI assigns, restated, that the district court erred (1) in failing to grant ABI's motion for a directed verdict, (2) in instructing the jury that the 1998 Commission Plan was ambiguous as a matter of law, and (3) in failing to instruct the jury on what constitutes an unenforceable promise.

IV. STANDARD OF REVIEW

[1] When a motion for a directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Steele v. Sedlacek*, 261 Neb. 794, 626 N.W.2d 224 (2001), *modified* 262 Neb. 1, 626 N.W.2d 224.

[2] Whether the jury instructions given by a trial court are correct is a question of law. *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

V. ANALYSIS

1. Directed Verdict

ABI assigns, first, that the district court erred in failing to grant a directed verdict in favor of ABI. ABI argues that the 1998 Commission Plan upon which Malone and Krantz base their claims cannot be interpreted to provide an enforceable contractual right and that Malone and Krantz did not present evidence upon which a jury could award reasonably certain damages.

[3,4] A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001), *modified* 262 Neb. 663, 641 N.W.2d 624. The party against whom a motion for directed verdict is made is entitled to all reasonable inferences deducible from the evidence. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001). Even if all reasonable inferences from the evidence are resolved in favor of Malone and Krantz, ABI argues that the district court should have entered a directed verdict because its management could, as a matter of law, change the commission plan at its discretion—retroactively and without notice.

ABI claims that paragraphs 4 and 5 of the 1998 Commission Plan clearly and unambiguously reserve to ABI the right to resolve all disputes concerning commissions and the right to change, alter, or repeal the 1998 Commission Plan. In *Feola v. Valmont Industries, Inc.*, 208 Neb. 527, 304 N.W.2d 377 (1981), this court upheld the trial court's decision that an employee was not entitled to a bonus after termination of employment based on its interpretation of the bonus plan and management's discretion. ABI claims that based on *Feola*, the 1998 Commission Plan at issue provides for a discretionary and gratuitous bonus for which there is no contractual right of recovery.

The employee in *Feola, supra*, was lawfully terminated and placed on a severance pay plan prior to the scheduled receipt

of his yearly bonus. Although the bonus plan in *Feola* contained language allowing for the discretion of the employer's board of directors in paying bonuses and this court concluded that the board had discretion to deny the employee's bonus, *Feola* does not control the instant case. The plan in *Feola* unambiguously provided that a terminated employee under a severance pay plan would not be entitled to receive a bonus. Therefore, notwithstanding this court's discussion of the board's discretion to dispense bonuses, the employee would not have received a bonus whether or not the board had discretion. See *id.*

ABI cites cases from other jurisdictions in support of its position. In *Parrish v. General Motors Corporation*, 137 So. 2d 255 (Fla. App. 1962), cited with approval in *Feola, supra*, an employee brought suit against a former employer to collect a bonus allegedly due to him under a bonus plan. Under the plan, management had discretion to determine bonus amounts and modify or suspend the plan. The *Parrish* court concluded that the plan at issue "[partook] of gratuity while lacking essential elements of contractual obligation. . . . [A]n employee [under the plan] is at all times charged with knowledge that a bonus award may be granted or withheld . . . at the discretion of the employer." 137 So. 2d at 258. See, also, *Mosow v. National Lock Co.*, 119 Ill. App. 2d 232, 255 N.E.2d 500 (1970) (concluding that contingent compensation plan at issue reserved determination of compensation to management's discretion); *Automatic Sprinkler Corp. v. Anderson*, 243 Ga. 867, 869, 257 S.E.2d 283, 285 (1979) (concluding that because compensation plan stated that " 'award of any direct incentive compensation is entirely within the discretion of the corporation,' " contract was unambiguous and employee had no absolute right to deferred incentive compensation); *Goodpaster v. Pfizer, Inc.*, 35 Wash. App. 199, 665 P.2d 414 (1983) (stating that employer's promise to pay bonus was illusory and finding no evidence that promise to pay bonus was definite and certain).

Malone and Krantz argue, however, that the 1998 Commission Plan does not constitute a discretionary and gratuitous bonus plan, but instead bases accrued sales commissions upon individual sales performance. Malone and Krantz assert that the 1998

Commission Plan constituted a contract that could not be (1) altered without notice or (2) retroactively altered.

Although Malone and Krantz acknowledge that an employer may change an original compensation agreement, they argue that an employer cannot retroactively modify commission agreements to deny accrued commissions. See, e.g., *Nichols v. Waterfield Financial Corp.*, 62 Ohio App. 3d 717, 719, 577 N.E.2d 422, 423 (1989) (stating that "the terms and conditions of an at-will contract can be *prospectively* changed without consideration" (emphasis supplied)). Malone and Krantz are correct in their assertion.

[5,6] Under either an at-will employment relationship or a contractual arrangement that allows employer modification at will, an employer can alter the terms of compensation, provided the employer has given notice of the alteration to the employee and the employee thereafter continues his or her employment. However, even if there is an at-will employment relationship, the employer cannot unilaterally alter the amount of compensation for work that has already been rendered or for commissions that have already accrued. See 27 Am. Jur. 2d *Employment Relationship* § 54 (1996). Simply put, an employer cannot modify a written commission agreement retroactively or without notice to its employees. See, *Martin v. Golden Corral Corp.*, 601 So. 2d 1316 (Fla. App. 1992) (reversing and remanding summary judgment to determine if employee had notice and acceptance of modification to at-will employment contract); *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227 (Tex. 1986) (stating that employee must have knowledge and notice of proposed modification when employer modifies at-will employment agreement). See, also, 27 Am. Jur. 2d, *supra*, §§ 23, 26, and 54.

We conclude that the district court did not err in refusing to direct a verdict in favor of ABI. Authority cited by ABI concerning gratuitous bonuses and illusory promises enforceable at management's discretion does not apply to the 1998 Commission Plan. The 1998 Commission Plan granted compensation based on individual sales performance, not mere gratuity. Further, unlike the cases cited by ABI, elements of contractual formation are present under the 1998 Commission Plan: ABI offered its commission plan to entice Malone and Krantz to

work for ABI, and Malone and Krantz accepted that plan as part of their employment.

Although ABI management retained some discretion with regard to the 1998 Commission Plan, that discretion (with respect to accrued commissions) may not be exercised retroactively, without notice to the employees. A directed verdict would not be appropriate in this case and cannot be entered as a matter of law.

ABI also claims that Malone's and Krantz' estimations of their commissions due resulted in a jury award of speculative damages. We disagree. Malone and Krantz offered sufficient evidence as to the amounts ABI owed them and evidence that they both disputed the reserves excluded from their second quarter commissions. Thus, the district court did not err in refusing to grant ABI a directed verdict.

2. Jury Instructions

(a) Instruction on Ambiguity of Commission Plan

ABI assigns, second, that the district court erred by instructing the jury that the 1998 Commission Plan was ambiguous as a matter of law. In instructions Nos. 2 and 7, the district court instructed the jury that the 1998 Commission Plan was ambiguous; ABI specifically objected to these instructions. In its brief, ABI relies on its arguments that the 1998 Commission Plan is unambiguous, as discussed above.

[7,8] Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001).

We conclude that several portions of the 1998 Commission Plan are ambiguous. The jury heard evidence that definition of the terms "paid sales" in paragraph 1, upon which commissions were to be based, meant POS reports to some ABI employees and money received from actual sales to other ABI employees. Commissions based on "performance" and disputes resolved by "senior management" in paragraph 4, and "subject to change at

management's discretion" in paragraph 5, are also ambiguous, as revealed by conflicting evidence adduced at trial. Additionally, the 1998 Commission Plan ambiguously states in paragraph 1 that "commissions are based on paid sales only" and in paragraph 4 that "commissions are based on performance."

Whether the jury instructions given by a trial court are correct is a question of law. *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002). We conclude that based on our interpretation of the law with regard to the 1998 Commission Plan and our determination of the plan's ambiguity, the district court did not err in (1) instructing the jury that the plan was ambiguous as a matter of law and (2) allowing the jury to resolve the ambiguities from the evidence adduced at trial.

(b) Failure to Instruct on Unenforceable Promise

Finally, ABI assigns that the district court erred in failing to include ABI's requested jury instruction, which read: "An agreement that depends upon the wish, will, or pleasure of one of the parties is illusory and does not constitute an enforceable promise." While certainly a unique argument, ABI is apparently claiming that this principle of law, set forth in *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 254 Neb. 418, 576 N.W.2d 806 (1998), would have permitted the trier of fact to conclude that the 1998 Commission Plan could not be enforced to allow Malone and Krantz to claim any specific amounts.

[9,10] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Springer, supra.* On appellate review, jury instructions must be read together; they must be read conjunctively, rather than separately in isolation. *Morris v. Rochester Midland Corp.*, 259 Neb. 870, 612 N.W.2d 921 (2000).

The district court instructed the jury that Malone and Krantz had the burden of proof and that all parties to a lawsuit are entitled to the same fair and impartial consideration, be they individual or corporation. The court further instructed that having found the plan to be ambiguous, the jury must consider both parties'

interpretations and constructions of the 1998 Commission Plan. Thus, the jury could have found in favor of ABI's interpretation of the 1998 Commission Plan. The jury did not accept ABI's interpretation. However, no prejudice against ABI occurred in the court's failure to include ABI's proposed instruction. We, therefore, conclude that the district court did not err in failing to instruct the jury with regard to unenforceable illusory promises.

VI. CONCLUSION

For the reasons stated above, we affirm the judgment of the district court.

AFFIRMED.

EDWARD SHIRLEY, APPELLANT, V. BEVERLY NETH, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

646 N.W.2d 587

Filed June 21, 2002. No. S-01-404.

1. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **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.
3. **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.
4. **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.
5. **Demurrer: Pleadings: Motor Vehicles: Appeal and Error.** A demurrer is a permissible responsive pleading to a petition filed pursuant to Neb. Rev. Stat. § 60-503 (Reissue 1998).

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Jeffrey A. Silver for appellant.

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

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Edward Shirley filed a petition under Neb. Rev. Stat. § 60-503 (Reissue 1998) in the district court for Douglas County in which he alleged in his first count that the suspension of his driver's license by Beverly Neth, director of the Department of Motor Vehicles, State of Nebraska, was improper and in his second count that the Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. § 60-501 et seq. (Reissue 1998), violated constitutional due process guarantees. The district court sustained the general demurrer of Neth and dismissed the petition. Shirley appeals. We affirm the sustaining of the demurrer as to the second count of Shirley's petition, but reverse, and remand for further proceedings with respect to the first count.

II. STATEMENT OF FACTS

Shirley was involved in an automobile accident on November 22, 1998. Because Shirley was an uninsured motorist, he was notified by the Department of Motor Vehicles (hereinafter Department) on March 26, 1999, that his license would be suspended effective April 15 unless he complied with the Motor Vehicle Safety Responsibility Act (hereinafter Act) by one of the methods prescribed therein. Shirley satisfied the requirements of the Act by depositing with the Department a bond in the amount of $1,002.

On December 7, 2000, the Department notified Shirley that the bond was no longer required because 2 years had passed since the accident. In order to receive a refund of the bond amount, Shirley signed an affidavit on December 19 in which he swore, inter alia, that no action had been instituted against him for any claim arising out of the accident. However, contrary to the statements in the affidavit and prior to the Department's

issuing the scheduled refund, the Douglas County Small Claims Court notified the Department of an unsatisfied judgment against Shirley arising out of the November 22, 1998, accident. On December 18, the day before Shirley signed the affidavit, the Department suspended Shirley's driver's license. The suspension was effective until the judgment was satisfied.

On December 22, 2000, Shirley filed a petition in district court pursuant to § 60-503, appealing the suspension. Shirley alleged in the first count that the suspension was unconstitutional in an unspecified manner, was not supported by evidence, was arbitrary and capricious, and was contrary to law. In the second count, he alleged that the Act was unconstitutional on its face because it violated the due process clauses of the U.S. and Nebraska Constitutions. Neth demurred to Shirley's petition. The district court sustained the demurrer and dismissed Shirley's petition. Shirley appeals.

III. ASSIGNMENTS OF ERROR

Shirley asserts, restated, that the district court erred in sustaining the demurrer and dismissing his petition because (1) the district court could not consider a demurrer to a case brought under the Act and (2) his petition stated a cause of action.

IV. STANDARDS 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. *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

[2] 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. *Spradlin v. Dairyland Ins. Co.*, 263 Neb. 688, 641 N.W.2d 634 (2002).

[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.*

[4] 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.*

V. ANALYSIS

1. Demurrer as Proper Pleading

On appeal, Shirley asserts that a demurrer is not a proper pleading in response to a petition filed pursuant to § 60-503 and that as a consequence, the district court erred in considering Neth's demurrer to his petition. The thrust of Shirley's argument is that an action brought under § 60-503 is akin to an appeal, to which a demurrer is inappropriate. We reject Shirley's claim and conclude that a demurrer is allowed as a responsive pleading to a petition filed under § 60-503.

Section 60-503(1) provides:

> Any person aggrieved by an order or act of the department under the Motor Vehicle Safety Responsibility Act may, within thirty days after notice thereof, file a petition in the district court of the county where the aggrieved person resides, but in the event the aggrieved person is a nonresident, then such petition shall be filed in the district court of Lancaster County for a review thereof. The filing of such petition shall suspend the order or act pending a final determination of the review. The license or registration of any person claiming to be aggrieved shall not be restored to such person in the event the final judgment of a court finds against such person until the full time of revocation as fixed by the department shall have elapsed. The court shall summarily *hear the petition as a case in equity* without a jury and *may make any appropriate order or decree.*

(Emphasis supplied.)

Although § 60-503 provides that the district court shall summarily hear the petition, as a matter of statutory interpretation, we conclude that the explicit provision in § 60-503 that a petition filed pursuant to that section is to be heard "as a case in equity" and the further provision that the court "may make any appropriate order or decree," taken together, indicate that a case brought under § 60-503 is not a summary proceeding. A case brought "in equity" presupposes a civil action. See Neb. Rev.

Stat. § 25-101 (Reissue 1995). In considering the process under § 60-503, we have stated that a petitioner proceeding under § 60-503 is "afforded an opportunity to present evidence and cross-examine witnesses at the hearing held in the district court." *Wollenburg v. Conrad*, 246 Neb. 666, 671, 522 N.W.2d 408, 412 (1994). Because an action brought on by a petition under § 60-503 is to be heard as a case in equity, including the opportunity to present evidence and to cross-examine witnesses, the process to be followed under § 60-503 is that applicable to civil actions.

Neb. Rev. Stat. § 25-803 (Reissue 1995) provides that in civil actions, including cases in equity, "[t]he only pleadings allowed are (1) the petition by the plaintiff; (2) the answer or demurrer by the defendant; (3) the demurrer or reply by the plaintiff; and (4) the demurrer to the reply by the defendant." We further note that Neb. Rev. Stat. § 25-806 (Reissue 1995) provides:

> The defendant may demur to the petition only when it appears on its face (1) that the court has no jurisdiction of the person of the defendant or the subject of the action; (2) that the plaintiff has not legal capacity to sue; (3) that there is another action pending between the same parties for the same cause; (4) that there is a defect of parties, plaintiff or defendant; (5) that several causes of action are improperly joined; or (6) that the petition does not state facts sufficient to constitute a cause of action.

Taking §§ 25-803 and 25-806 together, it is clear that a demurrer is a proper responsive pleading to a civil action, including one brought "as a case in equity" under § 60-503, and that the grounds for a demurrer listed in § 25-806 may be raised against a petition filed pursuant to § 60-503.

[5] Because petitions filed pursuant to § 60-503 are to be heard as civil cases in equity and because the challenges that may be raised by demurrer may be raised against a petition filed pursuant to § 60-503, we conclude that a demurrer is a permissible responsive pleading to a petition filed pursuant to § 60-503. We therefore conclude that the district court did not err in considering the demurrer filed by Neth, and we reject Shirley's first assignment of error.

2. Demurrer in Present Case

Shirley next asserts that even if a demurrer is a proper pleading to challenge a petition filed under § 60-503, the demurrer in this case should not have been sustained because his petition did not fail to allege facts stating a cause of action. Shirley fashioned his petition as containing two counts, and we will consider each count separately in reviewing whether the district court properly sustained Neth's demurrer as to that count.

(a) First Count

In his first count, Shirley alleged that the suspension of December 18, 2000, was "(a) in violation of constitutional provision; (b) unsupported by competent, material, and substantial evidence in view of the entire record as made on review; (c) arbitrary and capricious; or (d) contrary to law and should be reversed by the Court." Shirley's allegation in the first count that the suspension of his driver's license by the Department was "in violation of constitutional provision" is apparently intended to be a challenge to the Act as applied to Shirley, not a facial challenge to the Act itself. Neth demurred to this count, and the district court sustained the demurrer.

On appeal, Shirley claims that the allegations contained in the first count of his petition were adequate to state a cause of action and that the demurrer was improperly sustained. Neth argues that the allegations in the petition as to the first count were inadequate, and in any event, taking the petition as a whole, including reference to the exhibits attached thereto, it is clear that the Department did nothing legally inappropriate and that Shirley's first count cannot succeed on the merits. Neth claims the district court did not err in sustaining her demurrer. We agree with Shirley's contention that the district court erred in sustaining the demurrer as to Shirley's first count.

Neth demurred to Shirley's petition pursuant to § 25-806(6), claiming that the petition failed to state facts sufficient to constitute a cause of action. As used in § 25-806(6), a statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. *Spradlin v. Dairyland Ins. Co.*, 263 Neb. 688, 641 N.W.2d 634 (2002). 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.*

To form the basis for a case brought pursuant to § 60-503, a plaintiff must claim to have been "aggrieved by an order or act" of the Department under the Act. See § 60-503(1). When the plaintiff has sufficiently pled a narrative of events, acts, or things done or omitted claiming that he or she was aggrieved by the Department, pursuant to § 60-503, the plaintiff is ordinarily "afforded an opportunity to present evidence and cross-examine witnesses at the hearing held in the district court," *Wollenburg v. Conrad*, 246 Neb. 666, 671, 522 N.W.2d 408, 412 (1994), and is entitled to an evaluation of the evidence by the district court of the order or action of the Department.

To summarize, in his petition, Shirley alleged historical facts surrounding the bond he was required to deposit, the anticipated refund, and the fact that on December 18, 2000, the Department suspended his driver's license and privilege to operate a motor vehicle in the State of Nebraska purportedly due to an unsatisfied judgment. He also alleged that such suspension was "(a) in violation of constitutional provision; (b) unsupported by competent, material, and substantial evidence in view of the entire record as made on review; (c) arbitrary and capricious; or (d) contrary to law." Shirley's allegations in his first count are sufficient to state a cause of action under § 60-503.

In support of her contention that the demurrer to the first count was properly sustained, Neth directs our attention to the petition to which Shirley attached a copy of the December 18, 2000, suspension in which the Department declares that it has received a certified copy of a transcript of judgment filed against Shirley from the small claims court for Douglas County. See *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001) (demurrer reaches exhibit filed with petition and made part thereof, so that court can consider such exhibit in determining whether petition states cause of action). Neth argues that because the Department had received a certified copy of an unsatisfied judgment against Shirley, it was required to suspend Shirley's license under § 60-517 and the allegation in

the first count of Shirley's petition under § 60-503 will ultimately fail. However, statements made by the Department are not alone sufficient to negate Shirley's allegations that such statements are unsupported by evidence, that the manner in which the suspension was imposed was arbitrary and capricious, and that the process by which the suspension was implemented was otherwise improper.

The demurrer was not properly sustained as to the first count because, as a matter of law, it contained allegations which, if found to be true, would support the granting of relief under § 60-503. We therefore reverse the granting of the demurrer and dismissal as to the first count and remand the cause to the district court for further proceedings with respect to the first count of Shirley's petition.

(b) Second Count

In his second count, Shirley alleged that the December 18, 2000, suspension was improper "because the statutory framework upon which it is based, to-wit, [the Act,] is void as contrary to the due process clauses of the Nebraska and United States Constitution[s,] and is therefore unconstitutional in whole or in part." We conclude that in his second count, Shirley failed to state a cause of action upon which relief could be granted and that, therefore, the district court properly sustained Neth's demurrer as to the second count.

In his second count, Shirley challenged the validity of the suspension on the basis that the Act was unconstitutional on its face because of due process concerns. This court considered due process challenges to the Act in *Wollenburg v. Conrad*, 246 Neb. 666, 522 N.W.2d 408 (1994); *Clayton v. Nebraska Dept. of Motor Vehicles*, 247 Neb. 49, 524 N.W.2d 562 (1994); and *Russell v. State*, 247 Neb. 885, 531 N.W.2d 212 (1995). In *Clayton*, we stated that "the Act complies with the notice and hearing requirements of the federal and state Constitutions. Accordingly, [plaintiff]'s argument that the Act is unconstitutional on its face is without merit." 247 Neb. at 52, 524 N.W.2d at 565. Because we have previously rejected arguments that the Act is unconstitutional on its face because of due process concerns, Shirley failed to state a cause of action upon which relief could be granted in his second

count. We therefore conclude that the district court properly sustained Neth's demurrer to the second count and properly dismissed the second count. Our conclusions regarding the facial challenge to the Act asserted in the second count do not apply to the first count, which appears to include a constitutional challenge to the Act as applied to Shirley.

VI. CONCLUSION

We conclude that a demurrer is a proper responsive pleading to a petition filed pursuant to § 60-503 and that the district court properly sustained Neth's demurrer to the second count of Shirley's petition. We therefore affirm the district court's order sustaining the demurrer as to the second count and dismissing the second count. We conclude, however, that the first count is adequately pled and that the district court erred in sustaining Neth's demurrer to the first count of Shirley's petition. We therefore reverse the district court's order of dismissal as to the first count and remand the cause for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROBERT L. GARZA, APPELLANT, V. MICHAEL KENNEY, WARDEN OF THE NEBRASKA STATE PENITENTIARY, APPELLEE.

646 N.W.2d 579

Filed June 21, 2002. No. S-01-412.

1. **Actions: Habeas Corpus: Collateral Attack: Appeal and Error.** As only a void judgment is subject to attack in a habeas corpus action, an appellate court is limited in such a case to reviewing a question of law, namely, is the judgment in question void?
2. **Judgments: Appeal and Error.** To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the court below.

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

Bryan E. Smith, Jr., of Hascall, Jungers & Garvey, for appellant, and, on brief, Robert L. Garza, pro se.

Don Stenberg, Attorney General, and Linda L. Willard for appellee.

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

STEPHAN, J.

Robert L. Garza filed a petition for writ of habeas corpus alleging that his conviction for kidnapping was void because a material element of the crime was neither charged in the information nor determined by the jury, thus depriving the trial court of jurisdiction to impose his sentence. The district court for Lancaster County sustained the State's motion to quash and dismissed Garza's petition for failure to state a claim for habeas corpus. Garza perfected this timely appeal.

FACTS

On April 7, 1983, the State filed an information charging Garza with, inter alia, kidnapping, in violation of Neb. Rev. Stat. § 28-313 (Reissue 1995). On February 17, 1984, Garza was convicted by jury of the kidnapping charge and subsequently sentenced to life imprisonment.

On February 1, 2001, Garza filed a pro se verified petition for writ of habeas corpus in the district court for Lancaster County. In his petition, Garza alleged that the factual issue set forth in § 28-313(3), i.e., whether the victim of a kidnapping was voluntarily released unharmed prior to trial, is an essential element of the crime of kidnapping. He alleged that because the State did not include this element in the information, the district court lacked subject matter jurisdiction to hear the case and impose a sentence and that his conviction was therefore void. Garza also alleged that his conviction was void because his due process rights were violated when this issue was determined by a judge rather than a jury during sentencing.

After receiving Garza's petition, the district court issued an order requiring the State to show cause why a writ of habeas corpus should not issue. The State responded by filing a motion

to quash the petition and argued that Garza had not alleged an appropriate basis for relief. After a brief hearing, the district court sustained the motion to quash and dismissed the petition.

Garza timely appealed from this order and filed a petition to bypass review in the Nebraska Court of Appeals, which we granted.

ASSIGNMENT OF ERROR

Garza assigns, restated and consolidated, that the district court erred in failing to void his conviction through a writ of habeas corpus because the fact issue set forth in § 28-313(3) must be included in the information and submitted to the jury before the trial court acquires the power to impose sentence.

STANDARD OF REVIEW

[1] As only a void judgment is subject to attack in a habeas corpus action, an appellate court is limited in such a case to reviewing a question of law, namely, is the judgment in question void? *Glantz v. Hopkins*, 261 Neb. 495, 624 N.W.2d 9 (2001); *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994).

[2] To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the court below. *Glantz, supra*; *State v. Portsche*, 258 Neb. 926, 606 N.W.2d 794 (2000).

ANALYSIS

In *Rehbein v. Clarke*, 257 Neb. 406, 409-10, 598 N.W.2d 39, 43 (1999), we stated:

> Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained. See *In re Application of Tail, Tail v. Olson*, 144 Neb. 820, 14 N.W.2d 840 (1944). A writ of habeas corpus is a remedy which is constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of liberty. See *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995).
>
> A writ of habeas corpus in this state is quite limited in comparison to those of federal courts, which allow a writ of habeas corpus to a prisoner when he is in custody in violation of the federal Constitution, law, or treaties of the United

States. *Case v. State*, 177 Neb. 404, 129 N.W.2d 107 (1964), *vacated on other grounds* 381 U.S. 336, 85 S. Ct. 1486, 14 L. Ed. 2d 422 (1965). It is established that where a judgment is attacked in a way other than a proceeding in the original action to have the judgment vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is considered a "collateral attack." *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985). An action for habeas corpus is an example of such a collateral attack. *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994).

Only a void judgment may be collaterally attacked. *Mayfield v. Hartmann, supra*. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. *Id*. A writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose. *Anderson v. Gunter*, 235 Neb. 560, 456 N.W.2d 286 (1990).

Garza assigns as error that his conviction is void because the factual issue outlined in § 28-313(3) is "a material element of the crime . . . which must be included in the charging information and submitted to the jury before the trial court acquires the power to impose sentence." This argument is without merit.

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.

In *State v. Schneckloth*, *Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981), we considered and expressly rejected the argument that § 28-313(3) is an element of the crime of kidnapping. We noted that § 28-313(3) contained various mitigating factors to be considered by the court at sentencing and that these factors therefore need not be charged in the information nor submitted to the jury. We have reaffirmed this holding on three subsequent occasions. See, *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002) (*Becerra III*); *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998); *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993).

Garza also relies upon *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), to support his argument that the jury must determine the factual issues outlined in § 28-313(3) before the court acquires the power to impose sentence. Recently, in *Becerra III*, we noted that *Apprendi* held that other than a prior conviction, any fact that increases the penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt. We then wrote that

> [u]nder § 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.

Becerra III, 263 Neb. at 759, 642 N.W.2d at 148.

It is clear from the record that the district court which imposed Garza's sentence had jurisdiction of the offense and of Garza's person and that the sentence was within the power of the court to impose. The conviction was thus not void, and it is therefore not subject to collateral attack through our state habeas corpus remedy.

CONCLUSION

The district court's dismissal of Garza's petition for a writ of habeas corpus is affirmed.

AFFIRMED.

JAMES THOMAS HALL, APPELLANT, V. STATE OF NEBRASKA, APPELLEE. STATE OF NEBRASKA, APPELLEE, V. JAMES T. HALL, ALSO KNOWN AS THOMAS DUANE STRAWDER, APPELLANT.

646 N.W.2d 572

Filed June 21, 2002. Nos. S-01-414, S-01-620, S-01-621, S-01-871.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **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.
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. **Declaratory Judgments.** An action for declaratory judgment does not lie where another equally serviceable remedy is available. 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.
6. **Constitutional Law: Criminal Law: Statutes: Collateral Attack: Declaratory Judgments.** A criminal defendant cannot collaterally attack the constitutionality of statutes relevant to his or her criminal prosecution by declaratory judgment.
7. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
8. **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.
9. **Postconviction.** Postconviction proceedings are not a tool whereby a defendant can continue to bring successive motions for relief.
10. ____. After a first motion for postconviction relief has been judicially determined, any subsequent motion for postconviction 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 postconviction relief.
11. **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.

Appeals from the District Courts for Lancaster and Hall Counties: BERNARD J. MCGINN and TERESA K. LUTHER, Judges. Affirmed.

James Thomas Hall, 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

James Thomas Hall, also known as Thomas Duane Strawder, appeals from district court orders in four separate cases. The four cases were consolidated before this court. In three declaratory judgment actions, cases Nos. S-01-414, S-01-620, and S-01-621, Hall appeals the granting of the State's motions for summary judgment by the district court for Lancaster County. In case No. S-01-871, Hall appeals the order denying his motion for postconviction relief entered by the district court for Hall County. In the three declaratory judgment actions and in the postconviction action, Hall raised issues regarding the constitutionality of the Nebraska homicide statutes. We affirm the orders of the district court for Lancaster County granting the State's motions for summary judgment in cases Nos. S-01-414, S-01-620, and S-01-621, and we affirm the order of the district court for Hall County denying Hall's motion for postconviction relief in case No. S-01-871.

STATEMENT OF FACTS

Background: Prior Proceedings Involving Hall.

In 1991, Hall was charged with first degree murder and other counts in connection with the shooting death of George D. Allan on January 2, 1991. Pursuant to a plea agreement, on July 16, Hall pled guilty to second degree murder and use of a weapon to commit a felony, and the other charges against Hall were dismissed. On September 5, Hall was sentenced to life imprisonment on the second degree murder charge and 20 years' imprisonment on the weapons charge, the sentences to run consecutively. Hall's

sentences were affirmed on appeal by this court. *State v. Hall*, 242 Neb. 92, 492 N.W.2d 884 (1992).

In 1993, Hall filed a motion for postconviction relief, which was denied by the district court for Hall County. The appeal of the denial of postconviction relief was dismissed by this court. *State v. Hall*, 245 Neb. xx (No. S-93-989, May 16, 1994). Hall filed a second motion for postconviction relief in 1995 on the basis that the information to which he pled guilty did not include "malice" as a material element of the crime. The second motion was denied by the district court on the ground of procedural default because the error could have been brought to the court's attention either on direct appeal or in the first postconviction action. On appeal, this court ruled that the error in the information was plain error resulting in an unconstitutional conviction. This court reversed the order of the district court denying Hall's motion for postconviction relief, set aside Hall's convictions for second degree murder and use of a weapon to commit a felony, and remanded the cause with directions to the district court to grant a new trial. *State v. Hall*, 249 Neb. 376, 543 N.W.2d 462 (1996), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

Following remand, on May 20, 1996, Hall was again charged with first degree murder and use of a weapon to commit a felony. Upon Hall's motion, the district court for Hall County dismissed the weapons charge on the basis that the charge was barred by the statute of limitations. This court dismissed the State's appeal from the dismissal of the weapons charge on the basis that it lacked jurisdiction because the district court's order dismissing the weapons count did not constitute a final order. *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997).

On November 12, 1997, Hall pled guilty to second degree murder and was sentenced on December 18 to life imprisonment. Hall appealed from the conviction alleging excessive sentence and no credit for time served. This court summarily affirmed Hall's conviction and sentence on May 20, 1998. *State v. Hall*, 254 Neb. xix (No. S-98-068, May 20, 1998).

On July 24, 1998, Hall filed a motion for postconviction relief related to the 1997 conviction. In the motion, Hall asserted, inter alia, that appellate counsel was ineffective for failing to appeal

the constitutionality of Nebraska's second degree murder statute. A hearing was held May 23, 2000. On July 13, the district court for Hall County overruled the postconviction motion. Hall filed a notice of appeal on September 15. This court entered an order dismissing the appeal on November 22 because the appeal had not been timely filed. *State v. Hall*, 260 Neb. xxiv (case No. S-00-1048, Nov. 22, 2000).

Declaratory Judgment Actions: Cases Nos. S-01-414, S-01-620, and S-01-621.

On August 17 and 20, 1999, Hall filed three petitions for declaratory judgment in the district court for Lancaster County. These three petitions initiated the actions that are the subjects of the appeals in cases Nos. S-01-414, S-01-620, and S-01-621. In case No. S-01-414, Hall sought a declaration that Neb. Rev. Stat. § 28-305 (Reissue 1995) regarding manslaughter was unconstitutional; in case No. S-01-620, Hall sought a declaration that Neb. Rev. Stat. § 28-304 (Reissue 1995) regarding murder in the second degree was unconstitutional; and in case No. S-01-621, Hall sought a declaration that Neb. Rev. Stat. § 28-303(1) (Reissue 1995) regarding murder in the first degree was unconstitutional. Hall filed amended petitions in the three actions on December 6, 2000. Hall asserted in the petitions that the homicide statutes were unconstitutionally vague and overbroad.

On January 24, 2001, the State filed motions for summary judgment in the three declaratory judgment actions. A hearing on the motions was held February 28. On March 20, the district court granted the three motions for summary judgment filed by the State.

With respect to case No. S-01-621, in which Hall challenged the first degree murder statute, § 28-303(1), the district court concluded that Hall had waived his opportunity to present the constitutional question he was attempting to raise in this declaratory action by having pled guilty to second degree murder after being charged with first degree murder. The district court further concluded in all three cases Nos. S-01-414, S-01-620, and S-01-621 that no present case or controversy existed between the parties regarding the statutes at issue and

concluded that the Uniform Declaratory Judgments Act applied only where there were actual controversies and justiciable issues presented. The district court further found that, to the extent Hall's challenges related to his conviction for second degree murder, (1) the procedural safeguards which inure to a criminal prosecution represented an " 'equally serviceable remedy' " by which he could have pursued the issues raised; (2) "res judicata" barred litigation of a point which the parties could have brought forward in the criminal proceeding; and (3) Hall had either waived the issues or had the issues resolved against him in his criminal action which was affirmed on appeal or in his postconviction proceeding. Finally, the district court concluded that the legal question Hall attempted to raise in all three actions had been resolved in a manner contrary to Hall's theory of relief by *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

In the orders entered March 20, 2001, the district court entered judgment in favor of the State and dismissed all three declaratory judgment actions. In cases Nos. S-01-414, S-01-620, and S-01-621, Hall appeals the orders granting the State's motions for summary judgment.

Current Postconviction Action: Case No. S-01-871.

On July 5, 2001, Hall filed a motion for postconviction relief in the district court for Hall County related to his conviction for second degree murder in 1997. In his postconviction motion, Hall claimed: (1) the amended information cited the wrong statute number, (2) the district court failed to allow a credit for time served, (3) the homicide statutes were unconstitutional in various respects, and (4) his trial counsel had been ineffective in various respects. Hall sought as relief, inter alia, declarations that §§ 28-303(1), 28-304, and 28-305(1) were unconstitutional.

On July 10, 2001, the district court for Hall County denied Hall's motion for postconviction relief without hearing. The district court concluded that the motion stated no legitimate grounds for relief and raised no new issues that could not have been raised on direct appeal or in the postconviction motion filed July 24, 1998. In case No. S-01-871, Hall appeals the denial of his motion for postconviction relief.

ASSIGNMENTS OF ERROR

Hall's assignments of error in these pro se appeals are not clearly and succinctly stated. However, in cases Nos. S-01-414, S-01-620, and S-01-621, Hall appears to generally assert that the district court for Lancaster County erred by failing to grant the declaratory relief requested. In case No. S-01-871, Hall generally asserts that the district court for Hall County erred in denying his motion for postconviction relief.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002). 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] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

[4] 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. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

ANALYSIS

Cases Nos. S-01-414, S-01-620, and S-01-621: Declaratory Judgment Actions Regarding Constitutionality of §§ 25-303(1), 28-304, and 28-305(1).

In cases Nos. S-01-414, S-01-620, and S-01-621, Hall appeals orders of the district court for Lancaster County dated March 20, 2001, which denied him declaratory relief. In these declaratory judgment actions, Hall made facial challenges to the constitutionality of Nebraska's homicide statutes. In case No. S-01-414, Hall filed a petition seeking a declaratory judgment

that § 28-305(1) was unconstitutionally vague and overbroad. Section 28-305(1) provides that "[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." In case No. S-01-620, Hall filed a petition seeking a declaratory judgment that § 28-304 was unconstitutionally vague and overbroad. Section 28-304(1) provides that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." In case No. S-01-621, Hall filed a petition seeking a declaratory judgment that § 28-303(1) was unconstitutionally vague and overbroad. Section 28-303 provides that "[a] person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice . . . ."

The district court granted the State's motions for summary judgment and dismissed the declaratory judgment actions on the bases that (1) there existed no case or controversy between Hall and the State with respect to § 28-305(1), (2) an equally serviceable remedy had been provided in the form of the procedural safeguards which inure to a criminal prosecution, (3) the issue Hall asserted in this declaratory judgment action was barred by "res judicata," (4) the claim made by Hall had been waived or resolved against him in the direct appeal of his criminal action and in his postconviction proceedings, and (5) the legal question raised by Hall had already been resolved contrary to his theory of relief in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[5] Although 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, we have nevertheless consistently held that an action for declaratory judgment does not lie where another equally serviceable remedy is available. *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002). 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. *Id.*

Hall pled guilty and was convicted of second degree murder after being charged with first degree murder. That conviction has been affirmed on appeal, and a subsequent motion for postconviction relief addressing this conviction has been denied. Hall now makes facial challenges to the constitutionality of the homicide statutes in these declaratory judgment actions. This issue could have been raised by conventional forms of remedy within the criminal prosecution. In a criminal prosecution, a defendant can bring a constitutional challenge to the facial validity of the statute under which he or she is charged by filing a motion to quash or a demurrer. See *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999). In the event the defendant's counsel fails to make such a challenge, the defendant can allege ineffective assistance of counsel either on direct appeal or in an action for postconviction relief.

[6] Hall had the opportunity to challenge the constitutionality of §§ 28-303(1), 28-304, and 28-305(1) in the criminal proceedings, but instead entered a guilty plea. A criminal defendant cannot collaterally attack the constitutionality of statutes relevant to his or her criminal prosecution by declaratory judgment. Equally serviceable remedies existed for Hall within the context of his criminal prosecution, and Hall either failed to pursue those remedies or those procedures resulted in decisions contrary to the positions he wishes to assert in these declaratory judgment actions. Because other equally serviceable remedies had been available to Hall, his actions filed under the Uniform Declaratory Judgment Act were not proper. For this reason, the State was entitled to judgment as a matter of law in these declaratory judgment actions. In view of our ruling, we need not consider the other bases stated by the district court. We affirm the orders of the district court for Lancaster County granting the State's motions for summary judgment.

Case No. S-01-871: Postconviction Action.

In case No. S-01-871, Hall appeals the order of the district court for Hall County denying his motion for postconviction relief without hearing on the bases that (1) no new issues were raised in the motion that could not have been raised on direct appeal or in his prior postconviction motion and (2) the motion

stated no legitimate grounds for relief. In this postconviction action, Hall sought relief from his 1997 conviction for second degree murder. Hall generally asserts that the district court erred in denying the motion.

[7-9] The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002). 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. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). Postconviction proceedings are not a tool whereby a defendant can continue to bring successive motions for relief. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

[10,11] After a first motion for postconviction relief has been judicially determined, any subsequent motion for postconviction 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 postconviction relief. *Parmar, supra*. 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. *Id*.

In the motion for postconviction relief filed by Hall on July 5, 2001, Hall raised the following issues: (1) The amended information filed in November 1997 cited the wrong statute number, (2) the district court failed to allow a credit for time served, (3) certain homicide statutes were not constitutional, and (4) trial counsel was ineffective in various respects. All the issues raised by Hall in the July 5, 2001, postconviction motion were issues that were or could have been raised either in his direct appeal or in the prior motion for postconviction relief filed July 24, 1998. The July 5, 2001, motion did not affirmatively show on its face that the basis relied upon for relief was not available at the time Hall filed for postconviction relief on July 24, 1998. We therefore affirm the order of the district court for Hall County denying Hall's motion for postconviction relief.

CONCLUSION

In cases Nos. S-01-414, S-01-620, and S-01-621, we conclude that Hall could not bring declaratory judgment actions to challenge the constitutionality of the homicide statutes when equally serviceable remedies existed for Hall to bring such challenges in his criminal prosecution, and we therefore affirm the orders of the district court for Lancaster County granting the State's motions for summary judgment. In case No. S-01-871, we conclude that the postconviction relief requested in Hall's motion filed July 5, 2001, was procedurally barred, and we therefore affirm the order of the district court for Hall County which denied Hall's motion for postconviction relief.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JESSE E. NARCISSE, APPELLANT.

646 N.W.2d 583

Filed June 21, 2002. No. S-01-520.

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: Effectiveness of Counsel: Conflict of Interest.** When a defendant raises no objection to a conflict of interest at trial, he or she must demonstrate (1) that his or her lawyer actively represented conflicting interests and (2) that the actual conflict of interest adversely affected the lawyer's performance.
3. **Effectiveness of Counsel: Conflict of Interest: Proof.** A conflict of interest must be shown to have resulted in conduct on the part of counsel which was detrimental to the defense.
4. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

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

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

WRIGHT, J.

NATURE OF CASE

Following an evidentiary hearing, the district court denied Jesse E. Narcisse's motion for postconviction relief. Narcisse 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. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

FACTS

In 1987, Narcisse was charged with one count of first degree sexual assault and one count of first degree false imprisonment. He was also charged with two counts of being a habitual criminal. Narcisse was convicted on all counts on February 26, 1988. His convictions were affirmed in *State v. Narcisse*, 231 Neb. 805, 438 N.W.2d 743 (1989).

In 1997, the district court denied Narcisse's request for postconviction relief without an evidentiary hearing. The Nebraska Court of Appeals affirmed, and we granted Narcisse's petition for further review. We concluded that Narcisse's motion for postconviction relief contained sufficient facts to entitle him to an evidentiary hearing. Therefore, we reversed the decision of the Court of Appeals and remanded the cause with directions to remand the cause to the district court for an evidentiary hearing. See *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000).

This matter is now before us on Narcisse's appeal from the denial of his motion for postconviction relief following an evidentiary hearing in the district court. At the evidentiary hearing, the issue presented was whether Narcisse's counsel had actively represented clients with conflicting interests during Narcisse's trial and subsequent appeal and, if so, whether the conflict of interest adversely affected the adequacy of Narcisse's counsel's performance.

The alleged conflict of interest related to the murder of Denise Stawkowski, who was found shot to death in Lancaster County on February 19, 1988. Herman Buckman and Goldie Fisher were arrested in connection with the death. On February 21, Miles Johnston, Jr., who represented Narcisse, was appointed to represent Buckman.

While awaiting trial, Narcisse was housed in the Lancaster County jail and worked as a trustee in the kitchen. There, he came into contact with Fisher, who had previously been Narcisse's girl friend. Allegedly, prior to Narcisse's trial, Fisher told him details about Stawkowski's murder. Fisher and Narcisse gave conflicting recorded statements to Det. Robert Marker, Jr., of the Lancaster County Sheriff's Department. Narcisse reported that Fisher said Stawkowski was shot by a third party, and not by Buckman. Narcisse knew Buckman from previous incarcerations.

On April 12, 1988, more than 1 month after Narcisse was convicted, Buckman was charged with murder. Attached to the information was a list of potential witnesses, which included Narcisse. Johnston then spoke with a deputy county attorney, who said that the State did not plan to call Narcisse as a witness because the information he had given was not believed to be accurate. Narcisse was not deposed and did not testify at Buckman's trial.

Narcisse was convicted on February 26, 1988, after a 4-day trial. Johnston conferred with Buckman four times between February 21 and 26. Before Narcisse was sentenced, Johnston met with Buckman an additional 14 times.

The district court found that although Johnston was appointed to represent Buckman and met with him on February 21, 1988, the day before commencement of Narcisse's trial, Johnston did not become aware of the possible involvement of Narcisse in Buckman's trial until after Narcisse had been convicted. The court found no evidence that Johnston's representation of Buckman adversely affected Johnston's representation of Narcisse. The evidence established that the State did not intend to use Narcisse as a witness in the Buckman trial and that there was no conflict between the two cases and their defendants.

The district court noted that Johnston had neglected to communicate with Narcisse after his sentencing, but there was no

evidence to support a conclusion that there was any relationship between that neglect and Johnston's representation of Buckman. The court denied Narcisse's request for postconviction relief.

ASSIGNMENT OF ERROR

Narcisse assigns as error that the district court erred in denying his motion for postconviction relief.

ANALYSIS

In support of his assignment of error, Narcisse claims he met the burden to demonstrate a conflict of interest which adversely affected counsel's performance. Narcisse alleges that the evidence established Johnston's deficient performance and that Johnston failed to convey a plea offer to him because of a conflict of interest that resulted in prejudice to Narcisse.

[2,3] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002). When a defendant raises no objection to a conflict of interest at trial, he or she must demonstrate "(1) that his or her lawyer actively represented conflicting interests and (2) that the actual conflict of interest adversely affected the lawyer's performance." See *State v. Fletcher*, 253 Neb. 1029, 1032, 573 N.W.2d 752, 755 (1998). A conflict of interest must be shown to have resulted in conduct on the part of counsel which was detrimental to the defense. See *id.*

At the evidentiary hearing, Johnston testified that he first met with Buckman on February 21, 1988. He was appointed to represent Buckman 3 days before the start of Narcisse's jury trial. Johnston did not discuss his representation of Narcisse with Buckman because Johnston had no idea Narcisse and Buckman knew each other or had any connection with each other.

Johnston said he first became aware that Narcisse was listed as a witness in the Buckman case when the information was filed against Buckman on April 12, 1988. His motion for fees indicated that he researched attorney-client privilege on April 4. He was told that the State did not believe Narcisse's information was accurate and that it did not intend to use the information or call Narcisse as a witness. Narcisse's statement to authorities

did not agree with the timeline that the authorities had already determined was factual.

Johnston testified that he believed a plea offer was made in Narcisse's case a few days prior to trial. He discussed the offer with Narcisse before the trial, and Narcisse declined to accept it. He encouraged Narcisse to accept the offer because Narcisse's only defense was that the sexual contact was voluntary. He believed that he encouraged Narcisse to testify during the trial, but Narcisse refused. Narcisse was not called as a witness at Buckman's trial, and his testimony was never offered. Johnston said he never discussed Narcisse's willingness to testify with prosecutors in the Buckman case.

Narcisse testified at the evidentiary hearing that he did not know about the plea offer until after the trial and sentencing and that he did not know the specifics of the offer. He said that when he asked Johnston his reasons for waiting until after sentencing to discuss the offer, Johnston said: " 'This will teach you to testify against my client.' " Johnston testified that he did not know the origin of that quote. Narcisse also claimed that he wanted to testify during trial but that Johnston advised against it. Narcisse claimed that if he had known Johnston was representing Buckman, he would have asked for another attorney because of the conflict of interest.

Detective Marker testified that as one of the lead detectives investigating the homicide of Stawkowski, he interviewed Narcisse on February 22, 1988. Detective Marker said the information from Narcisse did not match other information obtained during the investigation, including information obtained directly from Fisher.

[4] On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997), *cert. denied* 522 U.S. 992, 118 S. Ct. 555, 139 L. Ed. 2d 397. The district court found that the statements given to Detective Marker by Fisher and Narcisse corroborated Johnston's testimony that the State did not call Narcisse as a witness in the Buckman case due to inconsistencies in Narcisse's statement. The evidence also supported Johnston's statement concerning the dates and times on which he met with Buckman.

The court found that Narcisse was not deposed and did not testify at Buckman's trial. The court found that it was not until early April 1988, after Narcisse had been convicted, that Johnston became aware of the potential of Narcisse's being called to testify in the Buckman case.

The district court heard Narcisse and Johnston testify concerning the allegation that Johnston did not inform Narcisse of the plea offer until after he had been convicted. It found no support for Narcisse's claim that the failure to notify him of the plea offer was in retaliation for Narcisse's testifying against Buckman. The fee application submitted by Johnston showed that he had talked to Narcisse about the plea on February 12, 1988, which was prior to trial.

The district court found no evidence that Narcisse's case was affected, adversely or otherwise, by Johnston's representation of Buckman and that there was no conflict between the two cases and their defendants. Johnston apparently did not communicate with Narcisse after his sentencing, but the district court found no evidence to suggest that the failure was related to Johnston's representation of Buckman.

We find no error in the findings of fact made by the district court. Narcisse has failed to establish a basis for postconviction relief. He has not met his burden to show that any conflict of interest existed in Johnston's representation of Buckman and Narcisse or that the representation of the two defendants adversely affected Narcisse's case. The findings of the district court are not clearly erroneous, and the court correctly denied postconviction relief.

CONCLUSION

Finding no error in its denial of postconviction relief, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
JOHN M. ROE, APPELLEE.

646 N.W.2d 264

Filed June 28, 2002. No. S-00-1130.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Don Stenberg, Attorney General, and William L. Howland for appellant.

Robert Wm. Chapin, Jr., for appellee.

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

WRIGHT, J.

This appeal arises from an order granting a petition to set aside a conviction pursuant to Neb. Rev. Stat. § 29-2264 (Cum. Supp. 2000). The Lancaster County District Court granted the petition, finding that § 29-2264 does not violate Neb. Const. art. II, § 1. The State appeals.

John M. Roe filed a petition to set aside his conviction on May 30, 2000, at which time he had completed all terms and conditions of probation related to a 1989 conviction for felony possession of a controlled substance. The State filed an answer raising the issue of the constitutionality of § 29-2264. At the hearing on Roe's petition, the State argued that § 29-2264 "is an unconstitutional delegation of the executive pardon power to the judiciary." The district court found the State's argument to be without merit and issued an order setting aside Roe's conviction.

The issues raised in this appeal are identical to those in *State v. Spady, ante* p. 99, 645 N.W.2d 539 (2002), and *State v. Leanna, ante* p. 114, 646 N.W.2d 263 (2002). In *Spady*, we concluded that § 29-2264 is constitutional and is not in violation of article II, § 1. For the reasons set forth in *Spady*, the judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION NO. C-1889 OF GCC LICENSE CORPORATION (WESTERN WIRELESS).
STATE OF NEBRASKA, PUBLIC SERVICE COMMISSION, APPELLEE, V. ARLINGTON TELEPHONE COMPANY ET AL., INTERVENORS-APPELLANTS, AND ARAPAHOE TELEPHONE COMPANY ET AL., INTERVENORS-APPELLEES.

647 N.W.2d 45

Filed June 28, 2002. No. S-01-343.

1. **Public Service Commission: Appeal and Error.** The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing an order 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: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
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. **Public Service Commission: Words and Phrases.** Neb. Rev. Stat. §§ 75-110 (Reissue 1996), 86-1406 (Reissue 1999), and 84-901 (Reissue 1999) do not require the Nebraska Public Service Commission to engage in rulemaking to define the term "public interest" in a federal statute.
6. **Due Process: Property.** The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections.
7. **Due Process: Notice.** If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case.
8. **Telecommunications: Due Process.** Exclusive eligible telecommunications carrier status is not a protected interest entitling incumbent rural telephone carriers to procedural due process under federal law.
9. **Administrative Law: Public Policy.** Courts must give substantial deference to a regulatory agency's judgment about how best to serve the public interest.
10. **Statutes: Public Policy: Words and Phrases.** The words "public interest" in a federal regulatory statute take meaning from the purposes of the regulatory legislation.
11. **Public Service Commission: Appeal and Error.** The appellate courts review a decision of the Public Service Commission for errors appearing on the record.
12. ____: ____. Determinations by the Public Service Commission are matters peculiarly within its expertise and involve a breadth of judgment and policy determination that should not be disturbed by an appellate court in the absence of a showing that the action of the commission was arbitrary or unreasonable.
13. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally

> cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.

Appeal from the Nebraska Public Service Commission. Affirmed.

Kelly R. Dahl and John W. McMullen, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., for appellants.

Steven G. Seglin, of Crosby Guenzel, L.L.P., and Mark J. Ayotte and Philip R. Schenkenberg, of Briggs and Morgan, P.A., for appellant GCC License Corporation (Western Wireless).

Don Stenberg, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

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

CONNOLLY, J.

GCC License Corporation is a wholly owned subsidiary of Western Wireless Corporation, doing business in Nebraska as Cellular One (Western Wireless). It was designated by the Nebraska Public Service Commission (PSC) as an eligible telecommunications carrier (ETC) under 47 U.S.C. § 214(e)(2) (Supp. V 1999), part of the federal Telecommunications Act of 1996. Designation as an ETC makes a company eligible for state and federal funding to ensure that all consumers have access to affordable telephone service, a concept that is generally referred to as "universal service." See, e.g., *Alenco Communications, Inc. v. F.C.C.*, 201 F.3d 608 (5th Cir. 2000). The appellants are rural Nebraska telephone companies who intervened in the PSC action to contest the designation of Western Wireless as an ETC.

The appellants contend that to receive ETC designation, Western Wireless had to prove that the designation would be in the public interest under 47 U.S.C. § 214(e). They argue that the PSC was required to engage in rulemaking to define the term "public interest." They also argue that even if rulemaking is not required, the PSC adopted the wrong test to define the public

interest and that the designation of Western Wireless as an ETC was not supported by the evidence. They further argue that the PSC, by certifying Western Wireless' ETC status to the Federal Communications Commission (FCC) after an appeal was filed, violated a stay provision in Neb. Rev Stat. § 75-134(3) (Cum. Supp. 2000).

We determine that rulemaking was not required and that Western Wireless met its burden of proof that it was eligible for ETC designation. We affirm.

BACKGROUND

Application Proceedings

In August 1998, Western Wireless applied for designation as an ETC in multiple service areas, and the appellants intervened. A hearing was held on the application in October 1999. All parties provided evidence regarding the definition of public interest and whether designation of Western Wireless as an ETC was in the public interest.

Gene DeJordy, an attorney and Western Wireless' representative on a rural task force established by the "Federal-State Universal Service Joint Board," testified for Western Wireless as follows: He stated that the federal Telecommunications Act of 1996 and the Nebraska Telecommunications Universal Service Fund Act established a mechanism to achieve a competitive universal service market by bringing the benefits of competition to rural areas. The acts allow incumbent local exchange carriers, as well as competitive carriers, to enter universal service market areas by seeking ETC status. He testified that Western Wireless was capable of offering universal service to rural customers if it was given ETC status. Western Wireless met all of the criteria for ETC designation, including the ability to offer required supported services, such as access to required emergency services.

Western Wireless planned to implement a universal service offering through the use of wireless local loop technology. Using this system, customers would use a wireless system for their home telephone that would be compatible for use with computers and fax machines. DeJordy explained that wireless loop technology has a more powerful output than a handheld wireless telephone and that the quality of service with a wireless

loop system was equal to, or better than, a landline system. He conceded that terrain could cause a signal to be unavailable to a handheld cellular telephone in certain areas, but indicated that the stronger signal of the wireless loop system would generally prevent that problem. He also stated that a signal could be optimized at a location by using antennas. Additional cellular sites would be constructed to make service available to all areas if necessary. He conceded that the wireless loop service would not likely be installed in hospitals because the antenna would have to be placed outside instead of inside where it could affect medical devices.

DeJordy further testified that Western Wireless would offer the services at a fixed monthly rate similar to what was offered by the incumbent telephone companies. Western Wireless would also provide an expanded local calling area. According to DeJordy, some customers would likely keep their service with the incumbent local carrier, but would use Western Wireless' services as a second telephone line instead of seeking two lines with the incumbent carrier.

DeJordy testified that designation of Western Wireless as an ETC was in the public interest by providing rural customers with a choice between service providers. Western Wireless would provide a new and innovative service with some extra features such as 24-hour customer service, some mobility of the telephone, and expanded local calling areas. Western Wireless did not provide an economic study regarding the impact a second ETC would have on incumbent rural telephone carriers.

Cynthia Bittinger, the secretary-treasurer for a local exchange carrier, testified on behalf of the appellants. She testified as follows: Western Wireless had not provided enough information to show that it would support the services necessary for ETC designation and had not disclosed the prices and terms under which it would offer services. Designation of Western Wireless as an ETC was not in the public interest because it would jeopardize the ability of incumbent rural carriers to provide basic and advanced services to their customers due to lost revenues. She suggested that costs to consumers would rise because of the possibility that a universal service surcharge paid by customers would need to be increased to

support multiple ETC's in rural areas. Bittinger expressed doubt that the economy of rural areas could support two ETC's, especially if the fund had to be adjusted for consumers who carried lines with both carriers. She knew of customers who had experienced dead spots in her area where they were unable to receive a signal when using conventional mobile cellular services provided by Western Wireless.

Steven Watkins, a consultant and attorney, testified for the appellants as follows: Western Wireless had failed to provide sufficient detail regarding the terms and conditions under which it would offer or provide universal service in a manner that would satisfy the conditions necessary for ETC designation. Designation of Western Wireless was not in the public interest because if the funds available were diluted due to multiple ETC's, all the carriers might be prevented from upgrading services in high cost areas and rural customers might be subjected to higher rates. He believed that Western Wireless did not have the capacity to serve all the customers in an area as a carrier of last resort. On cross-examination, he stated his disagreement with existing federal rules and admitted that he believed it would never be in the public interest to designate an additional ETC in a rural telephone company area.

Donald Macke, an economist and the executive director of the Nebraska Rural Development Commission, reviewed Western Wireless' application for ETC designation and wrote a detailed report of his findings. Based on standards used to determine whether to assist development projects, Macke testified that it was not in the public interest to designate Western Wireless as an ETC because the ability of rural markets to support a single provider was in question and they could not support multiple providers.

Barbara Wilcox, the director of product and market issues for U S West Communications, Inc., testified that Western Wireless' services might not be affordable to all customers. She testified that Western Wireless should be required to file a business plan and present details regarding the costs of their services before ETC designation could be granted. She admitted that U S West Communications did not file a business plan when it was designated as an ETC.

PSC Findings

In November 2000, the PSC granted Western Wireless' application for ETC designation. In its order, the PSC stated that it must be shown by clear and convincing evidence that designation of a second ETC in a rural area is in the public interest. The PSC found that the purpose of the public interest requirement of 47 U.S.C. § 214(e) was not to protect rural telecommunications companies from competition but to ensure that rural areas receive the same benefits as urban areas. The PSC determined that the public interest requirement is centered on a threshold issue of whether a proposed application has defined its service area reasonably enough to prevent " 'cherry picking' " of desirable customers by incoming ETC's. The PSC determined that the designated service area was large enough to prevent cherry-picking. The PSC then determined that Western Wireless also offered additional benefits to the public interest such as an expanded calling area and mobility.

The PSC found the report written by Macke to be unpersuasive. The PSC found that the report suggested that it should consider the ability of Western Wireless to provide high quality voice, video, and data services as part of the public interest test and suggested that comparisons of capability should be made with existing rural telecommunications providers. The PSC found that there was no basis in law for these suggestions. The PSC also made note of an admission in the report that Macke lacked the expertise to evaluate the capabilities of wireless technology.

The PSC determined that Western Wireless had provided sufficient and credible evidence that it was willing and capable to provide the services required by federal law. The PSC determined that federal law did not require that the services should already be offered and was more concerned with whether the carrier was willing to provide them. Because the PSC determined that Western Wireless was willing to offer the required services and that designation of Western Wireless as an ETC was in the public interest, it granted the application.

The appellants moved for reconsideration. In their motion, the appellants stated that in a posthearing brief, they (1) "suggested that adopting standards to define the 'public interest' might require a rulemaking prior to proceeding with the Application";

(2) alleged that the PSC had inappropriately adopted a new public interest standard; (3) alleged that rulemaking was required; (4) alleged that they were denied due process; and (5) alleged that the PSC applied the wrong criteria to determine the definition of public interest. After a hearing, the motion for reconsideration was denied.

The appellants filed a notice of appeal on March 19, 2001. On March 29, the PSC certified to the FCC that Western Wireless had been designated as an ETC. The PSC informed the FCC that a notice of appeal had been filed and that the appellants were contending that the notice of appeal held the order granting ETC status in abeyance under Nebraska law. The PSC informed the FCC that oral arguments would be held regarding the effect of the notice of appeal and that the PSC would inform the FCC of any additional findings on the subject. The PSC informed the FCC that if the designation as an ETC was not modified or held in abeyance by the Nebraska courts, that Western Wireless would be eligible to receive federal universal service funding.

On April 12, 2001, the appellants filed a motion for emergency relief and to compel compliance with § 75-134(3), arguing that under § 75-134, the order of the PSC was held in abeyance while the appeal was pending. The appellants requested that this court order the PSC and Western Wireless to honor the stay imposed by § 75-134. Western Wireless responded that the PSC stated in its order that the order constituted a certificate of ETC designation and that § 75-134 does not hold in abeyance an order authorizing the issuance of a certificate. This court overruled the motion.

ASSIGNMENTS OF ERROR

The appellants assign, consolidated and rephrased, that the PSC erred by (1) adopting a public interest test without complying with rulemaking provisions of the Administrative Procedure Act, (2) depriving them of due process by conducting a hearing before determining public interest criteria, (3) applying the wrong standards to define the term public interest, (4) determining that Western Wireless had met its burden of proof for ETC designation, (5) altering their service areas, and (6) implementing its order after an appeal was filed.

STANDARD OF REVIEW

[1] The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record. *Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist.*, 256 Neb. 479, 590 N.W.2d 840 (1999).

[2] When reviewing an order 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] Statutory interpretation presents a question of law. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (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. *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002).

ANALYSIS

RULEMAKING

The appellants contend that the PSC was required to engage in rulemaking under the Administrative Procedure Act to determine the definition of "public interest" found in 47 U.S.C. § 214(e), which provides:

> **Provision of universal service**
>
> **(1) Eligible telecommunications carriers**
>
> A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received—
>
> (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title . . . and
>
> (B) advertise the availability of such services and the charges therefor using media of general distribution.
>
> **(2) Designation of eligible telecommunications carriers**
>
> A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications

> carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

Section 214(6) provides authority for the FCC to designate an ETC using identical criteria when an area does not fall under the jurisdiction of a state commission.

Neb. Rev. Stat. § 75-110 (Reissue 1996), pertaining to the PSC, provides:

> The Public Service Commission shall adopt and promulgate rules and regulations for the government of its proceedings, including rules of procedure for notice and hearing. The commission shall adopt and promulgate rules and regulations which the commission deems necessary to regulate persons within the commission's jurisdiction. The commission shall not take any action affecting persons subject to the commission's jurisdiction unless such action is taken pursuant to a rule, regulation, or statute.

The Nebraska Telecommunications Universal Service Fund Act provides: "The commission shall determine the standards and procedures reasonably necessary, adopt and promulgate rules and regulations as reasonably required, and enter into such contracts with other agencies or private organizations or entities as may be reasonably necessary to efficiently develop, implement, and operate the fund." Neb. Rev. Stat. § 86-1406 (Reissue 1999).

[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. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002); *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

Here, the PSC was required to determine the meaning of the term "public interest" as used in 47 U.S.C. § 214(6). Section 75-110 requires the PSC to promulgate rules only for the government of its proceedings, including rules of procedure for notice and hearing and rules which the commission considers necessary to regulate persons within its jurisdiction. We read nothing in § 75-110 that requires the PSC to engage in rulemaking when defining terms in a federal statute unless the PSC first considers that such action is necessary. Indeed, § 75-110 allows the PSC to take any action pursuant to a statute. Likewise, nothing in § 86-1406 requires the PSC to engage in rulemaking to interpret federal law in conjunction with the administration of the Nebraska Telecommunications Universal Service Fund.

The appellants argue, however, that the definition of a "rule" in Neb. Rev. Stat. § 84-901 (Reissue 1999) requires the PSC to engage in rulemaking. They also point to an instance in another context in which the PSC engaged in rulemaking to define the "public interest." Section 84-901 defines a rule or regulation in part as:

> (2) Rule or regulation shall mean any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure.

[5] Although § 84-901 states that a rule may include a standard designed to interpret law, it provides a definition only of the term "rule" and does not create any affirmative duties for the PSC to engage in rulemaking when interpreting a federal statute. That the PSC is allowed to engage in rulemaking when it considers it to be necessary and that a rule is allowed to encompass interpretation of law does not impose any affirmative rulemaking requirement. Here, the PSC did not consider it necessary to engage in rulemaking to interpret the meaning of the term "public interest." The PSC was not required to engage in rulemaking to reach that determination. The appellants' assignment of error is without merit.

Due Process

The appellants next contend that they were denied due process because the PSC announced a rule regarding public interest without first notifying them regarding what that rule was.

[6,7] The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case. See *Prime Realty Dev. v. City of Omaha*, 258 Neb. 72, 602 N.W.2d 13 (1999).

The Washington Court of Appeals recently held that ETC status is not a protected interest that entitles incumbent telephone companies to procedural due process under federal law. *WITA v. WUTC*, 110 Wash. App. 498, 41 P.3d 1212 (2002). The Washington Court of Appeals noted that the language of 47 U.S.C. § 214 does not protect incumbent telephone carriers from competition. Rather, the customers' interests, instead of the competitors' interests, control an agency's decision under the act. Thus, the court reasoned, an incumbent carrier did not have a constitutionally protected interest in the designation of another carrier as an ETC.

We agree with the reasoning of the Washington Court of Appeals. Section 214(e)(2) gives a state commission discretion to designate more than one ETC in a rural service area. *Id*. The Telecommunications Act does not mention protecting the private interests of incumbent rural carriers, who are often exclusive ETC's simply by default as the sole service provider operating in a particular area. *Id*.

[8] Because exclusive ETC status is not a protected interest entitling incumbent rural carriers to procedural due process under federal law, the appellants' due process claim is without merit. We need not reach the second step in the analysis. See *id*.

Application of Public Interest Test

The appellants contend that the PSC applied the wrong factors to determine the definition of public interest. The appellants contend that the PSC should have considered the effect of a second

ETC on incumbent telephone carriers and whether the service area could support more than one ETC.

[9,10] It has been stated that "[c]ourts must give substantial deference to a regulatory agency's judgment about how best to serve the public interest." *WITA*, 110 Wash. App. at 516, 41 P.3d at 1221, citing *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 101 S. Ct. 1266, 67 L. Ed. 2d 521 (1981). The U.S. Supreme Court has consistently stated that the words "public interest" in a federal regulatory statute take meaning from the purposes of the regulatory legislation. *NAACP v. FPC*, 425 U.S. 662, 96 S. Ct. 1806, 48 L. Ed. 2d 284 (1976).

The policy of Congress in creating a public interest requirement was to favor competition. See, e.g., *Alenco Communications, Inc v. F.C.C.*, 201 F.3d 608 (5th Cir. 2000); *WITA, supra*. Indeed, as one court has noted, the preamble to the Telecommunications Act states that it is " '[a]n act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.' " *In re GCC License Corp.*, 623 N.W.2d 474, 480 (S.D. 2001), quoting Pub. Law 104-104, 110 Stat. 56 (1996).

When considering whether it was in the public interest to designate Western Wireless as an ETC in Wyoming, the FCC, acting in the absence of a state commission, noted that an important goal of 47 U.S.C. § 214 is to open local telecommunications markets to competition. *In the Matter of Federal-State Joint Board on Universal Service*, 16 F.C.C.R. 48 (2000). The FCC stated that competition benefits consumers in rural and high cost areas by increasing customer choice, innovative services, and new technologies. The FCC rejected the argument that rural areas are not capable of sustaining competition for universal service support. In particular, the FCC stated:

> We do not believe that it is self-evident that rural telephone companies cannot survive competition from wireless providers. Specifically, we find no merit to the contention that designation of an additional ETC in areas served by rural telephone companies will necessarily create incentives to reduce investment in infrastructure, raise

> rates, or reduce service quality to consumers in rural areas. To the contrary, we believe that competition may provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers.

16 F.C.C.R. at 57. The FCC, however, did not rule out considering evidence that a particular area could not sustain two ETC's.

The FCC also allowed additional factors to be taken into consideration such as whether consumers would be harmed, whether they would be adequately served should the incumbent telephone company relinquish its ETC designation, and additional benefits to consumers. *Id*. The FCC designated Western Wireless as an ETC in Wyoming, noting that it had demonstrated a commitment and ability to provide services that minimized the risk that it might not satisfy its obligations as an ETC after designation. In reaching this determination, the FCC considered that Western Wireless already provided services in 17 states and that it was not convinced that incumbent carriers would relinquish their ETC status or withdraw service if Western Wireless was designated as an ETC. The FCC further noted that as an ETC, Western Wireless would have a statutory duty to offer service to every customer within the service area. The FCC also noted additional benefits to consumers through designating Western Wireless as an ETC, such as providing a larger local calling area. *Id.*

Here, the PSC defined "public interest" in a manner that is consistent with the Telecommunications Act and considered the purpose of the act of furthering competition. The PSC also considered whether the service area was large enough to prevent harm to consumers by " 'cherry picking' " and whether Western Wireless would make additional benefits available to consumers such as mobility and an expanded local calling area. Thus, the PSC applied a definition of "public interest" that mirrors the definition applied by the FCC. In its order, and particularly in its order denying the motion for reconsideration, the PSC made clear that it considered and rejected the argument of the appellants that the rural areas in question could not support more than one ETC. Accordingly, we find no error in the PSC's definition of "public interest."

Burden of Proof

The appellants argue that Western Wireless failed to meet its burden of proof because it showed that it was willing to provide only required services and did not present specific evidence to show that it could do so if it became a carrier of last resort.

[11,12] This court reviews a decision of the PSC for errors appearing on the record. *Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist.*, 256 Neb. 479, 590 N.W.2d 840 (1999). Determinations by the PSC are matters peculiarly within its expertise and involve a breadth of judgment and policy determination that should not be disturbed by an appellate court in the absence of a showing that the action of the commission was arbitrary or unreasonable. See *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

Section 214(e) requires a carrier seeking ETC status to demonstrate that it will "offer" services required under 47 U.S.C. 254(c) (Supp. V 1999). It has been held in another case involving Western Wireless that 47 U.S.C. § 214(e) requires applicants for ETC designation to show only that they are capable of offering or providing the required services. See *In re GCC License Corp.*, 623 N.W.2d 474 (S.D. 2001). The South Dakota Supreme Court stated that under 47 U.S.C. § 214(e), a carrier designated as an ETC is eligible to receive universal service support, but ETC status does not make federal funding automatic. Thus, if a carrier wishes to receive subsidies, it must follow through on its intentions. *Id.*

Here, Western Wireless presented evidence that it was willing and able to provide all the services required by federal law. Although the appellants presented evidence to the contrary, the PSC was convinced that Western Wireless could offer the required services and that its ETC designation would be in the public interest. We determine that there was no error in the PSC's determination of this issue. Accordingly, we determine that this assignment of error is without merit.

Alteration of Service Areas

The appellants contend that the PSC unlawfully altered their service areas. The PSC was not asked to order, and did not order, a change in the appellants' service areas. Instead, the PSC

designated Western Wireless as an ETC in each of the appellants' study areas. We have reviewed this assignment of error and find it to be without merit.

AUTOMATIC STAY

The appellants contend that the PSC violated the stay provision in § 75-134(3). They argue that under § 75-134, the order of the PSC was held in abeyance while the appeal was pending.

[13] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 628 N.W.2d 677 (2001).

This court has previously denied a motion for emergency relief filed by the appellants regarding this issue, and we now affirm the decision of the PSC. We determine that the issue is moot, and we do not address it.

CONCLUSION

We determine that the PSC was not required to engage in rulemaking to define the words "public interest" in 47 U.S.C. § 214(e). We also determine that the appellants were not denied due process when the PSC adopted and applied a definition of "public interest." We determine that the PSC did not err in the manner in which it defined "public interest" and in determining that Western Wireless met its burden of proof to show that it should be designated as an ETC. Finally, we determine that the PSC did not alter the appellants' service areas and that any issue regarding a stay is moot. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WYMAN R. MATHER, APPELLANT.

646 N.W.2d 605

Filed June 28, 2002. No. S-01-738.

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. **Rules of Evidence: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
4. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
5. **Criminal Law: Statutes.** Whether a particular course of conduct involves one or more distinct offenses under a statute depends on how a legislature has defined the allowable unit of prosecution.
6. **Criminal Law: Photographs: Minors.** A person who generates differing and multiple prohibited visual depictions or causes a child to engage in the creation of such visual depictions commits multiple offenses of Neb. Rev. Stat. § 28-1463.03(1) or (3) (Reissue 1995), even though each such differing visual depiction involves the same subject captured in a narrow timeframe.
7. **Trial: Evidence: Proof.** Proof that an exhibit remained in the custody of law enforcement officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence.
8. **Trial: Evidence.** Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis.
9. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Julie E. Bear, Deputy Cass County Public Defender, of Reinsch & Slattery, P.C., for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

On April 5, 2001, Wyman R. Mather was convicted by a jury in the district court for Cass County of 18 counts of visual depiction of sexually explicit conduct which has a child as one of its participants in violation of Neb. Rev. Stat. § 28-1463.03 (Reissue 1995) of the Child Pornography Prevention Act. Mather was sentenced on each of the 18 counts to imprisonment for a term of 3 to 5 years, and the district court ordered that the sentences run concurrently. Mather appeals his convictions and sentences.

On appeal, Mather claims that, if guilty, his conduct amounted to one continuing offense rather than 18 separate counts, that certain evidence was erroneously admitted, and that his sentences are excessive. We conclude that based on the statutory language, and because each of the 18 differing photographs represented a separate violation under either § 28-1463.03(1) or (3), Mather's convictions on 18 counts were not error; that the district court did not err in its evidentiary ruling; and that the sentences are not excessive. Accordingly, we affirm.

STATEMENT OF FACTS

Mather is a photographer who had a studio in his home in Weeping Water, Nebraska. In September or October 1999, T.P. made an appointment to get her high school senior photographs taken by Mather. At the time, T.P., who was born May 25, 1982, was 17 years old. T.P. arrived at the studio in the afternoon, and shortly after her arrival she and Mather left the studio to take photographs outdoors. Photographs were taken at various locations within Weeping Water, including at a ballpark, near a church, and by a lake.

At some point, Mather told T.P. that he had taken nude photographs of women for their husbands and that he thought nude photography was beautiful. Mather asked T.P. whether she wanted to take some nude photographs, and T.P. said, "Okay." While they were near the lake, Mather took two photographs of T.P. in which she had unzipped her jeans. Mather then drove T.P. to an area approximately 5 miles west of Weeping Water,

described by T.P. as "a place out in the country with a barn and little creek." T.P. testified the location was within Cass County. At this location, Mather took 16 additional photographs of T.P. in which she was completely or near completely nude and in which her breasts and/or her genitals were displayed. Throughout the session, Mather told T.P. she was beautiful and directed her on how to pose, including placing his hands on her breasts and her genital area in order to demonstrate how she should place her hands for the photographs. Each of the 18 photographs depicts a different pose.

Mather and T.P. then returned to Mather's studio where he took senior photographs of T.P. wearing her prom dress. When he had completed taking the senior photographs, Mather told T.P. they would be ready in 2 to 3 weeks. T.P. returned to Mather's studio when the photographs were ready and picked up the senior photographs. Mather showed T.P. the nude photographs; however, he told her she could not have the nude photographs until she turned 18.

T.P. returned to the studio in June 2000, after she had turned 18, and attempted to get the nude photographs, but Mather claimed he would need time to locate the photographs. Officers in the Cass County sheriff's office subsequently obtained a search warrant for Mather's house and studio where they found, inter alia, the 18 photographs that are the subject of the charges in this case.

On July 25, 2000, the State filed an 18-count information in the district court charging that Mather did

> knowingly make, publish, direct, create, provide, or in any other manner generate visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers or did knowingly employ, force, authorize, induce, or otherwise cause a child to engage in any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

The language in the information tracked § 28-1463.03(1) and (3). Each count specified 1 of the 18 photographs.

Following a trial held April 3 through 5, 2001, a jury found Mather guilty of all 18 counts. On June 5, the district court sentenced Mather to imprisonment for 3 to 5 years on each of the

18 counts and ordered that the sentences be served concurrently. Mather appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Mather asserts the district court erred in (1) determining that the State properly charged him with 18 separate counts rather than 1 count when the alleged facts involved one continuous act resulting in multiple photographs featuring the same subject and taken at the same time and location, (2) admitting the photographs into evidence without proper foundation as to the chain of custody and the location where the photographs were taken, and (3) imposing excessive sentences.

STANDARDS 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. Rhea*, 262 Neb. 886, 636 N.W.2d 364 (2001).

[2] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. 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. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001).

[3] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001).

ANALYSIS

Multiple Counts.

Mather was charged under § 28-1463.03(1) and (3). Subsection (1) provides, "It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers." Subsection

(3) provides, "It shall be unlawful for a person to knowingly employ, force, authorize, induce, or otherwise cause a child to engage in any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers." For purposes of the Child Pornography Prevention Act, a "visual depiction" is defined as a "live performance or photographic representation." Neb. Rev. Stat. § 28-1463.02(6) (Reissue 1995).

Mather asserts generally that the conduct complained of, if established by the evidence, amounted to one count. He specifically argues that the conduct complained of was a continuing offense and that the district court erred in determining that the State properly charged him with 18 separate counts of visual depiction of sexually explicit conduct which has a child as one of its participants under § 28-1463.03(1) and (3). Mather argues that the facts of this case support only one count because, although the State based its charges on 18 separate and different photographs, all 18 photographs were taken of the same subject on the same day as part of one ongoing or continuous act. Mather also argues that being charged with and sentenced on 18 separate counts violated the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions which preclude multiple punishments for the same offense imposed in a single proceeding. See *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

[4] The Double Jeopardy Clauses of both the federal Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Id.*; *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). Although in his brief Mather couches his argument in terms of multiple "counts," we understand his claim to be based on the prohibition against multiple punishments for one offense.

[5] The issue raised by Mather with respect to whether or not he has received multiple punishments for the same offense is resolved by reference to the statutory language of § 28-1463.03(1) and (3). It is well settled that whether a particular course of conduct involves one or more distinct offenses under a statute depends on how a legislature has

defined the allowable unit of prosecution. See, *Sanabria v. United States*, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978); *Bell v. United States*, 349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 2d 905 (1955). Thus, whether Mather's conduct in creating the 18 different photographs involved 1 offense or 18 separate offenses depends on how the statute defines the offense and the " 'unit of prosecution' " intended by the Legislature as reflected in the plain language of the statute. See *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001) (in reading statute, court must determine and give effect to purpose and intent of Legislature as ascertained from entire language of statute considered in its plain, ordinary, and popular sense).

With respect to the prohibited conduct, a person commits an offense under § 28-1463.03(1) by making, publishing, directing, creating, providing, or generating "any visual depiction" of the subject matter described, which depiction under § 28-1463.02(6) may be a "photographic representation." A person commits an offense under § 28-1463.03(3) by employing, forcing, authorizing, inducing, or causing a child to engage in the creation of any such "visual depiction."

[6] Distilled, the focus of subsection (1) is on generating "any visual depiction," and the focus of subsection (3) is on causing a child to engage in the creation of "any visual depiction." The plain language of the statute focuses on "*any* visual depiction." Under § 28-1463.02(6) a "photographic representation" is such a depiction. The singular form of "photographic representation" covered under the statute read in conjunction with the term "any" indicates that the Legislature intended prosecution for each differing photographic representation. The statute is not ambiguous with respect to the prosecution of a photograph as a "photographic representation." Under either § 28-1463.03(1) or (3), an offense is committed as to each differing visual depiction of the type described in the statute. A person who generates differing and multiple prohibited visual depictions or causes a child to engage in the creation of such visual depictions commits multiple offenses of § 28-1463.03(1) or (3), even though each such differing visual depiction involves the same subject captured in a narrow timeframe. Our reading of § 28-1463.03(1) and (3) is in accord with other jurisdictions with similar statutory language.

See, *U.S. v. Esch*, 832 F.2d 531, 541 (10th Cir. 1987) (under federal statute prohibiting use of minor for purpose of producing " '*any visual depiction*' " of sexually explicit conduct, correct unit of prosecution held to be per photograph; each photograph represented separate and distinct use of child); *Burk v. State*, 705 So. 2d 1003 (Fla. App. 1998) (legislative intent was to make production of each individual photograph separate crime; direction of poses and taking of each photograph sufficient to support separate violations for each photograph); *Vineyard v. State*, 958 S.W.2d 834, 837 (Tex. Crim. App. 1998) (use of singular tense in statute meant unit of prosecution for possession was per " 'film image' "); *State v. Morrison*, 31 P.3d 547, 556 (Utah 2001) (each individual " 'visual representation' " of child pornography possessed constitutes basis for separate offense); *State v. Multaler*, 252 Wis. 2d 54, 81, 643 N.W.2d 437, 450 (2002) (where statute referred to possession of " 'any . . . photograph,' " unit of prosecution was each of 28 images found on two computer disks). Compare *State v. Root*, 141 Wash. 2d 701, 710, 9 P.3d 214, 218 (2000) (where focus of Washington statute was on causing minor to engage in sexually explicit conduct rather than on resultant depictions, unit of prosecution for sexual exploitation of minor was "per photo session" per minor involved in each session).

We are mindful that the dissent concludes that the use of the word "any" in § 28-1463.03 makes the statute ambiguous. In reaching this conclusion, the dissent relies, in part, on two cases involving federal statutes, *United States v. Kinsley*, 518 F.2d 665 (8th Cir. 1975), and *U.S. v. Coiro*, 922 F.2d 1008 (2d Cir. 1991). The former involved "any" in the context of a federal statute dealing with the crime of felon in possession of a firearm and the latter involved "any" in the context of a federal statute dealing with obstruction of communication regarding crime. The dissent also relies on *U.S. v. Kimbrough*, 69 F.3d 723, 729-30 n.6 (5th Cir. 1995), which involved a federal possession statute with an explicit quantitative provision making it a single crime to " 'possess 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction' " of child pornography; *State v. Parella*, 736 So. 2d 94 (Fla. App. 1999), which involved the crime of the possession of movies

with the objective of intending to promote child pornography; and *American Film Distributors, Inc. v. State*, 471 N.E.2d 3 (Ind. App. 1984), which involved the crime of the exhibition of movies containing child pornography where complainant paid one fee to view the movies.

We believe the federal child pornography statute at issue in *U.S. v. Esch*, 832 F.2d at 541, which "proscribes the use of a minor to engage in 'any sexually explicit conduct for the purpose of producing *any visual depiction* of such conduct.' (emphasis added)," is a more compelling comparison to the statute and facts at issue in this case. The Court of Appeals for the 10th Circuit concluded that the words "any visual depiction" contained in the federal child pornography statute, see 18 U.S.C. 2251(a) (2000), required that each photograph be charged as a separate and distinct violation. The language of the federal child pornography statute is similar to that of § 28-1463.03.

In a similar analysis, the Wisconsin Supreme Court in *State v. Multaler*, 252 Wis. 2d 54, 643 N.W.2d 437 (2002), concluded that "any" in the Wisconsin child pornography statute, Wis. Stat. Ann. § 948.12 (West 1996), required a separate charge per photograph. The *Multaler* court reasoned that the term "any" indicated that the legislature intended prosecution for each photograph. In *Multaler*, the Wisconsin Supreme Court rejected the defendant's assertion that the unit of prosecution in that case was each of two computer disks and stated that notwithstanding the fact that the 28 images to which the defendant entered pleas to 28 counts of possession of child pornography were found on two computer disks, a separate charge per image was nevertheless indicated. The *Multaler* court stated: "In essence, because it appears that the images on the disks were photographs of actual children, the disks served as electronic photo albums [and it is] appropriate to bring separate charges for separate photographs in a traditional photo album." 252 Wis. 2d at 84, 643 N.W.2d at 451. In *Multaler*, the court found that every time the defendant downloaded a new image, he recommitted himself to additional criminal conduct. In the present case, every time Mather directed and caused T.P. to assume a new pose and took a differing photograph, he recommitted himself to additional criminal conduct.

We are aware of the Washington Supreme Court's decision in *State v. Root*, 141 Wash. 2d 701, 9 P.3d 214 (2000), cited favorably by the dissent. We note, however, that the statute at issue in *Root* differs from the Nebraska provisions. The statute involved in *Root* stated as follows:

> "(1) A person is guilty of sexual exploitation of a minor if the person:
>
> "(a) Compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;
>
> "(b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; or
>
> "(c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance."

141 Wash. 2d at 706-07, 9 P.3d at 216-17. The Washington Supreme Court concluded that the Washington statute essentially consisted of two elements: (1) posing a minor in sexually explicit conduct and (2) knowing that the conduct will be photographed. Based on the particular language of the statute, the Washington Supreme Court concluded that the unit of prosecution under the Washington statute was "per photo session." *Id.* at 710, 9 P.3d at 218. While such conclusion is supported by the language of the Washington statute, the language of the Nebraska statute differs and does not support a "per session" unit of prosecution.

Finally, the dissent posits that under our interpretation of § 28-1463.03, if a child is the subject of a motion picture, each frame of the film could conceivably be charged as a separate count. We note that the present case involves 18 works of still photography, each of which is clearly encompassed by "photographic representation," see § 28-1463.02(6), and that the issue of a motion picture is not before us. In this regard, we note that unlike Nebraska, other states address the motion picture issue in statutory language. For example, in Wisconsin, § 948.12 provides: "Whoever possesses any undeveloped film, photographic

negative, photograph, motion picture, videotape or other pictorial reproduction or audio recording of a child engaged in sexually explicit conduct under all of the following circumstances is guilty of a Class E felony . . . .” Because it is not the subject of this prosecution, we make no comment on the “motion picture” hypothetical.

In the present case, Mather was charged with making 18 photographs and causing a child to engage in 18 differing visual depictions of sexually explicit conduct, each of which was the type of “visual depiction” or “photographic representation” described in and prohibited by the statutes under discussion. Under the language of § 28-1463.03(1) and (3) and the facts of this case, each photograph represented a separate offense, and Mather was properly charged with 18 separate offenses. Because each photographic work represented a separate offense, Mather was not subjected to multiple punishments for “the same offense” and there was no violation of double jeopardy principles. We reject Mather’s first assignment of error.

Admission of Photographs Into Evidence.

Mather next argues that the district court erred in admitting exhibits 1 through 18 and 31 into evidence. Exhibits 1 through 18 are prints of the 18 photographs at issue in this case, and exhibit 31 is a packet found in the search of Mather’s home and studio containing prints and negatives of the 18 photographs at issue in this case as well as other photographs. At trial, Mather generally objected to the foundation for each of these exhibits.

On appeal, Mather asserts that his objections regarding foundation related to “the chain of custody as well as the issue of venue.” Brief for appellant at 12. With respect to the chain of custody, Mather argues on appeal that “there was a complete lack of evidence regarding the chain of custody for said photographs, as well as the Officer’s failure to decipher whether exhibits 1 through 18 were original photographs or copies.” *Id.* With respect to his argument regarding the venue of the crimes charged, Mather argues on appeal that T.P.’s testimony did not establish the exact location where the photographs shot outside Weeping Water were taken.

The testimony regarding exhibits 1 through 18 and 31 was as follows: Randall Olsen testified that as an investigator for the

Cass County sheriff's office he conducted the search of Mather's residence and studio. During the search, another officer found the packet of prints and negatives, which would become exhibit 31, and gave them to Olsen, who looked at them and gave them to the evidence officer. Olsen testified that the evidence officer tagged the exhibit and checked it into the evidence room at the sheriff's office.

Olsen testified that he later checked the negatives and prints out of the evidence room and took them to a film processing shop to have additional prints made for the county attorney. Olsen handed the negatives to the operator at the film processing shop and had her sign the evidence log. While in Olsen's view, the operator placed the negatives into a processing machine which produced additional prints. The operator returned the negatives to Olsen and gave him the additional prints. Olsen returned the negatives to the packet and returned the packet containing the prints and negatives to the evidence room. Olsen gave the additional prints which became exhibits 1 through 18 to the county attorney's office.

Exhibits 1 through 18 and 31 were offered into evidence during T.P.'s testimony. T.P. was shown exhibits 1 through 18 and testified that each photograph depicted her and that each print fairly and accurately represented her poses in photographs that were taken by Mather in September or October 1999. T.P. was also shown exhibit 31 and identified it as containing photographs corresponding to exhibits 1 through 18 as well as other photographs taken by Mather on the same day. T.P. described the area where the photographs were taken as being in Weeping Water and another location about 5 miles to the west of Weeping Water and inside Cass County.

As to exhibits 1 through 18, it was not asserted by the State that such photographs were found in Mather's studio, but, rather, the import of Olsen's testimony was that such exhibits were the additional prints made at the film processing shop from the negatives found at Mather's studio. T.P. testified that each of the photographs, exhibits 1 through 18, fairly and accurately represented poses directed by Mather and photographs of her taken by Mather. Such testimony was sufficient for the introduction of exhibits 1 through 18 into evidence, which exhibits contained proof of the conduct charged against Mather.

[7-9] With respect to the chain of custody regarding the packet identified as exhibit 31, we have stated that proof that an exhibit remained in the custody of law enforcement officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence. See *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998). Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis. *Id.* A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *State v. Green*, 238 Neb. 492, 471 N.W.2d 413 (1991).

There was testimony by Olsen that exhibit 31 remained in the custody of law enforcement officials, which was sufficient evidence to prove a chain of possession and provided a sufficient foundation to permit its introduction into evidence. The district court in this case did not abuse its discretion in admitting exhibit 31.

On appeal, Mather mentions "the issue of venue." Brief for appellant at 12. Mather's appellate argument appears to be that the State failed to prove that the charged conduct took place in Cass County where the case was tried. In this regard, we note that the right to be tried in the county where the offense is committed is a statutory right. Neb. Rev. Stat. § 29-1301 (Reissue 1995). Mather did not object at trial to a trial in a county other than where the offense was committed. He therefore acquiesced to holding the proceedings in Cass County and waived his rights under § 29-1301. See *State v. Meers*, 257 Neb. 398, 598 N.W.2d 435 (1999). We reject Mather's second assignment of error.

Excessive Sentences.

Mather finally argues that the district court imposed excessive sentences. He argues that he "was self employed as a photographer for many years, had recently suffered the loss of his son, had no prior criminal history and had a large volume of character reference letters submitted in support of a probationary sentence [rather than incarceration] by members of the Weeping Water community." Brief for appellant at 14.

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). Mather was convicted of 18 counts of violating § 28-1463.03. The 18 counts were each charged as first offenses which, pursuant to Neb. Rev. Stat. § 28-1463.04 (Reissue 1995), are Class III felonies. The sentencing range for a Class III felony is a minimum 1 year's imprisonment and a maximum 20 years' imprisonment, a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000). Mather was sentenced to 3 to 5 years' imprisonment on each count to be served concurrently.

Mather was convicted of a serious crime. The statute under which Mather was convicted is aimed at combating child pornography. The U.S. Supreme Court has observed: "The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. . . . [T]he materials produced are a permanent record of the children's participation . . . ." *New York v. Ferber*, 458 U.S. 747, 758-59, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

The record and presentence report show that at the time of sentencing, Mather was 53 years old and that at the time the photographs of T.P. were taken, she was 17 years old. When T.P. picked up her senior photographs, Mather encouraged T.P. to repeat a session of nude photography, but she refused. The presentence report includes the observation that the victim continues to endure the negative effects of the event giving rise to this prosecution. Mather's sentences were within statutory limits, and we find no abuse of discretion in the district court's sentencing. We therefore reject Mather's third assignment of error.

CONCLUSION

T.P., aged 17, was depicted sexually in 18 differing photographs taken and generated by Mather. Mather was charged, tried, and convicted by a jury of 18 counts of visual depiction of sexually explicit conduct which has a child as one of its participants in violation of § 28-1463.03. Mather was sentenced to 18 concurrent sentences of 3 to 5 years' imprisonment.

In view of the 18 differing photographs and the statutory language, we conclude that the proper unit of prosecution under

§ 28-1463.03(1) and (3) was each photograph and that the district court therefore did not err in determining that the State properly charged Mather with 18 separate counts rather than 1 count as urged by Mather. We further conclude that the district court did not err in admitting exhibits 1 through 18 and 31 into evidence and did not abuse its discretion in sentencing Mather. We therefore affirm Mather's convictions and sentences.

AFFIRMED.

WRIGHT, J., dissenting.

The State filed an information charging Mather with 18 counts of knowingly making a visual depiction of sexually explicit conduct based on 18 separate photographs. Mather was convicted on all 18 counts and was sentenced to a term of 3 to 5 years' imprisonment on each count, with the sentences to run concurrently. I respectfully disagree with the majority's statutory interpretation of how many criminal acts were committed.

Neb. Rev. Stat. § 28-1463.03 (Reissue 1995) provides in relevant part: "(1) It shall be unlawful for a person to knowingly make . . . create . . . or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers." The term "visual depiction" shall mean "live performance or photographic representation." See Neb. Rev. Stat. § 28-1463.02(6) (Reissue 1995).

The question of how many convictions can lawfully be obtained under circumstances such as those in the case at bar is a question of the appropriate unit of prosecution, and that is a question of legislative intent. See *Castaldi v. United States*, 783 F.2d 119 (8th Cir. 1986), *cert. denied* 476 U.S. 1172, 106 S. Ct. 2897, 90 L. Ed. 2d 983. With respect to federal law, when Congress fails to set the unit of prosecution with clarity, doubt as to congressional intent is resolved in favor of lenity for the accused. See *United States v. Kinsley*, 518 F.2d 665 (8th Cir. 1975).

In *Kinsley*, the court confronted the issue of whether a felon's possession of four firearms constituted one or four violations of 18 U.S.C. app. § 1202(a) (1970), which prohibited a convicted felon's possession of " 'any firearm.' " See 518 F.2d at 666. The court noted that in many cases in which courts have found ambiguity in connection with the allowable unit of prosecution, the object of the offense has been prefaced by the word "any." The

court concluded that the phrase "any firearm" in 18 U.S.C. app. § 1202(a) was ambiguous. In contrast, the court noted that because I.R.C. § 5861(d) (1970) is drawn in terms of " 'a firearm,' " the provision arguably suffers from no ambiguity. See *Kinsley*, 518 F.2d at 670 n.9.

In *U.S. v. Coiro*, 922 F.2d 1008 (2d Cir. 1991), the court held that 18 U.S.C. § 1510(a) (1982), which prevents the obstruction, delay, or prevention of the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator, was ambiguous with respect to the allowable unit of prosecution. The court found that use of the word "any" in the phrase "any person" made the phrase ambiguous. It stated that in cases in that and other circuits, the word "any" has typically been found ambiguous in connection with the allowable unit of prosecution, for it contemplates the plural rather than specifying the singular, relying on *United States v. Kinsley, supra*.

Courts have also noted the difference between the use of the terms "a" and "any" in cases involving pornography. See, *U.S. v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995); *State v. Parrella*, 736 So. 2d 94 (Fla. App. 1999); *American Film Distributors, Inc. v. State*, 471 N.E.2d 3 (Ind. App. 1984). These cases conclude that when the statute uses "any" instead of "a," the intent of the legislature is not clear, and the cases must be resolved against turning a single transaction into multiple offenses.

For example, the majority relies in part on *Burk v. State*, 705 So. 2d 1003 (Fla. App. 1998). In *Burk*, the statute criminalized the production of "a" sexual performance of a child. There, the court held that it was permissible to charge a defendant with 25 counts for 25 different photographs. But other Florida cases have held the opposite when the statute used the term "any" instead of the term "a."

In *Parrella*, the fourth district of the Florida Court of Appeals, the same district that decided *Burk*, held that the showing of multiple movies containing child pornography could not be charged as separate counts when the statute criminalized the possession of "any" motion picture. The court specifically stated that when the term "any" is used instead of the term "a," the legislature intended only a single unit of prosecution. See, also,

Wallace v. State, 724 So. 2d 1176 (Fla. 1998) (discussing difference between terms in case involving resisting police officer).

The majority relies on *State v. Multaler*, 252 Wis. 2d 54, 643 N.W.2d 437 (2002), as an example in which multiple counts were permissible under a statute that utilizes the term "any." In *Multaler*, there were more than 28 separate image files. Multaler began downloading images over a period of time. The court determined that since there were more than 28 separate files, every time Multaler downloaded a new file, he recommitted himself to additional criminal conduct. The statute in question provided: " 'Whoever possesses any . . . photograph, motion picture, videotape . . . is guilty of a . . . felony.' " *Id.* at 81, 643 N.W.2d at 450. The court found that because Multaler had downloaded, compiled, and stored multiple images over time, multiple punishments were appropriate. Therefore, I find *Multaler* to be factually distinguishable. In addition, to the extent *Multaler* is read to hold that in all cases, separate counts may be imposed per photograph, I disagree with its reasoning.

In the case at bar, § 28-1463.03(1) refers to "any visual depiction of sexually explicit conduct." Mather took 18 photographs of T.P., and the majority has determined that each photograph constituted a separate offense and that Mather was properly charged with 18 counts.

In my opinion, § 28-1463.03 is ambiguous because of the phrase "any visual depiction." In this case, one could logically conclude that two separate events occurred because two photographs were taken when Mather and T.P. were near a lake and Mather then drove to an area 5 miles west of Weeping Water and took 16 more photographs of T.P. at a different location. Following this line of reasoning, two separate counts would be appropriate. See *State v. Root*, 141 Wash. 2d 701, 710, 9 P.3d 214, 218 (2000) (Supreme Court of Washington, en banc, held that correct unit of prosecution was "per photo session" involved).

Another problem with § 28-1463.03 is that equally culpable conduct may be charged differently. For example, a 10-minute live performance in which a child depicts sexually explicit conduct may be charged as one count. If the child is photographed using a standard 35-mm motion picture camera, which would produce the equivalent of 14,400 still frames,

each frame could be charged as a separate count. Unlike criminal statutes in other jurisdictions, which describe the terms "photograph," "motion picture," "photographic negative," or "videotape," § 28-1463.02(6) defines "visual depiction" as "live performance or photographic representation."

Separate criminal conduct may be charged in the same act if the Legislature expressly so provides, but if the Legislature does not expressly provide, or when it fails to set the unit of prosecution with clarity, any doubt as to the Legislature's intent is to be resolved in favor of the accused. I find nothing in § 28-1463.03 which suggests that the Legislature intended to impose multiple punishments depending on the number of photographs taken during a photography session in which a minor engages in sexually explicit conduct.

In my opinion, the statutory provision "in any manner generate any visual depiction of sexually explicit conduct" is ambiguous, and the ambiguity should be construed in favor of a criminal defendant. See § 28-1463.03. While Mather committed a serious act, for which a serious punishment should be imposed, I believe it would have been more appropriate to charge him with 2 counts rather than 18.

CONNOLLY and MCCORMACK, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
ROBERT FABER, APPELLANT.

647 N.W.2d 67

Filed June 28, 2002. No. S-01-893.

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 court below.
2. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: 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.
3. **Motions to Suppress: Judgments: Appeal and Error.** When reviewing a trial court's ruling on a motion to suppress evidence, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.

4. **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.
5. **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.
6. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
7. **Constitutional Law: Statutes.** 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. ____: ____. An attack on the overbreadth of a statute asserts that language in the statute impermissibly infringes on a constitutionally protected right.
9. ____: ____. A statute may be unconstitutionally overbroad only if its overbreadth is substantial, that is, when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable.
10. **Constitutional Law: Criminal Law: Minors.** Child abuse is not a constitutionally protected activity.
11. **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.
12. **Constitutional Law: Statutes: Legislature: Notice.** The more important aspect of the void-for-vagueness doctrine is not actual notice, but the requirement that a legislature establish minimal guidelines to govern law enforcement.
13. **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.
14. ____: ____: ____. A court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.
15. ____: ____: ____. The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.
16. **Search Warrants: Motions to Suppress: Judges: Affidavits.** Suppression is an appropriate remedy if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his or her judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.
17. **Search Warrants: Affidavits: Probable Cause: Words and Phrases.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.

18. **Search Warrants: Affidavits: Probable Cause.** In reviewing the strength of an affidavit as a basis for finding probable cause to issue a search warrant, we have adopted the "totality of the circumstances" rule established by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).
19. ____: ____: ____. In evaluating probable cause for the issuance of a search warrant, the magistrate who is evaluating the probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
20. ____: ____: ____. In evaluating probable cause for the issuance of a search warrant, the question is whether the issuing magistrate had a "substantial basis" for finding that the affidavit established probable cause.
21. **Constitutional Law: Search and Seizure: Search Warrants: Affidavits.** Not every defect in an affidavit renders a search warrant defective or the seizure made pursuant to the warrant unconstitutional.
22. **Constitutional Law: Search and Seizure: Search Warrants: Affidavits: Probable Cause.** Although it may be necessary to excise certain matter from an affidavit, if the remainder of the affidavit is sufficient to establish probable cause, the warrant issued upon such remaining information in the affidavit will be proper and the results of the search pursuant to the warrant are constitutionally obtained.
23. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity and establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.
24. ____: ____. The reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
25. **Search Warrants: Affidavits: Appeal and Error.** As a general rule, an appellate court is restricted to consideration of the information and circumstances found within the four corners of an affidavit used to obtain a search warrant.
26. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** After-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts.
27. **Search Warrants: Probable Cause: Proof: Time.** Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time.
28. **Search Warrants: Time.** In general, no more than a reasonable time may have elapsed between the occurrence of facts and the issuance of a search warrant based thereon.

29. **Affidavits: Probable Cause: Time.** Where the affidavit recites a mere isolated violation, it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature—a course of conduct—the passage of time becomes less significant.
30. **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.
31. **Criminal Law: 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.
32. **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.
33. **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.
34. **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.
35. ____. In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors.
36. ____. 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 Madison County: PATRICK G. ROGERS, Judge. Affirmed.

Bradley C. Easland, of Johnson, Morland & Easland, P.C., for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Robert Faber was charged by information in the district court for Madison County with knowing and intentional child abuse

pursuant to Neb. Rev. Stat. § 28-707(1) and (4) (Cum. Supp. 2000). After a bench trial, Faber was found guilty of said charge and received an indeterminate sentence of 24 to 28 months' imprisonment. On appeal, Faber challenges the constitutionality of § 28-707(1)(a) as applied to the facts of his case. This case also presents the issues of whether a search warrant was supported by probable cause, whether the evidence was sufficient to find Faber guilty of the charged offense, and whether the sentence he received was excessive.

II. BACKGROUND

Jimsonweed is a plant that grows in the eastern and midwestern regions of the United States. Each plant bears pods containing seeds, with each pod containing 50 to 100 seeds. Jimsonweed is an anticholinergic poison containing four active toxins: atropine, scopolamine, hyoscyamine, and nitrates. Although jimsonweed has some medical uses when used in small dosages, it can be toxic to humans and other animals.

When ingested, jimsonweed begins breaking down into its component toxins and begins to produce a number of harmful effects on the human body. Those portions of the central nervous system that regulate heart rate become severely impaired, resulting in a rapid increase in heart rate up to the point of cardiac arrest. Body temperature is also impaired, potentially causing hypothermia. Jimsonweed can also produce respiratory failure and can have significant effects on the digestive system. Specifically, jimsonweed slows down the processes in the digestive and urinary systems, resulting in a slow expulsion of the ingested jimsonweed from the individual and, thus, prolonged exposure to the toxins. Individuals who have ingested jimsonweed also experience an inability to focus their eyes because of dilation of the pupils and an inability to talk because of a lack of saliva in the mouth. Jimsonweed also produces a hallucinogenic effect in individuals. The confusion, poor judgment, and disorientation produced by jimsonweed can last for up to 2 weeks after ingestion.

At Faber's trial, the State presented the testimony of S.B., who was a minor at the time. S.B. testified that on an occasion prior to November 12, 2000, Faber approached her and asked if

she would help Faber find people to buy jimsonweed pods from him. Eventually, S.B. and a friend ingested some of the jimsonweed seeds, causing them to become ill. S.B. later informed Faber that the seeds had made her sick, and she told Faber that he should no longer sell them. Faber replied that S.B. should have ingested more seeds than she had actually consumed.

On November 12, 2000, 15-year-old J.W. went with two friends, C.B. and C.S., also minors, to S.B.'s apartment in Norfolk, Nebraska, for the purpose of obtaining jimsonweed pods. At the apartment, J.W., C.B., and C.S. met Faber, who offered to sell several pods to J.W. for $5. Because he did not have the proper change to complete the transaction, J.W. was initially unwilling to buy any pods. This prompted Faber to offer to leave and get change for J.W. Upon returning to the apartment with the change, Faber sold three pods to J.W. Faber also instructed J.W., C.B., and C.S. how to consume the jimsonweed. Faber said that the seeds should first be separated from the stem and leaves and then should be swallowed whole, along with something to drink. Faber did not instruct them about how many seeds should be consumed at one time. Because J.W. was then on probation for a juvenile offense and subject to drug tests, Faber also told J.W. that the jimsonweed would not produce a positive drug test. Faber told J.W. that the jimsonweed would produce a "really, really hard trip." The word "trip" is often used to refer to hallucinations and other effects produced by jimsonweed.

Approximately 45 minutes to 1 hour after leaving S.B.'s apartment, J.W., C.B., and C.S. arrived at J.W.'s home. J.W. then ingested the seeds from one of the jimsonweed pods as previously instructed by Faber, while C.B. and C.S. also ingested seeds. J.W. passed out soon after taking the seeds. When he awoke, J.W. testified that his face was "beet red" and that he could not stand up because his legs were not functioning properly. He further testified that he could not talk, think, eat, or drink; that he "walked into things"; and that he "missed doorknobs and things." He also stated that he could not recognize his parents when he saw them. J.W. did not remember being taken to the hospital.

J.W.'s mother testified that when she returned home, she found "puke all over my kitchen, everywhere." She found J.W. lying on the couch and observed that he was "not coherent at

all." His pupils appeared to be "bigger than the color of his eyes," and he was very aggressive, leading her to remove any sharp objects from his control to prevent him from injuring himself. She testified that when she held J.W., his body temperature was very hot. J.W.'s parents had difficulty trying to take J.W. to the hospital because J.W. repeatedly would take his clothes off in an effort to cool down.

One of the doctors who treated J.W. at the hospital testified that upon admission to the hospital, J.W.'s heart rate was escalated, his pupils were dilated, and he was confused and "not really with the program." J.W. was diagnosed as suffering from an anticholinergic reaction. The doctors testified that, to a reasonable degree of medical certainty, J.W.'s physical safety was endangered as a result of his ingestion of the jimsonweed. J.W. remained in the hospital for 4 days.

While investigating another case in the area involving jimsonweed, Investigator David Bos of the Norfolk Police Division became aware of J.W.'s case. The investigation eventually led law enforcement to Faber, and on December 5, 2000, a search warrant was issued for Faber's apartment. At the apartment, police confiscated several items, including a plastic bag containing 84 jimsonweed pods.

On December 8, 2000, Faber was arrested pursuant to an arrest warrant and was transported to the Norfolk Police Division. At the police station, Faber was interrogated by Bos. Bos began the interrogation by identifying himself and reading Faber his *Miranda* rights. Faber signed a rights waiver form indicating that he understood his rights. Faber then requested the services of an attorney. Bos promptly terminated the interview and left the room to arrange for Faber's transport to jail. Bos returned to the interview room and informed Faber that he would be taken to jail. Faber then began indicating that he did not want a lawyer and was willing to talk to Bos. Bos replied he was not allowed to continue the interrogation because of Faber's request for a lawyer. After Faber made several more requests to talk to Bos, Bos again reviewed the rights waiver form with Faber. Faber indicated that he understood his rights and that he wanted to proceed without an attorney.

During the interrogation, Faber indicated that he was familiar with jimsonweed and had used it in the past, but had never sold it

to anyone. Faber did admit to giving it to friends in the past, but claimed he had stopped giving it away after one of his friends had gotten sick from using it. Faber described to Bos some of the hallucinogenic effects of jimsonweed, specifically comparing it to the effects produced by "acid." Faber also told Bos that he did not know J.W. However, Faber was able to recall an occasion at S.B.'s apartment where Faber gave, but did not sell, some jimsonweed to C.S. and two of C.S.'s friends, neither of whom Faber knew. Bos also confronted Faber with the fact that Faber's apartment had been searched 3 days earlier and that a bag containing jimsonweed had been discovered. Faber admitted that the bag was his.

An information was filed in district court charging Faber with knowing and intentional child abuse pursuant to § 28-707(1) and (4). On February 12, 2001, Faber filed a motion to quash the prosecution against him on the grounds that § 28-707(1) was unconstitutionally overbroad and vague, both on its face and as applied. On February 27, the district court overruled the motion to quash, citing *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990). At his February 28 arraignment, Faber pled not guilty.

On April 4, 2001, Faber filed a motion to suppress all evidence seized during the search of his apartment, alleging that (1) the affidavit in support of the search warrant failed to state sufficient probable cause to believe the evidence sought would be found at the location described in the warrant; (2) the affidavit contained information that was " 'stale' "; (3) statements were taken from Faber in violation of his *Miranda* rights and were involuntary, the products of inducements, threats, or promises, and should be suppressed according to *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964); (4) the affidavit in support of Faber's arrest warrant did not contain facts sufficient to establish probable cause for Faber's arrest on the charges of child abuse, and any evidence obtained from or following Faber's arrest, including any statements made by him, should be suppressed as fruit of the poisonous tree pursuant to *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The district court subsequently overruled Faber's motion. After a bench trial, Faber was found guilty of knowing and intentional child abuse under § 28-707(1)(a) and (4). He was sentenced to 24 to 28 months' imprisonment.

III. STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, this court is obligated to reach a conclusion independent of the decision reached by the court below. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001).

[2,3] 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. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (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.*

[4] 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. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002).

[5] An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences. *Id.*

IV. ASSIGNMENTS OF ERROR

Faber asserts that the district court erred in (1) overruling the motion to quash the information filed against him because § 28-707(1) and (4) are unconstitutionally overbroad and vague as applied to the facts of this case, (2) overruling the motion to suppress because the search warrant obtained by law enforcement was not supported by probable cause and because statements taken from Faber should have been suppressed as "fruit of the poisonous tree," (3) finding that there was sufficient evidence presented at trial to find Faber guilty of knowing and intentional child abuse, and (4) imposing an excessive sentence.

V. ANALYSIS

1. Constitutionality

Faber argues that the district court erred in overruling his motion to quash because § 28-707(1) and (4) are unconstitution-

ally overbroad and vague as applied to the facts of his case. Section 28-707 provides in relevant part:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> (a) Placed in a situation that endangers his or her life or physical or mental health;
>
> . . . .
>
> (4) Child abuse is a Class IIIA felony if the offense is committed knowingly and intentionally and does not result in serious bodily injury as defined in section 28-109.

[6] Although Faber now argues that § 28-707(4) is unconstitutional, his motion to quash in the district court challenged the constitutionality of only § 28-707(1). An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001). Therefore, we limit our review to the constitutionality of § 28-707(1).

(a) Overbreadth

[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. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002).

[8,9] An attack on the overbreadth of a statute asserts that language in the statute impermissibly infringes on a constitutionally protected right. *State v. Sommerfeld*, 251 Neb. 876, 560 N.W.2d 420 (1997). A statute may be unconstitutionally overbroad only if its overbreadth is substantial, that is, when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable. *State v. Sommerfeld, supra*; *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994).

Faber argues that § 28-707(1) reaches a substantial amount of constitutionally protected activity, citing a number of hypothetical situations which could constitute child abuse under § 28-707(1), but which he claims are generally without criminal fault or are constitutionally protected. However, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984).

In *State v. Sinica*, 220 Neb. 792, 372 N.W.2d 445 (1985), a defendant challenged § 28-707(1)(b) (Cum. Supp. 1984) on overbreadth grounds. After finding that the term "cruelly punished," as used in § 28-707(1)(b), was clearly defined, we concluded that the defendant's overbreadth challenge must fail.

[10] For the same reasons, Faber's overbreadth challenge fails. We have previously held that § 28-707(1)(a) has an easily and commonly understood meaning. *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990). Section 28-707(1)(a) reaches only that activity which causes or permits a minor child to be placed in a situation that exposes the minor child's life or health to danger or the peril of probable harm or loss. *Id.* We reiterate here our pronouncement in *Sinica*: "Child abuse is not a constitutionally protected activity." *State v. Sinica*, 220 Neb. at 798-99, 372 N.W.2d at 449. Thus, the statute does not reach a substantial amount of constitutionally protected activity and, therefore, the overbreadth challenge is without merit.

(b) Vagueness

[11,12] 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. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998). The more important aspect of the vagueness doctrine is not actual notice, but the requirement that a legislature establish minimal guidelines to govern law enforcement. *State v. Sommerfeld, supra*.

[13-15] 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. *State v. Irons*, 254 Neb. 18, 574 N.W.2d 144 (1998); *State v. Roucka, supra*; *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996); *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996); *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996). A court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court. *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000). The test for standing to assert a

vagueness challenge is the same whether the challenge asserted is facial or as applied. *Id.*

Faber argues that he has standing to challenge § 28-707(1) on vagueness grounds because his conduct is not clearly prohibited by the statute. Faber characterizes his conduct as providing jimsonweed to J.W. and argues that because jimsonweed is not a controlled substance, his conduct is not clearly prohibited by the statute. However, Faber was not charged with distributing a controlled substance, but with knowingly and intentionally causing or permitting a minor child to be placed in a situation in which the minor child's life or health is exposed to danger or the peril of probable harm or loss.

In *Crowdell*, we rejected a facial challenge to § 28-707(1)(a), finding that the word " 'endangers' means to expose a minor child's life or health to danger or the peril of probable harm or loss" and thus has an easily and commonly understood meaning. 234 Neb. at 474, 451 N.W.2d at 699. We conclude, therefore, that Faber's constitutional challenge for vagueness is without merit.

2. Motion to Suppress

In his second assignment of error, Faber argues that the district court erred in not suppressing the evidence gathered during the search of his apartment. Faber claims that the affidavit in support of the search warrant was not supported by probable cause. Faber further claims that the affidavit failed to establish the reliability of several informants mentioned in the affidavit and that the affidavit relies upon stale information.

[16] Suppression is an appropriate remedy if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his or her judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid. *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). If none of the

aforementioned circumstances exist, the evidence should not be suppressed. *Id.*

[17] A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *Id.*

[18-20] In reviewing the strength of an affidavit as a basis for finding probable cause to issue a search warrant, we have adopted the " 'totality of the circumstances' " rule established by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). *State v. Detweiler*, 249 Neb. 485, 489, 544 N.W.2d 83, 88 (1996). The magistrate who is evaluating the probable cause question must make a practical, commonsense decision. The magistrate must determine whether, given the totality of the circumstances set forth in the affidavit, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* The question is whether the issuing magistrate had a " 'substantial basis' " for finding that the affidavit established probable cause. *Id.*

[21,22] The affidavit in support of the search warrant for Faber's apartment was sworn to by Investigator Steven Mills of the Norfolk Police Division. The affidavit relies in part on information provided by a confidential informant and also on information provided by two other informants: Eric Lech and C.T. Faber argues that the affidavit fails to establish the reliability of the confidential informant and therefore, the information provided by the confidential informant may not be considered in determining whether probable cause existed. See *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999). We assume, without deciding, that Faber's assertion is correct. However, not every defect in an affidavit renders the warrant defective or the seizure made pursuant to the warrant unconstitutional. *Id.* Although it may be necessary to excise certain matter from an affidavit, if the remainder of the affidavit is sufficient to establish probable cause, the warrant issued upon such remaining information in the affidavit will be proper and the results of the search pursuant to the warrant are constitutionally obtained. *Id.* We conclude that even after excising the information provided

by the confidential informant, the remainder of the affidavit contains sufficient evidence to establish probable cause.

As grounds for the search warrant, Mills averred:

> 2. That affiant is aware that [A.M.], D.O.B. 10/24/1982, was missing since November 19, 2000 from Madison County, Nebraska, and her vehicle that she was last reported driving was found in a ditch located in Stanton County, Nebraska.
>
> 3. That affiant is awarethat [sic] on December 2, 2000, a landowner, who was pheasant hunting, observed an unresponsive body lying in a pasture located in Stanton County, Nebraska. The landowner immediately called authorities. The body was located approximately ½ mile from where the missing persons vehicle was located.
>
> 4. That affiant was advised by Investigator Keith Janata of the Stanton County Sheriff's [office] that on December 2, 2000, at approximately 5:50 p.m., Investigator Janata had contact with Eric Lech and [C.T.]. Investigator Janata furhter [sic] advised that Eric and [C.T.] are friends of [A.M.] and they advised that they were with her on the night of November 19, 2000 and dropped her off at her car located in King's Lanes parking lot at approximately 1:00 a.m. on November 20, 2000.
>
> 5. Affiant was advised by Investigator Janata that Eric and [C.T.] both stated in written statements that they were present with [A.M.] when [A.M.] received two pods of Jimson Weed from Robert Faber who lives at the Kensington [Apartments] in Room #538 on November 19, 2000.
>
> . . . .
>
> 7. Affiant was also advised by Investigator Janata Eric and [C.T.] advised him that another male subject, Jeremy Langenberg, was also present with [A.M.] inside Room #538 on November 19, 2000. Eric and [C.T.] stated that [A.M.] received the "Jimson Bud" from Robert Faber while inside Room #538 at the Kensington Apartments on November 19, 2000. Eric and [C.T.] also stated that Jeremy Langenbeg [sic] purchased "Jimson Bud" from Robert [Faber] while they were in Room #538.
>
> . . . .

> 10. Investigator Janata also advised that [C.T.] stated to him [that] at approximately 11:00 p.m[.], she observed [A.M.] consume a palm full of the "Jimson Bud" seeds that she had received earlier from Robert Faber. Inv. Janata advised that he had asked [C.T.] if she had seen [A.M.] use any other drugs that night and she said "not that she had seen".
>
> 11. Affiant was advised advised [sic] by Investigator Janata that on December 4, 2000, he attended an autopsy that was conducted on [A.M.] Investigator Janata was informed by Dr. Robert Bowen, who conducted the autopsy, that there was no trauma to the body and no visual cause of death. Dr. Bowen provided Investigator Janata with approximately 25 Jimson seeds that were recovered from the stomach of [A.M.] Dr. Bowen advised Investigator Janata that blood and urine tests will be conducted to help determine the cause of death and the levels of Jimson Seed in [A.M.]'s system.

[23-25] When a search warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity and establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). The reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *Id.* As a general rule, an appellate court is restricted to consideration of the information and circumstances found within the four corners of the affidavit. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

The district court found that Lech and C.T. were

> citizen informants, close friends of [A.M.], whose motivation, identity and relationship to the case are immediately

> apparent from the affidavit, and whose statements were given for the purpose motivated by good citizenship. In addition, their statements in the affidavit can be considered to be corroborated by the results of the autopsy conducted on December 4, 2000, on [A.M.], wherein 25 Jimson seeds were discovered in her stomach.

[26] After-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts. *State v. Ildefonso, supra*; *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996).

We do not determine if Lech and C.T. were citizen informants because the district court was not clearly erroneous in finding that their reliability was established by independent police investigation. The autopsy of A.M. indicated that she had ingested approximately 25 jimsonweed seeds prior to her death. This corroborates the information provided by Lech and C.T. They stated to police that they observed A.M. obtain two pods of jimsonweed from Faber at Faber's apartment and later, according to C.T., consume "a palm full" of the seeds that A.M. had received from Faber. Having established the reliability of Lech and C.T., we now consider Faber's argument that the information provided by Lech and C.T. was stale.

[27,28] Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time. *State v. Ortiz, supra*. In general, no more than a reasonable time may have elapsed between the occurrence of facts and the issuance of a search warrant based thereon. *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991). As the Eighth Circuit stated in *U.S. v. LaMorie*, 100 F.3d 547, 554 (8th Cir. 1996):

> "There is no bright-line test for determining when information is stale. Whether the averments in an affidavit are sufficiently timely to establish probable cause depends on the particular circumstances of the case, and the vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit. Time factors

> must be examined in the context of a specific case and the nature of the crime under investigation." . . . Where continuing criminal activity is suspected, the passage of time is less significant.

[29] Where the affidavit recites a mere isolated violation, it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature—a course of conduct—the passage of time becomes less significant. *United States v. Johnson*, 461 F.2d 285 (10th Cir. 1972). See, also, *United States v. Tucker*, 638 F.2d 1292 (5th Cir. 1981) (primary consideration in evaluating staleness issue is whether affidavit describes single transaction or continuing pattern of criminal conduct).

Lech and C.T. advised police that they were inside Faber's apartment on November 19, 2000, and that while they were there, they observed Faber provide jimsonweed to two individuals. The affidavit was sworn to by Mills on December 5, 2000—16 days after Lech's and C.T.'s observations. The search warrant for Faber's apartment was issued and executed on December 5.

In addition to those portions of the affidavit recited above, Mills also averred:

> 12. Affiant is aware that on December 4, 2000, Investigator Janata had contact with Dr. Richard Bell[,] M.D. of Faith Regional West Campus. Dr. Bell advised Investigator Janata that the hospital has seen several cases of subjects coming into the Emergency Room feeling extremely ill and advising they had consumed Jimson seeds. Dr. Bell advised that Jimson seeds has [sic] had the effect of causing persons to be under the influence, to wander disoriented, and, often times, to disrobe.

We conclude that under the facts of this case, the information provided by Lech and C.T. 16 days prior to the issuance of the search warrant was not stale. The affidavit provided evidence of recurring activity of jimsonweed use by individuals and the harmful effects it produced. When combined with the assertion that jimsonweed was located in Faber's apartment, we cannot say the district court was clearly erroneous in finding that there

was a fair probability of finding jimsonweed in Faber's apartment at the time the search warrant was issued.

3. Suppression of Faber's Statements

Faber also argues that the district court erred in failing to suppress the statements Faber made to law enforcement. Faber argues that his statements were made after being confronted with evidence obtained during the purported illegal search of Faber's apartment and thus should be suppressed as " 'fruit of the poisonous tree' " under *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

[30] Faber's argument is without merit for two reasons. First, the search of Faber's apartment was valid, as stated above, and thus any statements produced by evidence obtained during that search are not "fruit of the poisonous tree." Furthermore, this argument is not properly before this court. In his motion to suppress filed in district court, Faber asserted, inter alia, that his statements were the product of his allegedly invalid *arrest* warrant. Faber now asserts that the statements were the product of an allegedly invalid *search* warrant. The district court never considered whether Faber's statements were the product of an allegedly invalid search warrant. When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *In re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002).

4. Sufficiency of Evidence

[31,32] 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. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002). 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. *Id.*

Faber was convicted of knowing and intentional child abuse under § 28-707(1)(a) and (4). This statute prohibits a person from knowingly and intentionally causing or permitting a minor child to be placed in a situation that endangers his or her life or physical or mental health and which does not result in serious bodily injury. The evidence presented by the State at trial is recounted above. We believe that evidence satisfies the essential elements of the crime of knowing and intentional child abuse beyond a reasonable doubt. The evidence is thus sufficient to support Faber's conviction.

5. Excessive Sentence

Faber's final assignment of error is that the district court abused its discretion in imposing a term of imprisonment of 24 to 28 months.

[33] An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Leonor, supra*. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

[34,35] 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. *Id.* In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors. *Id.*

[36] 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. *Id.*

Faber was found guilty of knowing and intentional child abuse not resulting in serious bodily injury. This offense is a Class IIIA felony, for which the maximum penalty is 5 years'

imprisonment, a $10,000 fine, or both. There is no minimum penalty. Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2000). Thus, Faber's sentence was within the statutory limits.

At the sentencing hearing, the district court noted that Faber had received medical training in the past and that the evidence indicated Faber knew that jimsonweed was harmful. The court, based on its observation of Faber's demeanor and attitude and other facts surrounding his life, declined probation. The court determined that if placed on probation, Faber would likely engage in additional criminal activity and that probation would depreciate the seriousness of the offense. The district court did not abuse its discretion in sentencing Faber, and we therefore conclude that Faber's sentence was not excessive.

VI. CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

GERRARD, J., participating on briefs.

SERENNA D. RUSSELL, APPELLANT, V.
JOAN C. BRIDGENS, APPELLEE.

647 N.W.2d 56

Filed June 28, 2002. No. S-01-965.

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 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. **Foreign Judgments: Jurisdiction: States.** A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment.
4. **Constitutional Law: Foreign Judgments: States: Collateral Attack.** The Full Faith and Credit Clause of the U.S. Constitution prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state, but a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction over the parties or the subject matter.

5. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

Appeal from the District Court for Douglas County: JOSPEH S. TROIA, Judge. Reversed and remanded for further proceedings.

Susan Ann Koenig and Angela Dunne Tiritilli, of Law Office of Susan Ann Koenig, P.C., for appellant.

John F. Eker III for appellee.

Christine Biancheria, of Biancheria, Eriksen, Maliver & Angell, P.C., Leonore F. Carpenter, Frank Cervone, Susan Frietsche, and Tiffany L. Palmer, for amici curiae Support Center for Child Advocates et al.

Amy A. Miller for amici curiae American Civil Liberties Union Foundation of Nebraska et al.

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

STEPHAN, J.

Appellant, Serenna D. Russell, appeals from an order of the district court for Douglas County granting the summary judgment motion of appellee, Joan C. Bridgens, and a further order overruling Russell's motion for reconsideration. We conclude that the district court erred in granting the summary judgment motion, and reverse, and remand for further proceedings.

FACTS

Bridgens adopted a minor child in Pennsylvania in September 1996. In December 1997, both Bridgens and Russell adopted the same minor child in what is referred to in the record as a "coparent" adoption. Although a certified copy of the 1997 adoption decree is a part of the record, the petition requesting such adoption is not. The certified decree expressly states that "[a]ll requirements of the Acts of Assembly have been fulfilled and complied with."

Bridgens and Russell are unmarried and of the same sex. They lived together and raised the child until August 1999. At that time, Russell and the minor child, who both had been residing with Bridgens in Germany, returned to the United States while Bridgens remained in Germany. On November 21, 2000, Russell filed a petition to establish custody and support for the minor child in the district court for Douglas County, Nebraska. After answering and cross-petitioning for custody and support, Bridgens filed a motion for summary judgment on May 16, 2001. The motion alleged that the 1997 adoption was invalid under Pennsylvania law. On July 23, 2001, the district court granted Bridgens' motion for summary judgment. The court reasoned that Pennsylvania law required Bridgens to terminate her parental rights prior to the 1997 adoption and found that "[i]t appears to the Court this was not done and [Russell] has not offered evidence to the contrary." In a subsequent order denying Russell's motion for reconsideration, the district court clarified that because the Pennsylvania statutory requirements for adoption were not met, the Pennsylvania court lacked subject matter jurisdiction to grant the adoption and that therefore, the adoption was not entitled to full faith and credit under the U.S. Constitution. Russell timely appealed, and we moved the case to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Russell assigns that the district court erred in (1) failing to apply the Full Faith and Credit Clause of the U.S. Constitution, (2) failing to recognize that res judicata bars an attack on the Pennsylvania decree, (3) not admitting Russell's affidavit in evidence, (4) failing to consider and find equitable estoppel as a bar to Bridgens' motion for summary judgment, and (5) failing to address Russell's status as a parent under the in loco parentis doctrine and failing to consider the minor's best interests.

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*, 263 Neb. 534, 641 N.W.2d 62 (2002); *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002). 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, supra*.

ANALYSIS

[3,4] The dispositive issue in this appeal is whether the record demonstrates as a matter of law that the 1997 Pennsylvania adoption decree was not entitled to full faith and credit under the U.S. Constitution. A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment. *Susan H. v. Keith L.*, 259 Neb. 322, 609 N.W.2d 659 (2000). The Full Faith and Credit Clause of the U.S. Constitution prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state, but a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction over the parties or the subject matter. *Walksalong v. Mackey*, 250 Neb. 202, 549 N.W.2d 384 (1996). In the instant case, Bridgens seeks to collaterally attack the judgment on the basis that the Pennsylvania court lacked subject matter jurisdiction to grant the adoption.

Whether the Pennsylvania court had subject matter jurisdiction is dependent upon Pennsylvania law. See *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975) (holding only defenses that would be valid in rendering state can be relied upon by courts of another state). Bridgens' argument is based upon the contention that the Pennsylvania court lacked subject matter jurisdiction because Bridgens and Russell did not comply with the requirements of the Pennsylvania adoption statutes at the time of the 1997 decree. Specifically, Bridgens argues that the extrinsic evidence in the record establishes that she had not relinquished her parental rights prior to the 1997 "coparent" adoption and that the requisite parental consents were not included in the

adoption petition. In this regard, 23 Pa. Cons. Stat. Ann. § 2701(7) (West 2001) provides that a petition for adoption shall state that "all consents required by section 2711 (relating to consents necessary to adoption) are attached as exhibits or the basis upon which such consents are not required." Further, 23 Pa. Cons. Stat. Ann. § 2711(a)(3) (West 2001) requires consent from "[t]he parents or surviving parent of an adoptee who has not reached the age of 18 years." In particular, the consenting parent must state, in part, "I hereby voluntarily and unconditionally consent to the adoption of the [minor] child. I understand that by signing this consent I indicate my intent to permanently give up all rights to this child." § 2711(d)(1). See *In re Adoption of C.C.G.*, 762 A.2d 724 (Pa. Super. 2000). An exception to the unqualified consent requirement is found in 23 Pa. Cons. Stat. Ann. § 2903 (West 2001), which provides that "[w]henever a parent consents to the adoption of his child by his spouse, the parent-child relationship between him and his child shall remain whether or not he is one of the petitioners in the adoption proceeding." In addition, 23 Pa. Cons. Stat. Ann. § 2901 (West 2001) provides that "[u]nless the court for cause shown determines otherwise, no decree of adoption shall be entered unless . . . all other legal requirements have been met."

[5] A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Polinski v. Sky Harbor Air Serv.*, 263 Neb. 406, 640 N.W.2d 391 (2002). Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* As the party moving for summary judgment, it was Bridgens' burden to demonstrate that the Pennsylvania court lacked subject matter jurisdiction due to lack of compliance with the requirements of the adoption statutes. The record before us, however, contains only the 1997 Pennsylvania adoption decree which affirmatively alleges on its face that it was decreed in conformance with Pennsylvania law. There is no evidence in the record establishing that the necessary consents were not included with the petition for adoption or that Bridgens did not,

in fact, relinquish her parental rights prior to the 1997 "coparent" adoption. Contrary to the finding of the district court, based upon this evidence the burden did not shift to Russell to affirmatively demonstrate that the requirements of the adoption statutes were met prior to the 1997 decree. On the record before us, Bridgens failed to meet her burden entitling her to summary judgment, and the district court erred in granting the motion.

Because this error requires reversal and remand for further proceedings, we do not reach Russell's remaining assignments of error.

CONCLUSION

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings. For the benefit of the parties and the district court, we note that the legal issue of whether compliance with the statutory requirements of the Pennsylvania adoption act is an aspect of subject matter jurisdiction is an issue we view to be significantly dependent upon the Supreme Court of Pennsylvania's resolution of the pending appeals in *In re Adoption of R.B.F.*, 762 A.2d 739 (Pa. Super. 2000), and *In re Adoption of C.C.G.*, 762 A.2d 724 (Pa. Super. 2000).

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GERRARD, J., concurring.

I agree with the majority's disposition of this appeal insofar as the court concludes that Pennsylvania law controls the question whether the Pennsylvania adoption decree is valid and that on the record presented, the district court erred in entering summary judgment for Joan C. Bridgens. I would, however, reverse the judgment of the district court based on my view that the Pennsylvania adoption decree was entered by a court with subject matter jurisdiction and is entitled to full faith and credit in Nebraska. I write separately, not because of a petty disagreement with the rationale of the majority opinion or as a mere intellectual exercise, but because the record reflects that the minor child's best interests have needlessly remained unaddressed while these proceedings continue on. The minor child affected by these proceedings has not had court-ordered visitation with

Serenna D. Russell (a primary caregiver in his life) for several months, nor have the custody or visitation issues been addressed as they should have.

Significantly, for the reasons that follow, I would also conclude that even if the Pennsylvania Court of Common Pleas erred in concluding that it had subject matter jurisdiction, under Pennsylvania law, the Court of Common Pleas' determination that all jurisdictional requirements had been satisfied is res judicata as to the parties to the adoption. Finally, I believe that the district court erred in excluding Russell's affidavit concerning her relationship with the minor child and in not considering the doctrine of in loco parentis at the summary judgment proceeding, as that doctrine provides a basis for Russell to proceed with this action regardless of the validity of the Pennsylvania adoption decree.

SUBJECT MATTER JURISDICTION

U.S. Const. art. IV, § 1, provides that "Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State." In order to fulfill this constitutional mandate, the judgment of a state court should have the same credit, validity, and effect in every other court of the United States, which it had in the state where it was pronounced. *Underwriters Assur. Co. v. N. C. Guaranty Assn.*, 455 U.S. 691, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982).

There are, however, basic limitations on the principles of full faith and credit. *Id.* Chief among these limitations is the caveat that " 'a judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.' " *Id.* at 704. Consequently, before a court is bound by the judgment rendered in another state, it may inquire into the jurisdictional basis of the foreign court's decree. *Id.* If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given. *Id.*

For purposes of argument, I am assuming that under Pennsylvania law—at least, as that law currently stands—the Court of Common Pleas may have erred in entering the adoption decree at issue in this case. See, *In re Adoption of R.B.F.*, 762

A.2d 739 (Pa. Super. 2000), and *In re Adoption of C.C.G.*, 762 A.2d 724 (Pa. Super. 2000) (appeals granted at 566 Pa. 684, 784 A.2d 119 (2001)). However, the dispositive question in this appeal is whether Bridgens' failure to relinquish her parental rights prior to the purported adoption was fatal to the subject matter jurisdiction of the Pennsylvania court.

Jurisdiction of subject matter relates to the competence of a court to hear and determine controversies of the general nature of the action before the court. *Vendetti v. Schuster*, 418 Pa. 68, 208 A.2d 864 (1965). See, also, *Aronson v. Sprint Spectrum, L.P.*, 767 A.2d 564 (Pa. Super. 2001). The test of whether a court has jurisdiction over a particular controversy depends upon the competency of the court to determine controversies of the general class to which the case presented for consideration belonged—whether the court had power to enter upon the inquiry, not whether it might ultimately decide that it was unable to grant the relief sought in a particular case. *Com. v. Ct. of Common Pleas, Philadelphia Cty.*, 506 Pa. 410, 485 A.2d 755 (1984). See, also, *In re Jones & Laughlin Steel Corp.*, 488 Pa. 524, 412 A.2d 1099 (1980); *Kaelin v. University of Pittsburgh*, 421 Pa. 220, 218 A.2d 798 (1966); *Vendetti, supra*; *Aronson, supra*; *Dynamic Sports Fitness v. Community YMCA*, 768 A.2d 375 (Pa. Commw. 2001). The thing of chief importance on a question of jurisdiction over the subject matter is not whether the petitioner may recover in the particular forum on the cause of action pleaded but whether the court is empowered to hear and determine a controversy of the character involved. See *Kaelin, supra*.

It is plain that pursuant to the foregoing propositions, the Court of Common Pleas had subject matter jurisdiction to enter the adoption decree at issue. "The court of common pleas of each county shall exercise . . . original jurisdiction over voluntary relinquishment, involuntary termination and adoption proceedings." 23 Pa. Cons. Stat. Ann. § 2301 (West 2001).

> If satisfied that the statements made in the petition are true, that the needs and welfare of the person proposed to be adopted will be promoted by the adoption and that all requirements of this part have been met, the court shall enter a decree so finding and directing that the person proposed to be adopted shall have all the rights of a child and

> heir of the adopting parent or parents and shall be subject to the duties of a child to him or them.

23 Pa. Cons. Stat. Ann. § 2902 (West 2001).

The Superior Court's decisions of *In re Adoption of R.B.F., supra*, and *In re Adoption of C.C.G., supra*, are not to the contrary. Those cases were presented to the Superior Court as direct appeals from the Court of Common Pleas from denials of petitions for adoption. The Superior Court was not confronted with a collateral attack on a final adoption decree. In this case, the Court of Common Pleas had jurisdiction over adoption cases generally and entered a decree of adoption and that decree became a final judgment not subject to collateral attack on the ground of subject matter jurisdiction.

Bridgens relies on *List Adoption Case*, 418 Pa. 503, 508-09, 211 A.2d 870, 873-74 (1965), a case involving a petition to vacate a decree of adoption, in which the Pennsylvania Supreme Court stated:

> In determining this appeal certain principles of law must be kept in mind: (1) an adoption decree entered by a court having jurisdiction over the subject matter and the parties is generally immune from collateral attack, particularly where the record shows a substantial compliance with the adoption statute; (2) where the record in the adoption proceedings affirmatively reveals a lack of jurisdiction, then the adoption decree is subject to collateral attack; (3) notice to a natural parent of the adoption proceedings and the consent of a natural parent, where necessary, are jurisdictional prerequisites in an adoption proceeding; (4) when an adoption decree is collaterally attacked, the entry of the decree raises a presumption of its validity and regularity and an implication arises that the court did find the necessary facts and did perform all the steps essential to the jurisdiction of the court; (5) the burden is upon the person attacking an adoption decree to establish its invalidity by clear and convincing evidence.

The clear import of *List Adoption Case* is that a petition to vacate an adoption decree—in essence, a collateral attack—will be entertained where a natural parent has been unjustly deprived of parental rights. The rule established by *List Adoption Case*,

while couched in jurisdictional language, relates more to the power of a court to enter an adoption decree than to the subject matter jurisdiction of the court. See *Riedel v. Human Relations Com'n of Reading*, 559 Pa. 34, 739 A.2d 121 (1999) (distinguishing between jurisdiction and exercise of power). Consequently, biological parents whose parental rights have been terminated by operation of law may seek to have a decree of adoption vacated where the consent of the relinquishing biological parents was not properly obtained. See, e.g., *In re Fritz*, 460 Pa. 265, 333 A.2d 466 (1975); *Singer Adoption Case*, 457 Pa. 518, 326 A.2d 275 (1974). This does not compel the conclusion, however, that a parent whose parental rights have remained intact can compel the vacation of an adoption decree that has finally inured to the benefit of another party.

To the contrary, the Pennsylvania Supreme Court has specifically noted that

> " '[i]t is especially important that persons who adopt minor children may rely on the decree as some guarantee that, in addition to the child, they are not also adopting at some future time litigation whose goal is to extinguish the parent-child relationship and force the adoptive parents to relinquish the child upon whom they have showered care and affection.' "

Matter of Adoption of Christopher P., 480 Pa. 79, 85, 389 A.2d 94, 97 (1978) (quoting *Adoption of Minor Child*, 109 R.I. 443, 287 A.2d 115 (1972)). Given this express principle, with which I agree, I cannot conclude that the Pennsylvania Supreme Court intended *List Adoption Case, supra*, to permit a collateral attack, under the circumstances of this case, on the evident subject matter jurisdiction of the Court of Common Pleas.

Because the record is sufficient to conclude, as a matter of law, that the Court of Common Pleas had subject matter jurisdiction to enter the adoption decree at issue, I would reverse the district court's order of summary judgment on that basis, and remand the cause to the district court for a determination of the merits of Russell's petition.

RES JUDICATA

Even assuming that the Court of Common Pleas lacked subject matter jurisdiction because of the parties' failure to strictly

comply with the Pennsylvania adoption statutes, Bridgens cannot assert that argument in this proceeding. Under Pennsylvania law, jurisdictional determinations made in a prior proceeding are res judicata in a subsequent proceeding involving the same litigants.

Although a court may have no jurisdiction over a particular subject matter, it may have jurisdiction to determine the question of its own jurisdiction, and an unappealed final determination of its subject matter jurisdiction—albeit erroneous—is res judicata as to those litigants. *Com. ex rel. Cook v. Cook*, 303 Pa. Super. 61, 449 A.2d 577 (1982); *Connellsville T. S. v. Connellsville*, 14 Pa. Commw. 532, 322 A.2d 741 (1974). Accord *Chartiers Valley School Dist. v. Board*, 154 Pa. Commw. 81, 622 A.2d 420 (1993). See, e.g., *Drummond v. Drummond*, 414 Pa. 548, 200 A.2d 887 (1964); *Irwin Boro. S. D. v. N. Huntingdon Twp. S. D.*, 374 Pa. 134, 97 A.2d 96 (1953); *Federal Land Bank v. Putnam et al.*, 350 Pa. 533, 39 A.2d 586 (1944); *Bartron v. Northampton County*, 342 Pa. 163, 19 A.2d 263 (1941); *Chartiers Valley v. Bd. of Prop. Assessment*, 94 Pa. Commw. 4, 503 A.2d 66 (1985).

This principle, long recognized in the Commonwealth of Pennsylvania and other forums, reflects judicial concern for finality of judgments, even when said judgments have been rendered by a court without jurisdiction of the subject matter. *Com. ex rel. Cook, supra* (citing *United States v. Mine Workers*, 330 U.S. 258, 67 S. Ct. 677, 91 L. Ed. 884 (1947); *Chicot County Dist. v. Bank*, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104 (1938); *Hodge v. Hodge*, 621 F.2d 590 (3d Cir. 1980); *Dyndul v. Dyndul*, 620 F.2d 409 (3d Cir. 1980); *Bartron, supra*; *Strauss v. W. H. Strauss & Co., Inc.*, 328 Pa. 72, 194 A. 905 (1937); *Pulaski Avenue*, 220 Pa. 276, 69 A. 749 (1908); and *Kase v. Best*, 15 Pa. 101 (1850)).

> "[W]hen a court decides that it has jurisdiction in a case pending before it, its decision in favor of its own jurisdiction is res judicata and cannot be collaterally attacked. The court has jurisdiction to determine its own jurisdiction, and hence its decision on this point is valid even if erroneous. That decision may be reversed on appeal, but if not, it is res judicata, and the issue of that court's jurisdiction cannot again be questioned by the parties or their privies."

Com. ex rel. Cook, 303 Pa. Super. at 69, 449 A.2d at 581-82 (quoting Dan B. Dobbs, *The Validation of Void Judgments: The Bootstrap Principle, Part II—The Scope of Bootstrap*, 53 Va. L. Rev. 1241 (1967)). Thus, the principles of res judicata apply to questions of subject matter jurisdiction as well as to other issues, and such a judgment is entitled to full faith and credit even as to questions of jurisdiction. See, *Underwriters Assur. Co. v. N. C. Guaranty Assn.*, 455 U.S. 691, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982); *Durfee v. Duke*, 375 U.S. 106, 84 S. Ct. 242, 11 L. Ed. 2d 186 (1963).

In the present case, Bridgens asserts that the adoption decree was entered without jurisdiction because all the requirements of the Pennsylvania adoption statutes were not met, i.e., the necessary consents were not filed with the adoption petition. The district court agreed with this argument as the basis for entering summary judgment. The adoption decree entered by the Court of Common Pleas, however, specifically sets forth the court's finding that "[a]ll requirements of the Acts of Assembly have been fulfilled and complied with." This determination—that the petition and filings fulfilled the requirements of the adoption statutes—may potentially have been in error, but was not appealed from and, under Pennsylvania law, is res judicata as to the parties.

In other words, Bridgens and Russell together invoked the jurisdiction of the court and received the decree they requested. Under these circumstances, Bridgens cannot now collaterally attack the jurisdiction of the court in the original proceeding. "[She] will not be permitted to 'blow hot and cold' by now taking a position inconsistent with that by which [she] previously induced" the entry of the adoption decree. See *Reese v. Reese*, 351 Pa. Super. 521, 527, 506 A.2d 471, 474 (1986).

While this broad principle admits to exceptions, none are present here. See *Connellsville T. S. v. Connellsville*, 14 Pa. Commw. 532, 322 A.2d 741 (1974). "In Pennsylvania, the courts have differentiated between jurisdictional determinations which are void on their face, i.e., where the want of jurisdiction is patent, and those where the determination is based upon extant jurisdictional facts, or merely an error of law, the unappealed determinations of which are binding." *Id.* at 537 n.4, 322 A.2d at 743 n.4. The

findings of the Court of Common Pleas in the instant case, even if erroneous, would clearly fall within the latter category and would be binding on the parties. Compare *Chartiers Valley School Dist. v. Board*, 154 Pa. Commw. 81, 622 A.2d 420 (1993) (want of jurisdiction patent where notice of appeal filed prior to trial court's jurisdictional determination).

Thus, even if we were to assume that subject matter jurisdiction was wanting, the Court of Common Pleas made a jurisdictional determination regarding compliance with the requirements of the "Acts of Assembly" and specifically foreclosed the argument Bridgens now seeks to advance. Under established principles of Pennsylvania law, the court's determination is res judicata, even if erroneous, and entitled to full faith and credit in the State of Nebraska.

IN LOCO PARENTIS

Russell also assigned that the district court erred by not considering Russell's affidavit concerning her relationship with the minor child and in not discussing the doctrine of in loco parentis. Russell's assigned error has merit and should be considered on appeal. Discussion of this issue is essential because under the in loco parentis doctrine, as established by both Nebraska and Pennsylvania law, Russell can maintain her petition for custody even if the Pennsylvania adoption decree is not entitled to full faith and credit. The district court's order of summary judgment was premised on the assumption that the adoption issue was dispositive of the action. However, we have stated that

> 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*.

(Emphasis in original.) *Weinand v. Weinand*, 260 Neb. 146, 152-53, 616 N.W.2d 1, 6 (2000). Accord *T.B. v. L.R.M.*, 567 Pa. 222, 786 A.2d 913 (2001) (lesbian former partner of biological mother had standing, in loco parentis, to maintain complaint for custody and visitation against biological mother). See, also, *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002);

State on behalf of Hopkins v. Batt, 253 Neb. 852, 573 N.W.2d 425 (1998); *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991); *Charles v. Stehlik*, 560 Pa. 334, 744 A.2d 1255 (2000), *cert. denied* 530 U.S. 1243, 120 S. Ct. 2689, 147 L. Ed. 2d 961.

The term "in loco parentis" refers to a person who has fully put himself or herself in the situation of a lawful parent by assuming *all* the obligations incident to the parental relationship and who actually discharges those obligations. *Weinand, supra*. Accord *T.B., supra*. The assumption of the parental relationship is largely a question of fact which should not lightly or hastily be inferred. *Weinand, supra*. The parental relationship should be found to exist only if the facts and circumstances show that the stepparent *means* to take the place of the lawful father or mother not only in providing support but also with reference to the natural parent's office of educating and instructing and caring for the general welfare of the child. *Id.* Once established, "[t]he rights and liabilities arising out of an *in loco parentis* relationship are, as the words imply, exactly the same as between parent and child." *T.B.*, 567 Pa. at 229, 786 A.2d at 917.

Based on the foregoing principles, it is clear that resolution of the validity of the Pennsylvania adoption is not dispositive of Russell's petition. Russell can maintain her petition regardless of whether the Pennsylvania adoption decree is given full faith and credit, if Russell can demonstrate an in loco parentis relationship with the minor child. The fact that Russell affected an adoption of the minor child is, standing alone, persuasive evidence supporting the existence of an in loco parentis relationship between Russell and the minor child. Furthermore, Russell proffered evidence to support such a finding. Russell offered an affidavit which describes, in detail, Russell's activities in the role of "primary care provider for [the minor child] since [the minor child] was adopted at age 9 months." The district court determined that this affidavit was irrelevant because of the district court's resolution of the adoption issue.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *V.C. v. Casady*, 262 Neb. 714,

634 N.W.2d 798 (2001). Based on the applicability of the in loco parentis doctrine, evidence of Russell's relationship with the minor child is clearly of consequence to the determination of the action. The district court erred by excluding Russell's affidavit and by dismissing Russell's petition absent a determination of whether Russell stood in loco parentis to the minor child.

Moreover, in my view, the record establishes conclusively that there exists a material issue of fact with respect to Russell's in loco parentis relationship with the minor child. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001), *modified* 262 Neb. 663, 641 N.W.2d 624. If a genuine issue of material fact exists, summary judgment may not properly be entered. *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002). Even if the Pennsylvania adoption decree is not entitled to full faith and credit, Russell is entitled to proceed to trial standing in loco parentis. This does not necessarily mean that Russell will prevail in seeking custody—but she at least has standing to fully litigate the issue. See *T.B. v. L.R.M.*, 567 Pa. 222, 786 A.2d 913 (2001).

At the very least, Russell's opportunity to litigate the issues of custody and visitation, pursuant to the doctrine of in loco parentis, should suggest to the district court that interim arrangements be made for the minor child's visitation with whichever party does not have temporary custody. So long as the ultimate disposition of this case remains uncertain, a temporary order of visitation should be entered that is consistent with the best interests of the child.

CONCLUSION

Therefore, for substantially different reasons than the majority—in both import and impact on the best interests of the minor child—I concur only with the result (i.e., reversal of summary judgment).

WRIGHT, J., joins in this concurrence.

CHADD MCLAUGHLIN, APPELLEE, V. REBECCA L. MCLAUGHLIN, NOW KNOWN AS REBECCA L. SHEETS, APPELLANT.

647 N.W.2d 577

Filed June 28, 2002. No. S-01-1137.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion 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 Custody.** In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
4. ____. A career enhancement for a custodial parent's spouse is a legitimate reason for removal.
5. **Child Custody: Visitation.** Neither a custodial parent nor the spouse of a custodial parent is required to exhaust all possible job leads locally before securing a better position in another state. Absent some aggravating circumstance, such as an ulterior motive to frustrate the noncustodial parent's visitation rights, significant career enrichment is a legitimate motive in and of itself.
6. ____: ____. In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation.
7. **Child Custody.** Custodial parents are not required to consult with their ex-spouses before considering out-of-state employment.
8. **Child Custody: Visitation.** When seeking removal, custodial parents are not prohibited from making out-of-state living arrangements while awaiting court approval if they have not moved without court approval and have not interfered with the noncustodial parent's visitation rights.
9. **Child Custody.** The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party.
10. ____. In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, a court should consider the following factors: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment

will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties.

11. ____. This list of factors to be considered in determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children should not be misconstrued as setting out a hierarchy of factors. Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted.
12. ____. A custodial parent's income can be enhanced because of a new spouse's career opportunities.
13. ____. A legitimate expectation of income based on commissions can be considered in evaluating the opportunity for enhanced earning potential.
14. **Child Custody: Proof.** Once a custodial parent has met his or her burden of proof for removal, he or she will not be placed in a position of deciding between custody of a child and a career advancement, whether it is his or her own career or the career of a new spouse.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Reversed.

Clarence E. Mock III and Denise E. Frost, of Johnson & Mock, for appellant.

John S. Slowiaczek and Willow T. Head, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

I. NATURE OF CASE

Rebecca L. McLaughlin, now known as Rebecca L. Sheets, is a custodial parent who has remarried and wishes to move to Huron, South Dakota, with her child because of her new husband's employment. Chadd McLaughlin, her former husband and father of the child, opposed the application for removal, and the district court denied Rebecca's application. She appeals. We determine that Rebecca satisfied her burden of showing a legitimate reason for the removal and that it was in the best interests of the child to continue living with her. Accordingly, we reverse.

II. BACKGROUND

The parties' marriage was dissolved in April 1999. In the decree, Rebecca and Chadd were awarded joint legal custody of their daughter, who was almost 4 years old at the time the application for removal was filed. Rebecca was awarded primary physical custody. Chadd was given reasonable and liberal visitation. He was not granted extended summer or holiday visitation. Beginning in May 2001, the parties agreed to a visitation schedule that gave Chadd custody from Thursday evening to Sunday evening, every other weekend.

In April 2000, Rebecca married Clayton Sheets. She stated that she continued to work because they needed her income. She earned about $22,000 in the year 2000. She quit her job in May 2001 to stay home with her daughter, and she and Clayton had a daughter in June 2001.

Clayton testified that soon after Rebecca and Clayton were married, he began searching for a new job so that he could earn enough income for Rebecca to stay home. His background and experience were in agriculture. He earned his bachelor's degree in agricultural sciences in 1996. When they married, he worked as an agronomist for a national farmers' cooperative in Gretna, Nebraska. His duties included scouting fields and giving farmers recommendations on their crops, and he also sold seed and chemicals to farmers. In addition, he was required to perform long hours of manual labor at the farmers' cooperative during the spring and summer. His annual base salary was $31,000, and he received $6,500 in bonuses for the year 2000. He stated that he had virtually no opportunity for advancement.

Clayton looked for new employment in Nebraska, but the only offers he received were for farmers' cooperative positions similar to the one he held in Gretna. He applied to some of the larger seed companies but did not receive an offer. He was offered an outside sales position in Omaha with an insurance company that paid $50,000 annually. He stated that he did not accept the position because it did not provide benefits; required considerable travel; and required him to provide his own vehicle and pay for all of his travel expenses, including food, gas, and hotels.

In June 2001, Clayton received an offer from Garst Seed Company in Huron, South Dakota, for a district sales manager

position. The company required an answer within a week, and he accepted. Clayton testified that his annual base salary with Garst Seed was $45,000 and that his new job offered scheduling flexibility, a home office, company car, and benefits. He was confident that he could earn enough in bonuses to exceed the income he and Rebecca had earned together while in Nebraska.

On July 6, 2001, Rebecca filed an application for removal and requested an expedited hearing because Clayton was to start at his new job on July 17. In his response, Chadd denied that the removal was in the child's best interests and cross-applied for physical custody. Rebecca also filed a motion for temporary removal or, alternatively, a trial date for the end of August. The court denied the motion for temporary removal, and trial was held on September 10.

At some point between Clayton's acceptance of the new position and the trial, Clayton and Rebecca sold their home in Papillion and purchased a new home in Huron. Rebecca stated that Huron is about a 4- to 4½-hour drive from the Omaha area. Clayton moved to Huron to begin his job. The record reflects that Rebecca and the children stayed in Huron for visits before the hearing and that she was able to describe the community and their new home to the court. She testified, however, that she was still living with her children at her parents' home in Elkhorn, Nebraska.

She described the neighborhood as quiet and friendly with an elementary school within a couple of blocks of their home. She stated that the new home cost no more than their old home but had an additional bedroom and had twice as much square footage. She believed that the cost-of-living in general was lower in Huron than in Omaha. She also stated that her daughter got along well with Clayton and her new half sister. She maintained that the loss of contact with her family in Omaha would be offset by the benefits of their new community and improved lifestyle. She stated that her family already had plans for visits and that she would visit Omaha frequently to see them. The record reflects that Huron is a city of 12,000 people.

Regarding Chadd's visitation, she testified that she would maintain the same visitation schedule until the child began kindergarten. She was also willing to meet Chadd halfway every

other weekend to shorten the drive time for him. After the child began school, she proposed an extended summer visitation of 5 weeks to compensate for the shortened weekend visitations.

Rebecca was asked what she would do if the court denied the removal, and she stated, "If it came to that, we would have to move back . . . ." She stated that she would not give up custody if the court denied the application because she did not believe it was in the child's best interests to live with Chadd. She stated the child's best interests were to continue living with her because she could stay home with her children in South Dakota and the family's lifestyle and home would be improved by Clayton's new position. She also asserted that her children would be safer in Huron than in Omaha. Finally, she testified that because of their increased disposable income, she and Clayton could save for their children's college educations, which they could not afford to do in Omaha.

On cross-examination, she stated she and Clayton did not inform Chadd that they intended to move to South Dakota until after Clayton had accepted the position, but before they had sold their house. Rebecca also stated that Clayton had not inquired about two Garst Seed positions that became available in Nebraska after he had accepted the Huron position because the positions were an extension of the territories for only existing representatives and were not available to new employees.

Chadd testified that he was told about Clayton's new job in South Dakota sometime between June 25 and 30, 2000. He stated that at that time, Clayton had already accepted the job, but Chadd did not believe the house was listed for sale yet. He maintained that Rebecca had already moved to South Dakota because he had received a telephone call from his daughter while she was there. Rebecca had also left a telephone message once stating that they were going to South Dakota. But he could not point to specific time periods when he thought she was there. He stated that he was not asking for custody of his daughter, but only asking the court to deny her removal from the jurisdiction, and that if the court denied the removal, and Rebecca still wanted to leave, he would assume custody.

Chadd asserted that it was in the child's best interests to remain with him in Elkhorn because he enjoyed a close relationship with

her and she was also very close to his stepson. He was concerned that he could not maintain his daily contact with his daughter if Rebecca's application were granted. In addition to his visitation, he alternated picking up and dropping off his daughter at preschool on the 2 days a week that she attended, and he picked her up from daycare on his visitation days.

Chadd believed that his daughter should not be separated from her extended family in the Omaha area. He stated that his sister was currently living with him and that his present wife's family lived in Elkhorn. He stated that Rebecca's and Clayton's extended families lived in the Omaha area also. His own parents lived in Hebron, however, and saw the child about once a month. Other than his sister, he admitted that he had no extended family in the Omaha area. He also admitted that he did not currently take the child to see any members of Rebecca's family when he had custody.

An attorney appointed by the court to serve as the guardian ad litem testified that he had observed the child in Chadd's home and at Rebecca's parents' home. He generally found that the child interacted well with both families. Just before testifying, he had observed a report from Joseph L. Rizzo, Ph.D., a clinical psychologist whom Chadd hired as an expert. He admitted that Rizzo had recommended that the court grant the application because (1) the child's primary bond was with Rebecca, (2) Rebecca was seeking to enrich her life and care for her child, and (3) Clayton's job in Huron was consistent with his training and future stability. Chadd did not call Rizzo as a witness.

Despite Rizzo's recommendations, the guardian ad litem recommended that the court deny the application for removal. He testified that he made his recommendation because Clayton was not required to move to South Dakota. He agreed that the child would be fine moving with her mother, but he thought that Clayton's desire "to better his position financially [was] not a sufficient reason to separate a child from her father."

Rebecca's expert witness, Kevin R. Cahill, Ph.D., a clinical psychologist specializing in marriage and family therapy, interviewed Rebecca and Chadd separately twice, alone and with their daughter. Although he found Chadd to be a loving and competent father, he stated that the child had developed a stronger

relationship with Rebecca. He believed that because Rebecca had been her primary caretaker during her infancy, the child's primary attachment was with her. He stated that both parents responded well to their child's demands and expectations for her developmental age and level and could relegate their needs to her needs. But he stated that when a child is removed from its primary attachment parent, there are a number of negative psychological effects.

Cahill opined that the potential gains weighing in favor of the removal were an improved quality of life, more time and attention from Rebecca, and a quieter, easier lifestyle. He stated that it was in the child's best interests—in terms of her security and stability—for Rebecca to stay home. The potential harm was the loss of frequent interaction with Chadd. But he stated that the loss was mitigated by Rebecca's stated willingness to maintain the visitation schedule and provide Chadd with visits when she returned to see her family and for extended visits in the summer. He stated she would not be harmed by the decreased weekend visitation with Chadd when she started school. He stated that with longer visitation in the summer, the density of the contacts with Chadd could actually be greater.

Cahill saw no indication that Rebecca had applied for the removal with the intent of damaging the child's relationship with Chadd. He also reviewed Rizzo's report while on the stand and stated that those recommendations were consistent with his own. Cahill opined it was in the child's best interests to be allowed to move to South Dakota.

After the parties' closing arguments, the court rendered its judgment from the bench. The court stated that this court had not decided whether a career improvement for a custodial parent's spouse could constitute a legitimate reason for leaving the jurisdiction. Nonetheless, the court found that Rebecca had a legitimate reason for the removal. Similarly, the court did not question Rebecca's motives for seeking the removal. The court believed, however, that Rebecca had already moved, and found it significant that Rebecca had not talked to Chadd before searching for a job, listing their home, or moving. The court recognized that the move considered and affirmed in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), was from Omaha to Denver,

but found this case distinguishable because the custodial parent's career prospects were improved in *Farnsworth*.

The court next considered the potential that the move held for enhancing the quality of life for the child and the custodial parent. It found that (1) the child's emotional and physical needs would be equally met with either Rebecca or Chadd, (2) the child was too young to express a preference, (3) Rebecca's income would not be enhanced because the income belonged to Clayton, (4) the housing and living conditions would be improved, and (5) the education advantages in Huron were no greater than in Omaha. It made no specific finding regarding the quality of the child's relationship with each parent.

The court further found that Cahill had conceded that a substantial reduction in time with Chadd would negatively affect the child and that the family ties were in Nebraska, not South Dakota. The court stated that it could not decide whether the move would antagonize the relationship between the parties. The court believed that Clayton could find work in Nebraska. Based on these findings, the court determined that it was not in the child's best interests to move to South Dakota and denied the application.

III. ASSIGNMENTS OF ERROR

Rebecca assigns that the district court erred in finding that she had not satisfied her burden of proving that the removal to Huron was in the child's best interests and in denying the application for removal.

IV. STANDARD OF REVIEW

[1] Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (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. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

V. ANALYSIS

[3] In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Vogel, supra*.

1. Legitimate Reason to Leave State

[4,5] The court found that Rebecca had a legitimate reason for removal, but also found that Clayton could find work in Nebraska. This court has previously determined that a career enhancement for a custodial parent's spouse is a legitimate reason for removal when the career change occurred after a remarriage. See, *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994); *Demerath v. Demerath*, 233 Neb. 222, 444 N.W.2d 325 (1989). See, also, *Little v. Little*, 221 Neb. 870, 381 N.W.2d 161 (1986). Further, this court has stated:

> [W]e have never required a custodial parent to exhaust all possible job leads locally before securing a better position in another state. Absent some aggravating circumstance, such as an ulterior motive to frustrate the noncustodial parent's visitation rights, significant career enrichment is a legitimate motive in and of itself.

Farnsworth v. Farnsworth, 257 Neb. 242, 252-53, 597 N.W.2d 592, 600 (1999). Because we have held that career advancement for the custodial parent can constitute a legitimate reason for removal, our holding in *Farnsworth* applies equally to the spouse of a custodial parent.

Although Clayton was offered employment in Nebraska with an insurance company, the position was not in an area in which he had experience and required him to incur significant expenses and travel time. There was no requirement in *Harder* that the new spouse search for employment outside of his field. Clayton testified that he had been unable to find a position that offered career advancement in Nebraska and that his new position offered sig-

nificant opportunities in his chosen field. He was not required to accept work outside of his field. The court acknowledged that the career change was a considerable advancement for Clayton. We conclude that Rebecca has shown a legitimate reason for removal.

2. Child's Best Interests

Rebecca contends that the court erred in finding that she had already moved to Huron and in failing to find that the move was in her daughter's best interests. Chadd contends that Rebecca acted in bad faith under the parenting plan by failing to consult him before Clayton accepted this position or making a decision to move. He also contends that the court correctly found that Rebecca had failed to prove that removal was in their daughter's best interests.

[6] In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

(a) Each Parent's Motives

The court determined that because the parenting plan called for both parents to have expansive contact with their daughter, Rebecca and Clayton should have consulted Chadd before searching for a job out of state, or listing and selling their home.

[7] This court has never required custodial parents to consult with their ex-spouses before considering out-of-state employment. To expect consensus on such an issue is unrealistic. The parties' personal interests in removal situations are almost always at odds. The parties did agree in their parenting plan that it was in the best interests of their daughter that both parents maintain an ongoing involvement to the greatest extent possible. But such agreements cannot be interpreted as a mandate for the custodial parent to seek permission from his or her divorced spouse over future career choices. Chadd testified that Rebecca and Clayton informed him of the job offer about the end of June,

which was very shortly after the offer was made. The court erred in its finding that Rebecca was required to consult with Chadd before Clayton could consider out-of-state employment.

[8] The court also found that Rebecca had already moved to South Dakota with her daughter, in violation of our rule set out in *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000). One issue in *Jack* was temporary removals. But that concern was directed toward trial courts and intended to discourage them from granting temporary permission for removal before holding a full hearing and ruling on permanent removal. Further, the evidence does not support the court's finding that Rebecca had moved. Although Clayton moved before the hearing to begin his job, Rebecca testified that she was living with her children at her parents' house. Despite Chadd's belief that she had already moved, he could not point to specific time periods that Rebecca and his daughter were in South Dakota. He testified that Rebecca had not interfered with his visitation times. Rebecca was not prohibited from making living arrangements in South Dakota if the court approved the removal. See *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994) (noting that by time of hearing, both custodial parent and spouse had obtained employment and leased home out-of-state). On the contrary, such efforts can assist the trial court in evaluating the merits of the removal.

Rebecca did not interfere with Chadd's visitation by spending time in South Dakota making preparations for a move, and the evidence does not indicate that she intended to avoid the court's jurisdiction. She filed an application for removal within 2 weeks of the position's becoming available to Clayton, and she testified that she would move back to Nebraska if removal were denied. We do not interpret her statement that she would move back to Nebraska to mean that she had moved without court permission, but that she and Clayton would be willing to sell their home in Huron and give up Clayton's job if the court denied the removal. The court erred to the extent that it found that Rebecca had already moved or imputed her preparations as bad faith in evaluating her motives for making the request.

[9] The ultimate question in evaluating the parties' motives is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party. See *Farnsworth*

v. Farnsworth, 257 Neb. 242, 597 N.W.2d 592 (1999). There is no evidence that either Rebecca or Chadd has acted in bad faith. Clayton's significant career advancement is a compelling motive for Rebecca to seek removal. On the other hand, Chadd's desire to maintain frequent contact with his daughter is an equally compelling motive to resist the move. Their motives are balanced. See *id.*

(b) Quality of Life

[10,11] In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, a court should consider the following factors: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). This list should not be misconstrued as setting out a hierarchy of factors. Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. *Id.*

We conclude that the court did not err in finding that a 4-year-old child is too young to express a preference between parents. We further conclude that the court did not err in finding that Rebecca had failed to show that schools in their new community would be superior to schools in their Nebraska community. See, *Brown, supra*; *Farnsworth, supra* (educational advantages factor receives little or no weight when custodial parent fails to prove that new schools are superior). We also agree with the court that the quality of housing and living conditions for Rebecca and the child would be improved by the move and that this factor weighs for the removal.

The court found that either parent could meet their daughter's emotional and physical needs. The record confirms that both

parties are loving parents and genuinely concerned with their daughter's needs. The court concluded that it could not tell whether the removal would antagonize the relationship between the parties. The record indicates that the parties have cooperated well in the past regarding their daughter's welfare, and we find no reason to presume that they would not continue to do so despite their dispute over the relocation. See *Brown, supra*. We disagree, however, with the court's findings on other quality of life factors.

(i) Enhancement of Income or Employment

[12,13] Although the court found that Rebecca had a legitimate reason to relocate, it also found that Rebecca's income could not be increased by Clayton's career opportunities. The court erred in this finding. See *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994). In *Harder*, the facts did not indicate whether the custodial mother's employment opportunities would be improved at all. It was sufficient that her husband's new job held out considerable opportunities for commission income. See *id*. Similarly, there was evidence that Clayton would have ample opportunities for bonuses and commissions, including a letter from his employer outlining the basis for that income. He testified that he could earn more income alone in Huron than he and Rebecca had earned together while in Nebraska. Although Chadd argues that Clayton has no guarantee of his income other than his base salary, a legitimate expectation of income based on commissions can be considered in evaluating the opportunity for enhanced earning potential. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). We conclude that Rebecca satisfied her burden of showing that her income would be enhanced by the move.

(ii) Ties to Community and Extended Family

The court also found that the strength of the child's ties to the present community and extended family there weighed against removal because all of Rebecca's extended family was in the Omaha area and because she had no family in Huron. However, no evidence was adduced concerning the child's relationships with Rebecca's extended family. In any case, Rebecca testified that she and her family had plans to visit often.

Chadd conceded that other than his sister, who was living with him at the time of the hearing, he did not have extended family in the Omaha area. He testified that his parents saw his daughter about once a month and that he could still provide that visitation time with his parents if the removal were granted. Under these facts, this factor receives little weight in our de novo review.

(iii) Quality of Relationship Between Child and Parents

The court made no specific finding regarding the relationship between the child and each parent. It did note that removal would be beneficial to her relationship with Rebecca and would negatively affect her relationship with Chadd. The effect of the removal, however, must be evaluated in light of the child's relationship with each parent. See *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000) (concluding that because of close relationship and extensive contacts between father and children, this factor weighed against long-distance relocation with mother).

The guardian ad litem reported that the child interacted well with both families. His opinion that removal should be denied was based wholly on his incorrect belief that Clayton's improved financial position was an insufficient reason for removal. Cahill, however, opined that the child had bonded more strongly with Rebecca because Rebecca had been her primary caretaker. He found that Chadd was a loving and competent father and that both parents responded well to the child's demands and expectations. But because of the child's primary bond with Rebecca, he opined that she would benefit from Rebecca's improved lifestyle and ability to stay home with her in Huron.

The court found that Cahill had conceded that a substantial reduction of time with Chadd would negatively affect the child. Contrary to this finding, however, Cahill stated that a child would be affected by a removal which precluded the possibility for contact with a parent. He specifically stated that he did not believe the child's well-being would be negatively affected by the parties' visitation schedule or the reduced weekend visitations once school started. He stated that Rebecca would make every effort to ensure that the child kept a positive relationship with Chadd and that Chadd could actually have a greater density of contacts because of extended summer visitation.

We find it significant that Chadd's own expert, Rizzo, while he did not testify, recommended that the court allow the relocation, in part, because of the child's bond with Rebecca. We conclude that the child's primary relationship is with Rebecca.

(iv) Quality of Life Conclusion

We determine that the court erred in (1) failing to find that the child's primary relationship was with Rebecca, (2) finding that Rebecca's income could not be enhanced by Clayton's employment opportunities, and (3) finding that the strength of the child's ties to the community and extended family weighed against removal. Under our de novo review, we conclude that Rebecca has satisfied her burden of proving that the removal will enhance the quality of life for her child and herself.

(c) Impact of Move on Contact Between Chadd and Child

The final consideration in the best interests of the child analysis is the effect of the relocation upon Chadd's ability to maintain a meaningful parent-child relationship with his daughter. This effect must be viewed in light of the court's ability to devise reasonable visitation arrangements. See *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). Rebecca testified that she is willing to drive halfway to help Chadd maintain the current visitation schedule until school starts. Afterward, when Chadd's weekend visitation is reduced, she is willing to provide extended summer visitation.

We recognize the difficulty that courts face in determining removal issues. In most applications for removal, the frequency of the noncustodial parent's visitation is likely to be diminished by distance. But the relocation here, from Omaha to Huron, involves no greater distance than some moves which could have been made within the state. Compared to some of the more distant relocations this court has considered, the impact on Chadd's visitation is not as great. See, *Brown, supra*; *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). Chadd will still have weekend visitation, even if it will be somewhat reduced after the child starts school. We determine that Chadd could maintain a meaningful relationship with his daughter after school starts through a reasonable visitation schedule, which included extended visitation in the summer.

We conclude in our de novo review that Rebecca has satisfied her burden of proving that it is in the child's best interests to continue living with her.

VI. CONCLUSION

[14] A custodial parent has the burden of proving that he or she has a legitimate reason for removal and that it is in the best interests of the child to continue living with him or her. Once a parent has met that burden, he or she will not be placed in a position of deciding between custody of a child and a career advancement, whether it is his or her own career or the career of a new spouse. See, *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999); *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994). The district court abused its discretion in refusing to grant Rebecca's application for removal. The judgment of the court is reversed. Upon remand, the court is to enter an order granting the application consistent with this opinion.

REVERSED.

STEPHAN, J., dissenting.

I respectfully dissent. I agree with the conclusion of the trial court and the majority that Rebecca established a legitimate reason for relocation through the evidence of Clayton's enhanced employment opportunities in Huron, South Dakota. I also agree with the majority that Rebecca was not required to consult with Chadd before Clayton could consider out-of-state employment and that the evidence does not support a conclusion that she had actually relocated the child to South Dakota at the time of the hearing on her request to do so. I also agree with the majority that there is no evidence of bad faith on the part of Rebecca. That said, I cannot agree that the district court abused its discretion in denying her request to remove the child from this state.

The crux of my position was aptly stated by the trial judge as a preface to his ruling from the bench when he remarked, "Well, this is a painfully close case." My review of the record leads me to precisely the same conclusion. The record discloses two fit, loving, and devoted parents. Both have played active roles in their daughter's life, and each recognizes the importance of the other in her continuing development. Were either of the parties lesser parents, this would be an easier case to judge. However,

the admirable qualities exhibited by each parent make it an extremely difficult one.

Because a legitimate reason for the relocation was established, the case turns on the "best interests of the child" analysis. Citing *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002), the majority frames the issue as whether the custodial parent can "demonstrate that it is in the child's best interests *to continue living with him or her*." (Emphasis supplied.) While this is an accurate statement of what we said in *Vogel* and other cases, I think it misstates the "best interests" issue under the facts of this case. Rebecca testified that if she is not granted permission to relocate to South Dakota, she and her new family would live in Nebraska with the child. At trial, Chadd only requested that the court deny Rebecca leave to relocate the child and did not ask the court to award custody to him. Thus, the child will continue to live with Rebecca whether or not Rebecca is given leave to relocate. The issue as presented to the district court was whether, on the basis of all relevant factors, it is in the best interests of the child to move to South Dakota *with Rebecca* or continue residing *with Rebecca* in Nebraska. The guardian ad litem correctly perceived this issue in arriving at his recommendation that the application for relocation be disallowed. The expert who testified on behalf of Rebecca seems to have missed the point when he opined that it would be in the best interests of the child "to move to South Dakota and maintain contact with her — primary contact with her custodial parent, her mother." This opinion ignores the fact that the child will have "primary contact" with Rebecca as the custodial parent regardless of whether she lives in Nebraska or South Dakota. The continuing integrity of the maternal bond is simply not an issue in this case.

As I read the record, there is credible evidence on each side of the issue. The move to South Dakota holds the promise of certain benefits to the child in that she would live in a larger house and stands to benefit in other ways from the economic opportunities anticipated by Clayton in his new employment. Also, if such opportunities are realized, Rebecca would be able to stay home with her children instead of working to supplement the family income, an arrangement which she and her expert witness believe will be beneficial to the child. It is also true that

the distance between Omaha and Huron, South Dakota, is not so great that it would absolutely preclude regular visitation; as the majority correctly notes, this distance is no greater than some intrastate relocations which would not require court approval.

On the other hand, the guardian ad litem for the child recommended that the court not allow the relocation because the potential benefits to the child did not outweigh the negative effect of separation from Chadd. Rebecca admitted that the move would make it virtually impossible for Chadd to participate in his daughter's school activities. She also admitted that under the biweekly visitation schedule she proposed in the event of relocation, her daughter would spend 9 hours every other weekend traveling by automobile between Rebecca's home in South Dakota and Chadd's home in Nebraska. The evidence also establishes that the child's extended family resides in Nebraska.

Based upon my de novo review of the record, I would conclude that in taking their respective positions in this case, each parent is sincerely motivated by what he or she genuinely believes to be in the best interests of their child. The proposed relocation would improve the child's quality of life in some respects as a result of the improved economic opportunities for Clayton and Rebecca's plan to stay home with her children, but the child's quality of life would be negatively impacted by the long biweekly commute for visitation and the diminished opportunity for interaction with her extended family. While the relocation would not completely eliminate the opportunity for regular visitation by Chadd, it would drastically alter the nature and frequency of the visitation he has exercised to date. Weighing these factors in order to determine whether to permit Rebecca to relocate with the child is a difficult task. Where, as in this case, there are no absolutes and no clearly right or clearly wrong answers, it is particularly important to bear in mind that our standard of review requires an appellate court to give deference to the discretion of the trial judge, who observed the demeanor of the witnesses as he or she heard their testimony. In order to reverse on the basis of an abuse of discretion, we must be able to state that the decision of the district court is untenable and unfairly deprives a litigant of a substantial right or a just result. I cannot reach that conclusion on this record. Finding no abuse of discretion, I would affirm.

JOHN WAYS, JR., APPELLANT, V. DAVE SHIVELY, ELECTION COMMISSIONER, AND GARY LACEY, COUNTY ATTORNEY, APPELLEES.

646 N.W.2d 621

Filed July 5, 2002. No. S-01-382.

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, correct conclusion irrespective of the decision made by the court below.
2. ____: ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
3. **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.
4. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel 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 the law.
5. **Mandamus: Proof.** In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.
6. **Constitutional Law: Voting.** The right to vote is a civil right, and the restoration referred to in Neb. Const. art. VI, § 2, is the restoration of the right to vote.
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.
8. **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.
9. **Statutes.** To the extent that there is a conflict between two statutes on the same subject, the specific statute controls over the general.
10. **Constitutional Law: Criminal Law: Statutes: Voting.** The purpose of Neb. Rev. Stat. § 29-112 (Reissue 1995), as evident from its plain language, is to provide the mechanism by which a felon's right to vote is restored.

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

Robert Wm. Chapin, Jr., for appellant.

Gary Lacey, Lancaster County Attorney, Michael E. Thew, and Douglas D. Cyr for appellees.

Don Stenberg, Attorney General, and Laurie Smith Camp for amicus curiae State of Nebraska.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellant, John Ways, Jr., brought this action seeking a writ of mandamus compelling appellee, Dave Shively, election commissioner of Lancaster County, Nebraska, to permit Ways to register to vote. The district court for Lancaster County denied Ways' petition for writ of mandamus and dismissed the petition. Ways has been convicted of a felony and is, therefore, not qualified to vote under Neb. Const. art. VI, § 2. Because Ways' right to vote has not been restored under Neb. Rev. Stat. § 29-112 (Reissue 1995), Ways has failed to show that he is entitled to vote and that Shively has a clear legal duty to permit Ways to register to vote. We affirm.

STATEMENT OF FACTS

The relevant facts are not in dispute. Ways is a felon who was discharged from the Nebraska State Penitentiary in June 1998 after completing his sentences for the crimes of pandering, carrying a concealed weapon, and attempting to possess a controlled substance. Upon his release from custody, Ways was provided a certificate of discharge from the Department of Correctional Services, which provided, inter alia, as follows:

> This document shall be evidence to all persons that the above captioned individual is finally discharged and restored all his/her civil rights, as provided by law, effective this 24th day of June, 1998.
>
> The issuance of this Certificate of Discharge does not restore to the above captioned individual his/her right to bear firearms.

Following his release, Ways attempted to register to vote at the Lancaster County election commissioner's office. Shively

refused to allow Ways to register to vote, citing to § 29-112, which provides:

> Any person sentenced to be punished for any felony, when sentence shall not have been reversed or annulled, shall be deemed incompetent to be an elector or juror, or to hold any office of honor, trust, or profit within this state, unless such convict shall receive from the Board of Pardons of this state a warrant of discharge, in which case such convict shall be restored to his civil rights and privileges; *Provided*, such warrant of discharge shall not release such convict from the costs of his conviction, unless otherwise ordered by the Board of Pardons.

On February 27, 2001, Ways filed a petition for writ of mandamus, seeking a writ compelling Shively to permit Ways to register to vote. The petition was filed in the Lancaster County District Court. The district court scheduled a show cause hearing for February 28, ordering Shively to show cause why he ought not be compelled to permit Ways to register to vote in Lancaster County.

On February 28, 2001, the parties appeared at the show cause hearing. In support of his petition, Ways claimed that Shively's refusal to permit him to register to vote violated Neb. Rev. Stat. § 83-1,118(5) (Reissue 1999), which provides: "Whenever any committed offender has completed the lawful requirements of the sentence, the director [of the Department of Correctional Services] shall issue a certificate of discharge to the offender, and the certificate shall restore the civil rights of the offender."

Shively responded that as a result of Ways' felony conviction, the sentence for which had neither been reversed nor annulled, Ways had lost his right to vote and the only method by which Ways' right to vote could be restored was through a warrant of discharge issued by the Board of Pardons pursuant to the specific provisions in § 29-112. It is undisputed that no warrant of discharge had been issued. In further argument in response to Ways' claim, Shively stated that the rights encompassed by the certificate referred to under § 83-1,118(5) would be such "civil rights" as the right to "liberty" and the right to travel but that such rights did not include the right to vote. In sum, Shively claimed that Ways did not have the right to vote and that Shively was not under

any duty to permit Ways to register to vote. Shively requested that the district court deny Ways' petition for writ of mandamus.

The district court agreed with Shively's reasoning. On March 1, 2001, the district court entered an order denying Ways' request for writ of mandamus and dismissing his petition. Ways appeals.

ASSIGNMENT OF ERROR

On appeal, Ways assigns one error. Ways claims the district court erred in concluding that § 29-112 controlled and in finding that Ways' voting rights had not been restored and dismissing his petition for writ of mandamus.

STANDARDS OF REVIEW

[1,2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002); *In re Interest of S.B.*, 263 Neb. 175, 639 N.W.2d 78 (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. *Chambers v. Lautenbaugh, supra*.

ANALYSIS

Constitutional Claim Not at Issue.

As an initial matter, we note that the Attorney General's office has filed an amicus brief in this appeal on behalf of the State of Nebraska, asking that the district court's order be affirmed. The State argues, in part, that "[t]o the extent § 83-1,118(5) purports to restore to a convicted felon any civil rights which a felon forfeits by operation of statute or constitution," § 83-1,118(5) violates the Nebraska Constitution's separation of power provision found at art. II, § 1. Brief for amicus curiae at 1. The State argues that under Neb. Const. art. IV, § 13, a separate Board of Pardons within the executive branch has been established, which board is solely authorized to "remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment."

[3] The constitutional issue raised by the State as amicus curiae on appeal was neither presented nor ruled on in the district 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. *In re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002). Accordingly, we do not consider the constitutional issue raised by the State.

Requirements for Issuance of Writ of Mandamus.

[4] We have recently stated:

> Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel 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 the law. . . . 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.

Sydow v. City of Grand Island, 263 Neb. 389, 400, 639 N.W.2d 913, 922-23 (2002). See, also, *State ex rel. AMISUB v. Buckley*, 260 Neb. 596, 618 N.W.2d 684 (2000); *State ex rel. Cherry v. Burns*, 258 Neb. 216, 602 N.W.2d 477 (1999).

[5] In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *State ex rel. AMISUB, supra*. Accordingly, Ways has the burden in the present case to demonstrate that he was entitled to register to vote and that Shively was legally obligated to permit him to register to vote.

Ways Has No Clear Right to Register to Vote, and Shively Has No Duty to Permit Ways to Register to Vote.

[6] Ways was convicted of a felony and lost his right to vote under Neb. Const. art. VI, § 2, which provides: "No person shall

be qualified to vote . . . who has been convicted of [a] felony under the laws of the state or of the United States, unless restored to civil rights." The right to vote is a civil right, *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), and the restoration referred to in Neb. Const. art. VI, § 2, is the restoration of the right to vote. Restoration of the right to vote is implemented through statute.

[7-9] The parties rely on different statutory provisions. This appeal presents a question of statutory construction. 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. *Heathman v. Kenney*, 263 Neb. 966, 644 N.W.2d 558 (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. *Id.* Furthermore, to the extent that there is a conflict between two statutes on the same subject, the specific statute controls over the general. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). We have stated that " ' "[w]here general and special provisions of the statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same . . . ." ' " *Nebraska Equal Opp. Comm. v. State Emp. Retirement Sys.*, 238 Neb. 470, 472, 471 N.W.2d 398, 400 (1991).

When an offender convicted of a felony completes the requirements of his or her sentence, a certificate of discharge is issued to the offender by the Department of Correctional Services. We observe that by its terms, the "civil rights" restored by the certificate of discharge are only those civil rights "as provided by law." Section 83-1,118(5) authorizing the issuance of the certificate of discharge, uses the phrase "civil rights" but does not enumerate the rights included within such phrase. In particular, the statute does not address the restoration of the right to vote. Nevertheless, Ways claims that when the certificate of discharge was issued to him pursuant to § 83-1,118(5) in June 1998, the right to vote was one of the "civil rights" restored to him, and accordingly, Shively was obligated to permit Ways to register to vote. We do not agree.

[10] Ways' reliance on § 83-1,118(5), which refers to "civil rights" without specification, ignores § 29-112, which is the statutory provision directly addressing restoration of a felon's right to vote. Under § 29-112, a felon whose sentence has not been reversed or annulled may not vote "unless such convict shall receive from the Board of Pardons of this state a warrant of discharge." The purpose of § 29-112, as evident from its plain language, is to provide the mechanism by which a felon's right to vote is restored. Comparing §§ 83-1,118(5) and 29-112, it is clear that § 29-112 is the more specific statute relative to the restoration of a felon's right to vote, and, therefore, the specific statute, § 29-112, must control the conditions under which a felon's right to vote is restored.

There is no dispute that Ways' felony sentence has not been reversed or annulled and that Ways has not received a warrant of discharge from the Board of Pardons. Thus, we conclude as a matter of law that pursuant to § 29-112, the specific right to vote was not restored to Ways upon his discharge from incarceration at the completion of his sentences. The certificate of discharge issued under § 83-1,118(5) did not restore Ways' right to vote. See, generally, *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991) (concluding, inter alia, that specific language of Neb. Rev. Stat. § 83-1,130(2) (Reissue 1987), which provided that Board of Pardons could restore right to possess firearms to person convicted of felony, controlled over more general language of Neb. Rev. Stat. § 29-2264 (Reissue 1989), which provided that upon completion of probation, convicted person's civil rights were restored, and, therefore, absent Board of Pardon's restoration of right to bear arms, person previously convicted of felony could be convicted of being felon in possession of firearm, in violation of Neb. Rev. Stat. § 28-1206(1) (Reissue 1989)). Ways did not have the right to vote restored, and Shively was not required to permit Ways to register to vote. The district court's order was correct.

CONCLUSION

Ways was convicted of a felony and, therefore, not qualified to vote. His sentence was not reversed or annulled. The Board of Pardons has not issued a warrant of discharge. Because Ways'

right to vote has not been restored under § 29-112, Shively did not have a clear duty to permit Ways to register to vote. The district court did not err in denying Ways' petition for writ of mandamus. We, therefore, affirm the district court's order denying Ways' petition for writ of mandamus and dismissing the petition.

AFFIRMED.

JOHN M. BURK ET AL., APPELLANTS, V.
MARILYN M. DEMARAY ET AL., APPELLEES.

646 N.W.2d 635

Filed July 5, 2002. No. S-01-395.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
4. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
5. **Deeds: Acknowledgments: Public Policy: Presumptions: Proof.** Public policy forbids that deeds and mortgages of real estate, duly authenticated in the mode pointed out by statute, should be set aside except upon clear and convincing proof that the certificate of acknowledgment is false. The presumption is in favor of the certificate, and the burden is upon the party alleging such a defense to prove it.
6. **Deeds: Forgery.** A forged deed is void and will not pass title for any purpose to the grantee or those who take under the grantee.
7. **Adverse Possession.** In order to tack the possession of predecessors in title for the purpose of establishing adverse possession, the predecessor occupant's possession must have been adverse to the true owner.
8. **Adverse Possession: Proof: Time.** A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years.

9. **Adverse Possession.** It is the visible and exclusive possession with intention to possess the land occupied under the belief that it belongs to him or her that constitutes its adverse character.
10. **Adverse Possession: Fraud.** If the possessor has committed fraud against the true owner to obtain title, he or she has no claim of right or ownership against the true owner unless the owner has reason to know of the possessor's malfeasance and fails to take action to protect his or her interests.
11. ____: ____. Proof of a possessor's actual fraud negates the adverse character of his or her possession.

Appeal from the District Court for Holt County: WILLIAM B. CASSEL, Judge. Reversed and remanded for further proceedings.

James G. Egley, of Moyer, Moyer, Egley, Fullner & Warnmunde, for appellants.

James D. Gotschall, of Strope, Krotter & Gotschall, P.C., for appellees.

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

CONNOLLY, J.

This is an appeal from a district court's order quieting title in the appellees, Gary Bartak and Mary Bartak (the Bartaks) to a quarter section of farmland in Holt County, Nebraska. Appellants John M. Burk (John), Barbara A. Burk King (Barbara), and her husband, Robert L. King (Robert) (collectively the Burk heirs), filed a petition asking the court to quiet title in them to their four-ninths interest in the property. The court found that the Bartaks were the owners of the property through adverse possession and dismissed the Burk heirs' petition with prejudice. The Bartaks obtained title from Marilyn M. Demaray (Marilyn), and her husband, Louis Eugene Demaray (Gene) (collectively the Demarays).

The Burk heirs alleged that deeds purporting to convey John and Barbara's property interests to their mother, Marilyn, were forged. Marilyn died before the hearing.

The trial court found that the Bartaks were entitled to summary judgment based on adverse possession regardless of whether the deeds were forged. We determine that there are genuine issues of material fact whether the deeds were forged and

that the parties' rights cannot be determined until the forgery issue is decided. We reverse, and remand for further proceedings.

BACKGROUND

On March 22, 2000, the Burk heirs filed suit to quiet title against the Demarays, the Bartaks, and all other persons claiming an interest in the property. They alleged that John and Barbara had inherited their interests while they were minors and had never been told of their inheritance. They also alleged that their interests were fraudulently conveyed to Marilyn through forgeries and that the Demarays had then conveyed the property to the Bartaks. They prayed for the court to quiet title in them for their combined four-ninths interest and provide any further relief as equity may require.

Gene filed an answer in which he generally denied the allegations. The Bartaks, in their amended answer and counterclaim, alleged that they were innocent good faith purchasers for value. They also alleged that they had become the owners of the property because they and their predecessors in title had maintained an actual, continuous, notorious, and adverse possession of the real estate for a period of 10 years. Finally, they alleged that the claimed forged deeds had been recorded for more than 22 years before the filing of the petition and that they were therefore entitled to rely upon the validity of the deeds under Neb. Rev. Stat. §§ 76-258, 76-288, and 76-289 (Reissue 1996). They also asked that the court quiet title in them.

The Bartaks moved for summary judgment asserting that they were entitled to judgment as a matter of law under Nebraska's curative statutes and adverse possession. The evidence submitted at that hearing showed the following facts:

John and Barbara are the surviving children of Marilyn and Patrick J. Burk (Patrick). Their sister, Linda LaRue (Linda), died in the 1980's. Patrick died intestate in May 1961. The final decree in the probate proceeding for his estate gave each of his three minor children a two-ninths interest in a quarter section of property that Patrick had acquired in 1959. John was about 9 years old when Patrick died, and Barbara was 4 years old.

In February 1978, two quitclaim deeds were filed with the register of deeds in Holt County. The first deed was signed and

notarized in November 1972 and conveyed Barbara's interests in the property to Marilyn, who was then Marilyn Petersen. Barbara was 19 years old at that time. The second deed was signed and notarized on February 27, 1978, the same day that both of the deeds were recorded. The second deed conveyed the interests of John and Linda and their spouses to Marilyn, who was then Marilyn Demaray. Both conveyances were made "in consideration of LOVE, AFFECTION AND ONE DOLLAR."

At some point after 1978—the deed is not in the record—Marilyn, alone or with Gene, sold the property to Schmiser Farms, Inc. (Schmiser). According to Barbara, Schmiser filed for bankruptcy and deeded the land back to the Demarays. The record does contain a quitclaim deed, dated March 1, 1984, in which Schmiser conveyed the property back to the Demarays for $1. The Bartaks stated in affidavits that in March 1989, the Demarays began leasing the property to them. The Demarays conveyed the property to the Bartaks in a warranty deed for $150,000, which was signed and dated March 28, 1990. The Bartaks made their last payment to Marilyn in 1999 and recorded the deed in April 1999. John and Barbara both testified that they knew that Marilyn had sold the property to the Schmisers and the Bartaks.

In 1999, Marilyn became ill and spent several weeks in the hospital. She needed nursing home care, and in July, while she was still hospitalized, she asked some of her family members to go through her personal papers to look for documentation that she might need. Barbara, Barbara's daughter, and Marilyn's brother went to her home in Grand Island for that purpose. It was during this search that they discovered copies of the quitclaim deeds purporting to convey the children's property interests to Marilyn. Marilyn's brother gave a copy of the deed to John.

John testified that Marilyn had never asked him to convey his ownership interests to her. In October 1999, John went to the courthouse to do research after Marilyn's brother gave him a copy of the deed. He discovered that he, Barbara, and Linda had each received a two-ninths interest in Patrick's property and that the quitclaim deeds had been recorded. The record reflects that a guardian ad litem was appointed for the children in Patrick's probate proceeding. John and Barbara testified, however, that

they had been unaware of the appointment, that no one had told them of their ownership interests, and that they had no knowledge of their interests before July 1999. John stated that until that time, he and Barbara had assumed the property had been left to Marilyn.

Dorothy Sojka, the notary public who notarized the 1972 quitclaim deed purportedly conveying Barbara's interests to Marilyn testified by deposition. Although she did not remember the deed, she remembered that Marilyn and Barbara came into the bank where she worked to have the deed notarized. The notary seal is not clearly legible, but she stated that her seal might not have penetrated. She stated that she had known Marilyn for 30 to 40 years and, therefore, did not check her identity with a driver's license. She admitted that she might not have known Barbara on sight at that time, and she did not state that she asked Barbara for identification.

Florence Ponton, the notary public who notarized the 1978 quitclaim deed, died before this action was commenced. John stated that he had known Florence well because she prepared his tax returns for many years, but he did not know her signature. He did not know of any reason that would account for her notarizing a signature that was not his.

Barbara testified that her signature on the 1972 quitclaim deed was a forgery. John testified that he knew the handwriting of the other people who purportedly signed the 1978 quitclaim deed and that his signature and the other signatures were forgeries. John's ex-wife also testified that her signature and the other signatures on the 1978 deed were forgeries. John and Barbara both believed that Marilyn had forged the deeds.

Neither John nor Barbara confronted Marilyn about the deeds. Barbara testified that she asked Marilyn about her financial status numerous times, but Marilyn would never discuss these matters. John stated that he had not been on speaking terms with Marilyn for 3 to 4 years before her illness. Marilyn died on June 16, 2000. The record does not reflect the content of a will or probate of her estate.

After the hearing, the court rendered its judgment in a written interlocutory order. The court found that the Bartaks conceded that there was a genuine issue of fact whether the 1972 and 1978

quitclaim deeds were forged and that, therefore, they could prevail only if they were entitled to judgment despite any forgeries. The court found that under § 76-288, to extend the chain of title back the required 22 years, the fraud claims had to be considered. Because claims of marketable record title are subject to claims or defects of title based on fraud, the court determined that § 76-288 provided no basis of relief for the Bartaks. The court further found that a forged deed could not be cured under § 76-258 because it was not a " 'defect, irregularity or omission.' " The Bartaks have not cross-appealed on these issues.

Finally, the court considered the Bartaks' claim of adverse possession. The court found that the Bartaks were bona fide purchasers for value without notice of the forgeries. The court further found that the Bartaks had satisfied all of the requirements for adverse possession since the time they became owners of the property on March 28, 1990. Because the petition was filed on March 22, 2000, however, the court found that the time of possession was short of the statutory period of 10 years. The court found, however, that the Bartaks were entitled to tack their possession to the Demarays' possession, as their predecessors in title.

Because John and Barbara admitted that they knew Marilyn had sold the property to Schmiser, the court found that the sale constituted an ouster sufficient to put them on notice of Marilyn's hostile possession. Although the deed evidencing the date of the sale to Schmiser was not in the record, the deed conveying the property back to the Demarays on March 1, 1984, was recorded and in the record. The court concluded that John and Barbara were given constructive notice of the hostile character of Marilyn's possession as of that date.

The court found that under Nebraska law, cotenants' ignorance of their property rights would not prevent the statute of limitations from running when they had actual or constructive knowledge of an ouster, in the absence of fraudulent concealment or misrepresentation. The court found that viewed in the light most favorable to the Burk heirs, there was no genuine issue as to any material fact regarding fraudulent concealment or misrepresentation. The court reasoned that because both John and Barbara had attained the age of majority when the alleged forgeries were committed, "whatever duty Marilyn might have owed to a minor

child had terminated. Thus, Marilyn had no duty to disclose the children's ownership interest." Because she had no duty to disclose their ownership interests, the court found that the evidence did not show concealment. The court also found that John and Barbara did not show that Marilyn had made any fraudulent misrepresentations to them regarding their interests. Under these facts, the court concluded that "Nebraska law, through the concept of adverse possession . . . values the defendants' rights over the wrong allegedly done to the plaintiffs."

The court dismissed the petition as to all defendants. After the Bartaks entered a motion to voluntarily dismiss their counterclaim without prejudice, a final order was entered quieting title to the property in the Bartaks. The Burk heirs appealed.

ASSIGNMENTS OF ERROR

The Burk heirs assign, restated and condensed, that the district court erred in (1) determining that the period of possession by the Demarays could be tacked to the period of possession by the Bartaks to satisfy the requirements for adverse possession, (2) finding that there was no evidence of fraudulent concealment by Marilyn because she had no duty to disclose her adult children's inheritance from Patrick, and (3) failing to find that the governing statute of limitations was Neb. Rev. Stat. § 25-207(4) (Reissue 1995) instead of Neb. Rev. Stat. § 25-202 (Reissue 1995).

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id*.

[3,4] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Reisig v. Allstate Ins. Co., ante* p. 74, 645 N.W.2d 544

(2002). 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

The Burk heirs contend that the period of possession by the Demarays could not be tacked to the period of possession by the Bartaks to satisfy the 10-year time requirement for adverse possession. They argue that tacking should not be permitted because the Demarays' possession was predicated upon fraudulent concealment, misappropriation, and forgery.

[5] The Bartaks conceded at the hearing that there were genuine issues of fact whether the signatures were forged. Although only the Burk heirs adduced evidence on the issue of forgery, there is a presumption favoring the validity of notarized deeds which creates an issue of fact to be resolved.

> " ' "Public policy forbids that deeds and mortgages of real estate, duly authenticated in the mode pointed out by statute, should be set aside except upon clear and convincing proof that the certificate of acknowledgment is false. The presumption is in favor of the certificate, and the burden is upon the party alleging such a defense to prove it." . . . ' "

Gaeth v. Newman, 188 Neb. 756, 766, 199 N.W.2d 396, 403 (1972); *Kucaba v. Kucaba*, 146 Neb. 116, 18 N.W.2d 645 (1945).

[6] The court correctly determined that a forged deed is void and will not pass title for any purpose. See, *Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes*, 207 Neb. 44, 295 N.W.2d 711 (1980); *Lindsay v. Palmer*, 58 Neb. 168, 78 N.W. 371 (1899). This is true not only as to the grantee, but also to those who take under the grantee. See *Martin v. Harvey*, 89 Neb. 173, 130 N.W. 1039 (1911) (affirming directed verdict for defendant in ejection action when evidence was sufficient to show forged deed in plaintiff's chain of title). In general, courts hold that a forged deed will not pass title even to an innocent, good faith purchaser for value. See, e.g., *Wutzke v. Bill Reid Painting Service, Inc.*, 151 Cal. App. 3d 36, 198 Cal. Rptr. 418 (1984); *Moore v. Smith-Snagg*, 793 So. 2d 1000 (Fla. App. 2001); *VanderWall v Midkiff*, 166 Mich. App. 668, 421 N.W.2d

263 (1988); *Prater v. Prater*, 208 Miss. 59, 43 So. 2d 582 (1949); *Yin Wu v. Wu*, 288 A.D.2d 104, 733 N.Y.S.2d 45 (2001). See, also, 14 Richard R. Powell & Michael Allan Wolf, Powell on Real Property § 82.02[1][e][i] (2002) (forged deeds are an exception to the general rule that good faith purchasers are protected by recording acts from claims of which they have no notice); 23 Am. Jur. 2d *Deeds* §§ 162 and 164 (2002).

The court, however, found that the Bartaks were entitled to summary judgment even if the deeds were forged based on the tacking of the Demaray's possession. But this conclusion is not correct if the deeds were forged, which—in this case—presents a genuine issue of material fact.

[7] The court correctly determined that the Bartaks' period of possession before this action was commenced was 7 days short of the 10-year statutory period. See *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998). The court found, however, that the Bartaks were entitled to tack their possession to the Demarays' possession as their predecessors in title. For the Bartaks to tack their period of possession to the Demarays' possession, the Demarays' possession must have been adverse to John and Barbara also. See *Bartlett v. Kloepping*, 195 Neb. 755, 240 N.W.2d 592 (1976).

The court found that Marilyn's sale of the property to Schmiser constituted an ouster sufficient to put John and Barbara on notice of the hostile character of Marilyn's possession. Thus, the court found that Marilyn's possession was adverse against her adult children as cotenants, from the earliest date in the record evidencing that conveyance. That date was March 1, 1984, when Schmiser deeded the property back to the Demarays. But if Marilyn had forged the deeds, then she obtained no rights to John and Barbara's property interests, and her conveyance to Schmiser could not convey their interests. See *Martin v. Harvey, supra*.

[8] Also, a party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession *under a claim of ownership* for the statutory period of 10 years. *Wanha v. Long, supra*. Marilyn could not assert a claim of ownership against her children if she had defrauded them of their property interests.

[9,10] A possessor may be mistaken in a claim of ownership. *McCain v. Cook*, 184 Neb. 147, 165 N.W.2d 734 (1969). Title may be acquired by adverse possession though the claim of ownership was invalid and the occupant believed he was asserting only legal rights. See *Wanha v. Long, supra*. But "it is the visible and exclusive possession with intention to possess the land occupied *under the belief that it belongs to him* that constitutes its adverse character." (Emphasis supplied.) *Id*. at 860, 587 N.W.2d at 540. If the possessor commits fraud against the true owner to obtain title, he or she has no belief that the property belongs to him or her. Thus, the possessor has no claim of right or ownership against the true owner unless the owner has reason to know of the possessor's malfeasance and fails to take action to protect his or her interests. See *Bell v. Dingwell*, 91 Neb. 699, 136 N.W. 1128 (1912) (requiring mother and her husband to account to her adult children for fraudulently obtaining deed in her name only and omitting children's interests in their deceased father's estate when children did not discover the fraud until 4 years after the youngest child reached age of majority and despite mother's claim of adverse possession).

Further, if Marilyn forged the deeds, her fraudulent conduct would result in the imposition of a constructive trust. See *Waite v. Cornette*, 259 Neb. 850, 856, 612 N.W.2d 905, 911 (2000) ("constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property"). Cotenancy alone does not create a fiduciary relationship as to the property owned by the cotenants; but if one cotenant has possession of property or funds belonging to the other cotenant, he or she becomes trustee thereof and stands in fiduciary relationship to a cotenant with respect thereto to the extent of the interest of the cotenant who may compel an accounting. *Hafeman v. Gem Oil Co*., 163 Neb. 438, 80 N.W.2d 139 (1956).

As a constructive trustee, she could not possess the property adverse to her children's interests unless they had reason to know of her conduct and failed to take action to protect their interests. See *Waite v. Cornette, supra*. See, also, *Adams v. Adams*, 512 So. 2d 1150 (Fla. App. 1987) (cotenants' fraudulent scheme to obtain title through tax sale resulted in constructive trust for other

cotenants); *Tanner v. Tanner*, 698 S.W.2d 342 (Tenn. 1985) (father who fraudulently obtained deed to property he had previously conveyed to his ex-wife in dissolution for benefit of his children became constructive trustee and could not hold adverse to his children's interests despite his open declaration to do so). Compare *Giacomini v. Giacomini*, 163 Neb. 798, 807, 81 N.W.2d 194, 199 (1957) (" 'a personal representative who takes possession of property in his fiduciary capacity is generally estopped to deny the title of his decedent or to set up an adverse title to the injury of those beneficially interested in the estate' ").

[11] Proof of Marilyn's actual fraud would negate the adverse character of her possession against her children. Thus, the Bartaks could not tack their period of possession to the Demarays' possession.

In light of this holding, we need not discuss the Burk heirs' remaining assignments of error.

CONCLUSION

We conclude that the district court erred in granting summary judgment to the Bartaks on their claim of adverse possession when the Bartaks could not satisfy the statutory period for adverse possession without tacking to the Demarays' possession. Because genuine issues of material fact exist on whether the quitclaim deeds filed with the register of deeds in 1978 were forged and the court made no findings regarding the forgeries, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JUDITH K. COLLINS, PERSONAL REPRESENTATIVE OF THE ESTATE OF EDWIN P. HENNINGS, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

646 N.W.2d 618

Filed July 5, 2002. No. S-01-401.

1. **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.

2. **Tort Claims Act: Time.** The reasoning of *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996), and *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991), concerning the time to file an action after the claimant has withdrawn the claim from the State Claims Board does not apply to claims that were decided by the State Claims Board.
3. **Tort Claims Act: Public Officers and Employees: Limitations of Actions: Notice.** Under Neb. Rev. Stat. §§ 81-8,213 and 81-8,227(1) (Reissue 1996), a claimant who files a tort claim with the Risk Manager of the State Claims Board 18 months or more after his or her claim has accrued, but within 2 years as provided by § 81-8,227(1), has 6 months to file suit from the date the board gives written notice to the claimant as to the final disposition of the claim.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Reversed and remanded for further proceedings.

David Geier for appellant.

Don Stenberg, Attorney General, and Vicki L. Boone-Lawson for appellee.

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

CONNOLLY, J.

This case involves the interplay between Neb. Rev. Stat. §§ 81-8,213 and 81-8,227(1) (Reissue 1996). These statutes pertain to the time in which claims must be filed with the State Claims Board and the effect of the filing of a claim on the 2-year statute of limitations for filing an action in the district court.

We hold that when a claimant files a claim with the claims board within 2 years from the date the claim accrued and allows the claims board to reach a determination on the claim, the claimant has 6 months to file suit from the date of mailing of notice as to the final disposition of the claim. To the extent *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996), and *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991), indicate a different rule, they are overruled.

BACKGROUND

On November 29, 2000, Judith K. Collins, the appellant and personal representative of the estate of Edwin P. Hennings, filed a petition against the appellee, the State of Nebraska. She alleged that on November 7, 1997, Hennings died as a result of

negligence of the State. She alleged that on November 1, 1999, she filed a claim with the State Claims Board and that the claims board rejected the claim on June 21, 2000.

The State filed a demurrer alleging that the court lacked subject-matter jurisdiction and that the petition failed to state sufficient facts to constitute a cause of action. The district court sustained the demurrer, holding that the action was barred by the 2-year statute of limitations. The court found that the time period to file an action was not extended when it was filed within 6 months of the denial of the claim by the claims board, but more than 6 months after the claim could have been withdrawn. The court relied on this court's decision in *Hullinger*. In *Hullinger*, we held that when a claim has been withdrawn from the State Claims Board, the time in which to file a petition runs from the date the claim could have been withdrawn instead of when it was actually withdrawn. The court applied the reasoning of *Hullinger* and dismissed the petition with leave to amend. Collins filed an amended petition, and the State filed a demurrer. The district court sustained the demurrer and dismissed the action. Collins appeals.

ASSIGNMENT OF ERROR

Collins assigns, rephrased, that the district court erred in dismissing her petition.

STANDARD OF REVIEW

[1] 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. *Ottaco, Inc. v. McHugh*, 263 Neb. 489, 640 N.W.2d 662 (2002).

ANALYSIS

Collins contends that when a claim filed with the State Claims Board is not actually withdrawn, the time period to file suit in district court is within 6 months from the date the claims board denies the claim. She argues that our decisions in *Hullinger v. Board of Regents, supra*, and *Coleman v. Chadron State College, supra*, are distinguishable because those cases involved claims that had been withdrawn from the State Claims Board. In the alternative, she argues that *Hullinger* and *Coleman* should be reversed.

Section 81-8,213 provides:

> No suit shall be permitted under the State Tort Claims Act unless the State Claims Board has made final disposition of the claim, except that if the board does not make final disposition of a claim within six months after the claim is made in writing to the board, the claimant may, by notice in writing, withdraw the claim from consideration of the board and begin suit under such act.

Section 81-8,227(1) 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 *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991), we first addressed the interplay between §§ 81-8,213 and 81-8,227. Coleman filed a claim with the State Claims Board in the 22d month after his claim had accrued. Because § 81-8,213 requires that a claim must remain with the State Claims Board at least 6 months before the claim can be withdrawn, Coleman was prevented from filing suit before the 2-year statute of limitations ran. Coleman withdrew the claim approximately 31 months after it had accrued. The district court granted Chadron State College's motion for summary judgment, concluding that the action was time barred.

On appeal, we looked at the legislative history and determined that the Legislature intended the period of limitation for filing an action in court under the State Tort Claims Act to be 2 years. We then noted that under § 81-8,213, a claim had to be filed with the State Claims Board but could not be withdrawn for 6 months. Thus, any claim filed over 18 months after the cause of action accrued could still be pending before the State Claims Board when the 2-year period for filing in district court had run. Interpreting §§ 81-8,213 and 81-8,227, we held that

> a claimant who files a tort claim with the Risk Manager of the State Claims Board 18 months or more after his or her claim has accrued, but within the 2-year statute of limitations, has 6 months from the first day on which the claim may be withdrawn from the claims board in which to begin suit.

237 Neb. at 501, 466 N.W.2d at 533. We then stated:

> This interpretation ensures that effect is given to the legislative intent embodied in §§ 81-8,213 and 81-8,227 and that both are applied in a consistent and commonsense fashion. Furthermore, fourth-quarter claimants are given the same opportunity as those who file earlier to withdraw their claim and file suit within 6 months thereafter.

Id.

In *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996), the claimant filed his claim with the State Claims Board 2 days before the 2-year time period ran. Over a year later, the claims board notified him that it would consider his claim. He then withdrew the claim and filed suit. The district court determined that the action was time barred. On appeal, Hullinger argued that § 81-2,213 extended his time to file in district court by 6 months from the date that his claim was withdrawn. We reaffirmed the interpretation set out in *Coleman* and disagreed with Hullinger's argument, stating:

> The interpretation Hullinger urges would allow a claimant to file a claim with the claims board just before 2 years after the accrual of the cause of action, wait however long until just before final disposition of the claim by the claims board to withdraw the claim, and then receive an additional 6 months in which to file suit in the district court.

249 Neb. at 873, 546 N.W.2d at 783.

Here, Collins filed her claim with the State Claims Board 6 days before the 2-year limitation period ran. May 1, 2000, was the date at which Collins could withdraw her claim, and November 1, 2000, was 6 months from that date. Collins, however, chose to allow the claims board to reach a determination. The claim was rejected on June 21, 2000, and December 21, 2000, was 6 months from that date. Collins filed her action in district court on November 29, 2000.

Under a strict interpretation of the rule set forth in *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991), and *Hullinger v. Board of Regents, supra*, Collins had 6 months from the first day on which her claim could have been withdrawn from the claims board in which to file suit. She failed to file suit within that time period. Collins contends, however, that her case is distinguished from *Coleman* and *Hullinger* because she did not withdraw her claim from the board and instead waited until her claim was denied. We agree.

In *Coleman* and *Hullinger*, our focus was on situations in which a claimant chose to withdraw a claim from the claims board. In particular, in *Hullinger*, we expressed concern that a claimant could allow a claim to remain undecided by the board for as long as possible as a way for the claimant to delay the filing of an action in district court. This reasoning does not apply when a claim has been decided by the claims board. When a claimant allows the claims board to reach a decision, any delay in the process is beyond the control of the claimant.

[2,3] Under the plain language of § 81-8,227, a claimant has 6 months to file suit after notice of the denial of the claim is mailed by the claims board. The reasoning of *Coleman* and *Hullinger* does not apply to claims that are decided by the claims board. Accordingly, we hold that a claimant who files a tort claim with the Risk Manager of the State Claims Board 18 months or more after his or her claim has accrued, but within 2 years as provided by § 81-8,227(1), has 6 months to file suit from the date the board gives written notice to the claimant as to the final disposition of the claim. To the extent *Coleman* or *Hullinger* indicate a different rule regarding claims that are decided by the claims board, they are overruled. Because Collins filed suit within 6 months after the claims board denied her claim, her suit was not time barred. Accordingly we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MATILDE LOPEZ, APPELLEE, V. IBP, INC., APPELLANT.

646 N.W.2d 628

Filed July 5, 2002. No. S-01-1281.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. **Workers' Compensation: Judgments: Time: Appeal and Error.** Neb. Rev. Stat. § 48-170 (Cum. Supp. 2000) is clear that any party who wishes to appeal the order of a single judge of the Nebraska Workers' Compensation Court shall file an application for rehearing before a three-judge panel within 14 days after the date of the single judge's order.
4. **Workers' Compensation: Final Orders: Time.** If a claimant does not file an application for a rehearing with the compensation court within 14 days after the date of the single judge's order, the order becomes conclusive and final.
5. **Negligence: Public Officers and Employees: Time: Appeal and Error.** The Nebraska Supreme Court has recognized an exception that allows an appellate court to consider an appeal filed after the statutorily prescribed time for appeal where the appellant was free from neglect and was prevented from having the appeal filed in the appellate court within the statutory period through the neglect or failure of the proper court official.
6. **Negligence: Principal and Agent: Public Officers and Employees: Appeal and Error.** If the negligence of the appellant or his agent concurs with that of a court official, it precludes an appeal.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and John M. Guthery, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Todd Bennett, of Rehm Bennett Law Firm, for appellee.

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

HENDRY, C.J.

INTRODUCTION

IBP, inc., appeals from the order of a three-judge review panel of the Nebraska Workers' Compensation Court, which dismissed IBP's application for review for lack of jurisdiction because it was not timely filed.

FACTUAL BACKGROUND

On June 3, 1999, Matilde Lopez filed a petition against IBP in the Workers' Compensation Court. A hearing was held, and on October 26, 2000, a single judge of the Workers' Compensation Court entered an award in favor of Lopez. IBP had until November 9 to file its application for review of the October 26 order because Neb. Rev. Stat. § 48-170 (Cum. Supp. 2000) provides, "Every order and award of a single judge of the Nebraska Workers' Compensation Court shall be binding upon each party at interest unless an application for review has been filed with the compensation court within fourteen days after the date of entry of the order or award."

On November 8, 2000, IBP's counsel sent, from Dakota City, Nebraska, IBP's application for review via United Parcel Service (UPS) next day air delivery. IBP directed UPS to deliver the document to " 'State of Nebraska, Workers' Compensation Court, State Capitol Building, Lincoln, Nebraska 68509-8908.' "

As of March 1, 2000, the clerk's office for the Workers' Compensation Court had been temporarily moved from the State Capitol Building to the Old Federal Building located at 129 North 10th Street in Lincoln, Nebraska, because the offices in the State Capitol Building were undergoing renovation. When UPS attempted to deliver IBP's application for review to the State Capitol at 9:53 a.m. on November 9, UPS was informed that the Workers' Compensation Court had been relocated. UPS did not determine the court's relocated address until 5:29 p.m. on November 9 and did not deliver IBP's application for review that day. UPS was not able to deliver IBP's application on Friday, November 10, because state offices were closed in observance of Veterans' Day, a legal holiday. It was not until Monday, November 13, that UPS delivered IBP's application for review to the clerk's office of the Workers' Compensation Court at its relocated address. The application was received and file stamped that same day.

On November 22, 2000, IBP filed a "Defendant's Motion to Accept Appeal as Timely" and Lopez filed a "Motion to Quash Appeal." On November 27, a hearing was held by a single judge of the Workers' Compensation Court regarding the motions filed by IBP and Lopez. On December 5, the single judge sustained

Lopez' motion and dismissed IBP's application for review for lack of jurisdiction. The judge determined that IBP's application for review was not filed within 14 days of the entry of the award as required by § 48-170.

On December 19, 2000, IBP appealed the December 5 order, arguing that the single judge erred in finding that the court did not have jurisdiction and in failing to refer the motions filed by IBP and Lopez to a three-judge review panel for its decision. Additionally, on January 2, 2001, IBP filed a "'protective appeal'" to the Nebraska Court of Appeals "because the [December 5] order purported to dismiss an application for review by a 3 member panel and was therefore arguably a final, appealable order." Brief for appellant at 6. On February 20, the Court of Appeals dismissed the appeal for lack of jurisdiction pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2000). See *Lopez v. IBP, inc.*, 9 Neb. App. lxiv (No. A-01-108, Feb. 20, 2001).

Thereafter, on May 22, 2001, a hearing was held before a three-judge review panel regarding the December 5, 2000, order. On June 1, 2001, the review panel determined that the single judge lacked jurisdiction to consider IBP's and Lopez' motions and to enter the December 5, 2000, order. The panel concluded that the motions should receive a hearing before a three-judge review panel.

A hearing was held before a three-judge review panel on August 29, 2001. The sole evidence presented at the hearing was exhibit 1, a stipulation by the parties as to the relevant facts. Exhibit 1 had several exhibits attached to it as follows: (1) a copy of the UPS shipping receipt dated November 8, 2000, for IBP's application for review, (2) a copy of an envelope and letter sent from the Workers' Compensation Court to IBP's counsel, (3) a copy of the relocation notice from the Workers' Compensation Court that was included with every mailing from the clerk of that court for several weeks before and after the court's relocation in March 2000, (4) copies of the call for the Workers' Compensation Court from March 22, 2000, through January 24, 2001, (5) a copy of the relocation notice which was posted on the Workers' Compensation Court Internet Web site, (6) a copy of the UPS tracking record for IBP's application for review, and (7) copies of a preface to the Nebraska Workers'

Compensation Act and Workers' Comp. Ct. R. of Proc. 1 and 2 (2000). On October 16, 2001, the review panel entered its order determining that it did not have jurisdiction over IBP's application for review because it was not timely filed. The panel dismissed IBP's appeal.

On November 2, 2001, IBP appealed to the Court of Appeals. We moved this case to our docket pursuant to our power to regulate the Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

IBP assigns, rephrased and summarized, that the review panel of the Workers' Compensation Court erred in determining that IBP's delivery of its application for review to the State Capitol Building on November 9, 2000, was not sufficient to confer jurisdiction upon the review panel.

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.*, 263 Neb. 544, 641 N.W.2d 55 (2002); *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999).

[2] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002); *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001).

ANALYSIS

IBP asserts that the three-judge review panel erred in dismissing IBP's appeal for lack of jurisdiction based on its determination that IBP's application for review was untimely filed with the clerk of the Workers' Compensation Court. IBP claims that delivery of its application for review to the State Capitol on November 9, 2000, would have been sufficient to confer jurisdiction upon the Workers' Compensation Court if the clerk of the court had fulfilled his or her statutory duty to have the clerk's office located in the State Capitol Building. IBP states, "Under the undisputed facts, it is clear that this appeal would have been timely filed but

for the fact that the Clerk was not present at the office's official location." Brief for appellant at 12.

In support of its argument, IBP relies primarily on § 48-170 and Neb. Rev. Stat. § 48-167 (Reissue 1998). Section 48-170 states, "Every order and award of a single judge of the Nebraska Workers' Compensation Court shall be binding upon each party at interest unless an application for review has been filed with the compensation court within fourteen days after the date of entry of the order or award." Section 48-167 states, "The Nebraska Workers' Compensation Court shall keep and maintain, in its office at the State Capitol, full and true record of all proceedings, documents, or papers ordered filed, rules and regulations, and decisions or orders." In addition, IBP cites Workers' Compensation Court rules of procedure 1 and 2 and a preface to the Nebraska Workers' Compensation Act. Rule 1 states:

> The office of the Nebraska Workers' Compensation Court shall be deemed to be in the State Capitol Building, Lincoln, Nebraska.
>
> Hearings or review hearings in compensation cases may be held at any other place within the State as provided by statute, but no such other place shall be deemed to be an office or branch office of the court.

Rule 2 states, in relevant part: "No paper or pleading regarding a proceeding of the Nebraska Workers' Compensation Court shall be deemed to be filed with the court until the same has been received and recorded by the clerk of said court at the office of the court in Lincoln."

The preface, as contained in the parties' stipulation of facts, states in relevant part:

> Attention is called to the fact that the situs of the compensation court is in the Capitol building at Lincoln, Nebraska, and all filings of every kind and nature must be filed with the court at that place. The date of filing is the date on which the filings are received by the clerk. (Dolner v. Peter Kiewit & Sons Co., 143 Neb. 384, 9 N.W.2d 483.)

IBP argues that taken together, §§ 48-167 and 48-170 and the Workers' Compensation Court rules of procedure make it clear that all applications for review must be filed in the clerk's office of the Workers' Compensation Court in the State Capitol Building

within 14 days of the entry of the award. IBP maintains that it complied with these provisions when it presented an application for review at the State Capitol on November 9, 2000. It argues that its application should not be considered untimely when the delay in filing resulted from the clerk's failure to be at his or her statutorily required location during normal business hours.

[3,4] Section 48-170 is clear that any party who wishes to appeal the order of a single judge of the Nebraska Workers' Compensation Court shall file an application for rehearing before a three-judge panel within 14 days after the date of the single judge's order. See *Schmidt v. Shoftstall Alfalfa*, 239 Neb. 248, 475 N.W.2d 523 (1991). If a claimant does not file an application for a rehearing with the compensation court within 14 days after the date of the single judge's order, the order becomes conclusive and final. *Id.*

[5] This court has recognized an exception that allows an appellate court to consider an appeal filed after the statutorily prescribed time for appeal. This exception was discussed in *Larson v. Wegner*, 120 Neb. 449, 451-52, 233 N.W. 253, 254 (1930), in which we stated:

> The only exception that has been made to the above rule and the only excuse which has been held sufficient to entitle the appellant to a review of the judgment of the lower court in this state has been *where the appellant was free from neglect* and was prevented from having his appeal docketed by the appellate court within the statutory period through the neglect or failure of the proper officer to prepare the transcript. . . .
>
> . . . The rule applicable in these cases may be stated thus: If the delay in filing the transcript in the appellate court is *caused without fault of the appellant solely by the act or omission of the court official charged with a duty* in connection with the preparation and filing thereof, it may be filed after the expiration of the prescribed time. *However, if the negligence of the appellant or his agent concurs with that of such a court official, it precludes an appeal.*

(Emphasis supplied.) See, also, *Dolner v. Peter Kiewit & Sons Co.*, 143 Neb. 384, 386, 9 N.W.2d 483, 484 (1943) (workers' compensation case where "[t]he failure to make a timely filing

was plaintiff's, as no negligence of the officials or failure to perform any duty [was] shown").

We must conclude that Lopez' award became "binding upon each party at interest" on November 9, 2000, pursuant to § 48-170, unless IBP can establish that (1) IBP was "free from neglect" and (2) IBP was "prevented from having [its] appeal docketed by the appellate court within the statutory period through the neglect or failure of the proper officer" whose duty it was to ensure that the clerk's office of the Workers' Compensation Court was located in the State Capitol Building. See *Larson*, 120 Neb. at 451, 233 N.W. at 254.

IBP's Negligence

In determining whether IBP was "free from neglect," we are guided by the general rule of law set forth in *Larson*. In *Larson*, the appellant chose to send a transcript for filing in Lincoln through the U.S. Postal Service. The appellant mailed the transcript on October 17, 1930, from Creighton, Nebraska, anticipating that it would arrive the same day, which was 1 day before the final day of the statutory appeal period. However, the transcript did not arrive at the clerk's office until October 20.

Although the court in *Larson* was not squarely presented with the alleged negligence of both the appellant and the court official, as in this case, the court discussed the effect of an agent's negligence in those situations where an appellant's appeal is untimely filed. The court stated:

> The appellant selected the United States mail for the purpose of transporting the transcript from Creighton, Nebraska, to the office of the clerk of the supreme court in Lincoln, Nebraska. . . . The appellant has thus selected the United States mail as his agent to transport and deliver the transcript to the office of the clerk of the supreme court. The agent was selected by the appellant, and the negligence of the agent, if any, was the negligence of the appellant.

Larson v. Wegner, 120 Neb. 449, 452-53, 233 N.W. 253, 254-55 (1930). The court found that the appellant's conduct did not qualify for the exception and denied the appellant's motion requesting the court to consider his appeal timely.

The present case is similar to *Larson* in that both IBP and the appellant in *Larson* selected agents to file documents with a

court. IBP selected UPS as its agent to file its application for review. The application needed to be filed by the end of the business day on November 9, 2000, and UPS arrived at the State Capitol Building at 9:53 a.m. that day. At that time, UPS was informed that the clerk's office of the Workers' Compensation Court had relocated. UPS still had the entire day to locate the clerk's office and file the application on time. However, UPS did not discover the location of the clerk's office until 5:29 p.m. As a result, IBP's application for review was not timely filed.

IBP's situation also resembles *Drier v. Knowles Vans, Inc.*, 144 Neb. 619, 14 N.W.2d 222 (1944), another case in which an appellant similarly selected an agent for filing. In *Drier*, an appeal from the justice of the peace court was dismissed because the appellant's required bond for appeal was not filed on time. The appellant's attorney, who could not find the specific street address for the justice of the peace, had chosen to mail the bond 3 days before the filing deadline to " 'Judge Woolsey, Justice of the Peace, Lancaster County, Lincoln, Nebraska.' " *Id.* at 621, 14 N.W.2d at 224. According to the appellant, the "postal authorities first delivered [the bond] to the wrong address and finally to the justice on September 14," 1 day after the filing deadline. *Id.* The appellant argued, inter alia, that the postal authorities were at fault and that the appeal should not be deemed untimely. This court determined that the postal authorities' actions did not excuse the appellant's untimely filed bond, stating, "Having so selected his agent, [the appellant] placed the burden upon that agent to search out and find the justice in Lincoln, Nebraska. The agent performed the task, but too late. The delay here was occasioned by the [appellant's] laches in proceeding as he did." *Id.* at 623, 14 N.W.2d at 225.

We recognize that *Larson* and *Drier* involved the filing of a transcript and bond, respectively, while the present case involves the filing of an application for review. However, the same principles apply equally in each situation.

We determine that in the same way the appellants in *Larson* and *Drier* were not free from neglect, neither was IBP, through its agent, UPS. The record simply does not disclose any reason why, despite having knowledge of the court's relocation at 9:53 a.m., well prior to the close of the court's business day, IBP's

agent could not have located the clerk's office and timely filed the application. In making this determination, we note from the exhibits attached to the parties' stipulation it is clear that the office telephone numbers for the Workers' Compensation Court remained unchanged despite the court's relocation.

In addition to the actions of IBP's agent as discussed above, the stipulation of facts before us shows that for several weeks "before and after the relocation" on March 1, 2000, a "Notice of Relocation" of the Workers' Compensation Court's State Capitol Building offices was "included with every mailing from the Clerk of the Court." This "Notice" clearly stated: "Effective March 1, 2000, the Nebraska Workers' Compensation Court's State Capitol Offices, located on the twelfth and thirteenth floors, will be relocated to the old Federal Courthouse, 129 North 10th Street, Lincoln, Nebraska. Office phone numbers will remain the same." The "Notice" also provided specific instructions for "**DELIVERIES**": "When a physical location address is required (FedX, *UPS*, deliveries, etc.) please use: Nebraska Workers' Compensation Court 129 North 10th Street, Suite 300 Lincoln, NE, 68508." (Emphasis supplied.) The Internet Web site of the Workers' Compensation Court also included a notice "For Immediate Release" dated "02/10/00" which contained the same relocation information and provided identical "UPS" delivery instructions.

The stipulation further shows that the Workers' Compensation Court had been at its relocated address for 8 months 8 days before IBP's attempted filing. During this time, as the stipulation demonstrates, the written call of the Workers' Compensation Court, which clearly identified the new location of the clerk's office, included cases involving IBP on May 24 and August 30, 2000, months prior to November 9, 2000.

For these reasons, we cannot conclude that the delay in filing IBP's application for review was "caused without fault of [IBP and] solely by the act or omission of the court official." See *Larson v. Wegner*, 120 Neb. 449, 452, 233 N.W. 253, 254 (1930). We determine that IBP was not "free from neglect" as required under *Larson* for a court to consider an untimely filed appeal.

Relocation of Clerk's Office

[6] Since we determine that IBP was not "free from neglect," it is unnecessary for us to address IBP's assertion that the clerk

of the Workers' Compensation Court was negligent in relocating the clerk's office in violation of § 48-167. Even assuming the clerk was negligent, "if the negligence of the appellant or his agent concurs with that of such a court official, it precludes an appeal." *Larson*, 120 Neb. at 452, 233 N.W. at 254.

CONCLUSION

We determine that IBP does not qualify for the exception that would allow the Workers' Compensation Court to consider an application for review filed after the prescribed time for appeal in § 48-170. Accordingly, the review panel's order dismissing IBP's appeal for lack of jurisdiction is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

GONZALO VEGA, APPELLANT, V. IOWA BEEF PROCESSORS, INC., APPELLEE.

646 N.W.2d 643

Filed July 12, 2002. No. S-01-141.

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. **Statutes.** The meaning of a statute is a question of law.
3. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation.** The workers' compensation statutes do not prohibit a worker from concurrently receiving statutory benefits for separate injuries arising out of separate accidents, so long as the combined payments do not exceed the maximum weekly rate allowed by Neb. Rev. Stat. § 48-121.01 (Reissue 1998).
5. ____. A worker may not simultaneously receive benefits for temporary total disability during vocational rehabilitation and benefits for a whole body permanent partial disability (i.e., loss of earning power) arising out of the same injury.
6. ____. There is no prohibition in the workers' compensation statutes, other than the statutory maximum set forth in Neb. Rev. Stat. § 48-121.01 (Reissue 1998), to prevent an injured worker from concurrently being paid permanent partial disability benefits arising out of a prior accident and temporary total disability benefits as a result of a subsequent injury.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

Joseph C. Dowding, of Dowding, Dowding & Dowding, for appellant.

Nicole M. Mailahn, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

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

GERRARD, J.

FACTUAL AND PROCEDURAL BACKGROUND

Gonzalo Vega, the appellant, suffered injuries as a result of accidents arising out of and in the course of his employment with Iowa Beef Processors, Inc. (IBP). Vega suffered injuries to his right shoulder, right knee, left elbow, and lower back in four separate accidents during 1994 and 1996. In an award entered October 8, 1998, and an order nunc pro tunc entered October 19, 1998, the single judge of the Nebraska Workers' Compensation Court found as follows:

1. Vega injured his right shoulder on September 19, 1994, while "pulling fat" and experienced a 10-percent permanent functional impairment of his right arm as a result of the accident;

2. Vega injured his right knee on January 26, 1996, while kneeling down on a metal grate and experienced a 30-percent permanent functional impairment of his right leg as a result of the accident;

3. Vega injured his left elbow on March 4, 1996, while "pulling fat" and experienced a 6-percent permanent functional impairment of his left arm as a result of the accident; and

4. Vega injured his lower back on March 14, 1996, as a result of "twisting and pulling on the production line" and experienced a 50-percent loss of earning capacity for impairment to the body as a whole as a result of that accident.

As a result of the court's finding three compensable injuries to scheduled members (i.e., shoulder, knee, and elbow), as well as a 50-percent loss of earning capacity for impairment to the body as a whole regarding the back injury, the single judge

ordered IBP to pay Vega permanent partial disability benefits for each of the injuries, medical expenses, waiting-time penalties, attorney fees, and interest. In addition, the single judge approved vocational rehabilitation services for Vega and ordered the payment of temporary total disability benefits during the period of vocational rehabilitation. Vega was enrolled in classes pursuant to the vocational rehabilitation plan from February 16, 1998, through January 8, 1999.

On February 18, 1999, the parties stipulated that there was $48,654.77 due and owing on the award of October 8, 1998. The parties agreed, in the stipulation, that "[t]he issue before the Court is whether or not the defendants are entitled to credit, against amounts due and owing per [the October 8, 1998,] Award, for temporary total disability paid during vocational rehabilitation, starting on 2/16/98 through the current date."

On January 5, 2000, after some intervening proceedings that are not relevant to this appeal, Vega filed a motion for waiting-time penalties, attorney fees, and interest. Vega alleged that the award of October 8, 1998, was then final and that IBP continued to owe Vega $10,990.87 in past-due benefits.

In an order entered June 19, 2000, the single judge of the Workers' Compensation Court agreed with Vega. The single judge found that IBP had paid a lump sum of past-due benefits, but had taken credit for temporary total disability benefits paid while Vega was engaged in vocational rehabilitation. The court concluded that IBP's obligation to pay temporary total disability benefits during Vega's vocational rehabilitation was separate and independent of its obligation to pay permanent partial disability benefits awarded at the original hearing. Because IBP could not take credit for the temporary total disability benefits paid during Vega's vocational rehabilitation, the single judge determined that IBP still owed Vega $10,990.87. The court ordered that this amount be paid, as well as $5,495.44 in waiting-time penalties and interest, and awarded Vega $1,800 in attorney fees.

The single judge, in confirming the parties' calculations of the total amount owed pursuant to the October 8, 1998, award, also engaged in a discussion whether certain permanent partial disability benefits could be "stack[ed]" onto temporary total disability benefits up to the statutory maximum set forth in Neb. Rev. Stat.

§ 48-121.01 (Reissue 1998). The single judge stated that such benefits could be stacked up to the maximum rate, which was $409 per week in this case, but that benefits exceeding that amount could be deferred until after temporary total disability benefits were exhausted. See *Anderson v. Omaha Pub. Sch. Dist.*, 254 Neb. 1007, 581 N.W.2d 424 (1998). The single judge determined that $8,237.80 in permanent partial disability benefits should have been paid to Vega concurrently with the temporary total disability benefits he received during vocational rehabilitation and that any other suspended benefits should have been paid by the time that IBP presented Vega with the lump-sum payment of past-due benefits. Thus, the single judge concluded that at the time of the lump-sum payment, all the benefits awarded in the October 8, 1998, award were due and owing, and entered a further award.

IBP filed an application for review, arguing that the single judge had erred in concluding that IBP was not entitled to credit for the temporary total disability benefits paid while Vega was engaged in vocational rehabilitation. The review panel of the Workers' Compensation Court reversed the judgment of the single judge, finding that the single judge had erred in stacking Vega's permanent partial disability benefits and temporary total disability benefits up to the statutory maximum set forth in § 48-121.01 when determining the amount of benefits that were past due at the time of IBP's lump-sum payment to Vega. The review panel stated that "[i]f the trial court is correct in that [§] 48-121.01 and $409.00 is the appropriate amount, then the figures set forth in the further award of June 19, 2000, are correct and should be affirmed." The review panel concluded, however, that the appropriate limitation on Vega's total benefits was 66⅔ percent of Vega's wages at the time of injury, as set forth in Neb. Rev. Stat. § 48-121(1) (Reissue 1998). Since the single judge, according to the review panel, based his calculations on an erroneous assumption regarding the amount that was past due at the time of the lump-sum payment, the review panel reversed and dismissed the further award entered on June 19. Vega appeals.

ASSIGNMENT OF ERROR

Vega assigns, consolidated and restated, that the review panel of the Workers' Compensation Court erred in determining

that a worker entitled to receive both temporary total disability and permanent partial disability benefits cannot receive those benefits concurrently up to the maximum weekly rate set forth in § 48-121.01.

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. *Schwan's Sales Enters. v. Hitz*, 263 Neb. 327, 640 N.W.2d 15 (2002).

[2,3] The meaning of a statute is a question of law. *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002).

ANALYSIS

[4,5] Before addressing the issue in this case, it is helpful to discuss two established principles in order to narrow the focus of our inquiry. We have long recognized that the workers' compensation statutes do not prohibit a worker from concurrently receiving statutory benefits for *separate injuries* arising out of *separate accidents*, so long as the combined payments do not exceed the maximum weekly rate allowed by statute. See, *Anderson v. Omaha Pub. Sch. Dist.*, 254 Neb. 1007, 581 N.W.2d 424 (1998); *Foreman v. State*, 240 Neb. 716, 483 N.W.2d 752 (1992); *Hansen v. Paxton & Vierling Iron Works*, 138 Neb. 589, 293 N.W. 415 (1940); *Peterson v. Borden's Produce Co.*, 125 Neb. 404, 250 N.W. 240 (1933); *Nelson v. Service Oil Co.*, 121 Neb. 762, 238 N.W. 525 (1931). The reasoning is that a worker should not be prohibited from receiving benefits for a current injury merely because that worker is receiving unrelated compensation for a separate injury to a separate part of the worker's body from a previous accident. See *Hansen, supra*. However, it is equally well settled that a worker may not simultaneously receive benefits for

temporary total disability during vocational rehabilitation and benefits for a whole body permanent partial disability (i.e., loss of earning power) arising out of the *same injury*. See, *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998); *Bindrum v. Foote & Davies*, 235 Neb. 903, 457 N.W.2d 828 (1990); *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987). This is because the effort at vocational rehabilitation is aimed at reducing the loss of earning power in a whole body permanent partial disability situation. See *Thom, supra*.

In the instant case, both of the above principles are in play, but neither the parties nor the Workers' Compensation Court articulated which of the particular permanent partial disability benefits could be paid concurrently with the benefits for temporary total disability during Vega's vocational rehabilitation. In other words, Vega was entitled to receive permanent partial disability payments for each of the three scheduled member injuries simultaneously with the temporary total disability payments during vocational rehabilitation (i.e., separate injuries to separate body parts from unrelated prior accidents)—so long as the combined payments did not exceed the maximum weekly rate allowed by statute. On the other hand, the permanent partial indemnity payments for the 50-percent loss of earning capacity (back injury) would have properly been suspended during the time that Vega received temporary total disability benefits for vocational rehabilitation. It should be noted that even though the parties did not draw such a distinction in the court below, the record reflects that all benefits set forth in the October 8, 1998, award were due and owing at the time of the lump-sum payment, if the single judge's interpretation of § 48-121.01 is correct.

With that in mind, we confine our analysis to the sole issue presented by the parties in this appeal: whether the single judge was correct in determining that the maximum weekly rate to which Vega was entitled to have his temporary total and permanent partial disability benefits combined was found in § 48-121.01, rather than the lesser rate in § 48-121(1). Section 48-121.01(1)(b) provides, in relevant part, that "[c]ommencing January 1, 1996, and each January 1 thereafter, the maximum weekly income benefit under sections 48-121 and 48-122 shall be one hundred percent, computed to the next higher whole dollar, of the state average

weekly wage . . . .” The single judge found that the maximum weekly income benefit available to Vega under § 48-121.01 was $409 per week, and neither party has contested this finding.

[6] As noted earlier, the propriety of stacking permanent partial disability and temporary total disability benefits was most recently addressed by this court in *Anderson v. Omaha Pub. Sch. Dist.*, 254 Neb. 1007, 581 N.W.2d 424 (1998), and in *Foreman v. State*, 240 Neb. 716, 483 N.W.2d 752 (1992). In both *Anderson* and *Foreman*, we determined that there was no prohibition in the workers’ compensation statutes, other than the statutory maximum set forth in § 48-121.01, to prevent an injured worker from concurrently being paid permanent partial disability benefits arising out of a prior accident and temporary total disability benefits as a result of a subsequent injury.

The review panel in the instant case, however, citing *Anderson, supra*, concluded that Vega was not entitled to have his permanent partial disability and temporary total disability benefits stacked up to the $409 weekly maximum rate set forth in § 48-121.01. The review panel based its conclusion on § 48-121(1), which provides in relevant part:

> For total disability, the compensation during such disability shall be sixty-six and two-thirds percent of the wages received at the time of injury, but such compensation shall not be more than the maximum weekly income benefit specified in section 48-121.01 nor less than the minimum weekly income benefit specified in section 48-121.01[.]

The review panel interpreted *Anderson, supra*, “to only allow all benefits to be ‘stacked’ up to the maximum of the lesser of 66 2/3 percent of the average weekly wage pursuant to Section 48-121(1) or the maximum benefit level as set forth in Section 48-121.01 for high wage earners.” Based on this interpretation of *Anderson*, the review panel concluded that the single judge had erred in his calculation of the amount of benefits past due at the time of IBP’s lump-sum payment to Vega.

The review panel’s conclusion, however, is inconsistent with both *Anderson, supra*, and *Foreman, supra*, and the workers’ compensation statutory scheme. The review panel’s reasoning was essentially that both §§ 48-121(1) and 48-121.01 set forth limitations on the amount of benefits available to an injured

worker and that benefits could only be stacked until reaching the lesser of the two limitations.

Under the review panel's reasoning, where an injured worker's wages are high enough that 66⅔ percent of the injured worker's wages at the time of injury is equal to or greater than the maximum weekly benefit level of § 48-121.01, then stacking is precluded because the worker's aggregate weekly benefits cannot exceed the statutory maximum. This was the situation in *Anderson, supra*. However, under the review panel's reasoning, where 66⅔ percent of an injured worker's wages at the time of injury is less than the maximum weekly benefit level set forth in § 48-121.01, stacking would *still* be precluded, because the amount of compensation for temporary total disability, pursuant to § 48-121(1), will always be 66⅔ percent of the injured worker's wages at the time of injury.

In other words, under the review panel's reasoning, there could be no circumstances in which temporary total disability and permanent partial disability benefits could be stacked. This result is inconsistent with our holding in *Anderson v. Omaha Pub. Sch. Dist.*, 254 Neb. 1007, 1011, 581 N.W.2d 424, 426 (1998), in which we said that "[t]here is no prohibition in the workers' compensation statutes, other than the statutory maximum of [§ 48-121.01], that would prevent Anderson from being paid concurrently for both her permanent partial disability and her temporary total disability." See, also, *Siliphet v. IBP, inc.*, 8 Neb. App. 48, 587 N.W.2d 895 (1999).

As in *Anderson, supra*, we observe that permanent partial disability benefits, arising out of a prior accident, and temporary total disability benefits paid while a worker is engaged in vocational rehabilitation, as a result of an unrelated accident, are two distinct forms of compensation, serving two separate purposes. *Anderson* holds, as the single judge correctly discerned, that the only statutory limitation on stacking of permanent partial disability and temporary total disability benefits is the maximum weekly income benefit set forth in § 48-121.01.

The review panel's conclusion is also inconsistent with the language of § 48-121(1). That section sets forth that the compensation shall be 66⅔ percent of an injured worker's wages at the time of injury "for total disability." Nothing in the language

of § 48-121(1), unlike § 48-121.01, purports to establish a limitation on the total amount of benefits that an injured worker may receive for two separate and distinct forms of compensation.

Instead, § 48-121(1) simply provides that "for total disability," the compensation shall be 66⅔ of the injured worker's wages at the time of injury, assuming that such compensation is not less than the minimum weekly income benefit set forth in § 48-121.01(2). This is a limitation on the compensation for total disability solely, and is not a limitation on the total weekly income benefit that an injured worker may receive when partial disability benefits are stacked with total disability benefits. That limitation, as the single judge correctly determined, is set forth in § 48-121.01.

The review panel found that if the single judge's determination of the maximum weekly income benefit was correct, then the single judge's calculations and conclusions were correct and should be affirmed. IBP has not cross-appealed from this determination and, thus, has not preserved in this court any alternative basis for affirming the judgment of the review panel. See *McDonald v. DeCamp Legal Servs.*, 260 Neb. 729, 619 N.W.2d 583 (2000).

CONCLUSION

The single judge of the Workers' Compensation Court correctly determined that Vega's temporary total disability and permanent partial disability benefits could be stacked up to the maximum weekly income benefit set forth in § 48-121.01. The review panel of the Workers' Compensation Court erred as a matter of law in concluding otherwise. Therefore, we reverse the judgment of the review panel and remand the cause with directions to reinstate the further award entered by the single judge on June 19, 2000.

REVERSED AND REMANDED WITH DIRECTIONS.

McCORMACK, J., participating on briefs.

A-1 Metro Movers, Inc., a corporation doing business in Nebraska, appellant, v. Mary Jane Egr, Tax Commissioner of the State of Nebraska, and the State of Nebraska, Department of Revenue, appellees.
Metro Moving Services, Inc., a corporation doing business in Nebraska, appellant, v. Mary Jane Egr, Tax Commissioner of the State of Nebraska, and the State of Nebraska, Department of Revenue, appellees.
Tri Cities Moving Services, Inc., a corporation doing business in Nebraska, appellant, v. Mary Jane Egr, Tax Commissioner of the State of Nebraska, and the State of Nebraska, Department of Revenue, appellees.

647 N.W.2d 593

Filed July 12, 2002. Nos. S-01-383 through S-01-385.

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.** An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
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.
5. **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.
6. **Taxation.** The general theory behind the sales and use taxes is to impose a tax on each item of property, unless specifically excluded, at some point in the chain of commerce. If the item is purchased in Nebraska, the sales tax applies. If the item is purchased outside of Nebraska, the use tax applies.
7. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose.

8. **Statutes: Legislature: Intent.** A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.

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

Kevin C. Siebert and Jane F. Langan, of Rembolt, Ludke & Berger, 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.

MCCORMACK, J.

NATURE OF CASE

A-1 Metro Movers, Inc. (A-1); Metro Moving Services, Inc. (Metro); and Tri Cities Moving Services, Inc. (Tri Cities) (collectively the appellants), appeal from orders of the district court for Lancaster County. The district court sustained tax deficiency determinations against the appellants made by the Nebraska Department of Revenue. The court found that containers purchased by the appellants are subject to use tax and are not exempted by Neb. Rev. Stat. § 77-2702.23(2) (Reissue 1996).

BACKGROUND

The appellants are in the business of moving tangible personal property for their customers from a location within Nebraska to locations outside of Nebraska. The moving services provided by the appellants include providing containers, packing the customer's personal property into containers, loading the packed containers and other household goods onto moving vans, transporting the goods from a location in Nebraska to a location outside of Nebraska, unloading the containers and other household goods, unpacking the containers at the destination, and disposing of the containers. "Containers" include boxes, cartons, packing materials, and padding materials used by the appellants. The containers are not sold separately by the appellants from the packing and moving services they provide. The appellants purchase the

containers from vendors located outside of Nebraska. The containers are shipped by common carrier to the appellants' premises in Nebraska. The appellants do not pay sales or use tax on the purchase of the containers to any state at any time.

When purchased by the appellants, the boxes arrive flat and in bundles of like size. For the appellants to use the boxes, the bundles must be broken and the boxes must be opened up and assembled and shaped with tape. Once the boxes are taped into shape, the customer's personal property is packed inside, and packing material is placed inside to protect the personal property from damage.

The containers, once packed with the customer's belongings and marked, are loaded on a moving van along with other household goods for transportation to the agreed-upon destination. Upon arrival at the destination, the containers are unloaded from the moving van and taken into the destination location. The containers may then be opened up, and the personal property and packing materials are taken out, or the containers may be left for storage and/or unpacking by the customer. If unpacked by the appellants, both the containers and the packing materials are left for the customer to dispose of or are removed from the destination premises by the appellants and disposed of. The appellants do not reuse or resell the containers they remove from the customer's destination. Instead, all of the containers are left with the customer out of state or are disposed of out of state.

The department conducted audits for sales and consumer's use taxes of the books and records of the appellants over various periods of time. As a result of the audits, the department issued a notice of deficiency determination to each of the appellants. Each of the appellants timely filed petitions for redetermination in protest of the total amount of each deficiency.

The department sustained the tax deficiencies levied against the appellants. The department found that the containers and packing materials used by the appellants constitute a taxable sale and that the exemption in § 77-2702.23(2) was not applicable. The appellants petitioned for review in the district court. The district court made two distinct findings. First, the court found that collateral estoppel barred Metro and Tri Cities from litigating the issue of whether the containers were subject to use

tax. In 1998, Metro and Tri Cities appealed from tax deficiency determinations made by the department and the district court for Lancaster County ruled against Metro and Tri Cities. The court found that the issue determined in the 1998 cases was identical to the issue presented in this case. Second, the district court affirmed the decision of the department as to A-1, finding that the containers were purchased for the purpose of using them in Nebraska and that the exemption in § 77-2702.23(2) did not apply. These consolidated appeals followed, and we moved the cases to our docket.

ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in (1) finding that the appellants' use of containers in interstate moves originating in Nebraska constitutes a sale of tangible personal property subject to Nebraska consumer's use tax and (2) finding that the appeals of Metro and Tri Cities are barred by the doctrine of collateral estoppel.

STANDARD 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. *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000). 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.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

[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. *Id.*

[5] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

ANALYSIS

[6] The issue presented in this case is whether the containers purchased and used by the appellants are subject to Nebraska use tax. Neb. Rev. Stat. § 77-2703(1) (Reissue 1996) imposes a sales tax "upon the gross receipts from all sales of tangible personal property sold at retail in this state." Section 77-2703(2) imposes a use tax on the "storage, use, or other consumption in this state of property purchased, leased, or rented from any retailer." The general theory behind the sales and use taxes is to impose a tax on each item of property, unless specifically excluded, at some point in the chain of commerce. If the item is purchased in Nebraska, the sales tax applies. If the item is purchased outside of Nebraska, the use tax applies. *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000).

Section 77-2702.23 defines "use" and also provides for an exemption to that definition. This section states:

> (1) Use shall mean the exercise of any right or power over property incident to the ownership or possession of that property . . . .
>
> (2) Except for a transaction that is subject to sales tax under the Nebraska Revenue Act of 1967, use shall not include the keeping, retaining, or exercising of any right or power over property for the purpose of subsequently transporting it outside the state or for the purpose of being processed, fabricated, or manufactured into, attached to, or annexed to other property to be transported outside the state and thereafter used solely outside the state.

The appellants concede that the containers are used in Nebraska, for purposes of § 77-2702.23(1), when they are assembled, packed with customers' goods, and loaded onto moving vans for transport. However, the appellants argue that this use occurs " 'for the purpose of subsequently transporting [the containers] outside the state.' " Brief for appellants at 9-10. The appellants alternatively argue that the containers, which are purchased in flat bundles, are used in Nebraska for the purpose of being processed or fabricated into containers to be transported outside the state and thereafter used solely outside the state.

The Rhode Island Supreme Court encountered a nearly identical situation in *Safeway Systems, Inc. v. Norberg*, 115 R.I. 127,

341 A.2d 47 (1975). The taxpayer was in the business of transporting furniture and other household goods. Nearly all of the taxpayer's moves were from points within Rhode Island to points outside of the state. The taxpayer purchased boxes and packing materials from out-of-state vendors, which it used to transport a customer's household goods. Upon completion of the move, the boxes and packing materials were never again used or returned to Rhode Island.

The taxpayer argued that the boxes and packing materials used in interstate moves were exempt from Rhode Island's use tax under a statutory exemption similar to our § 77-2702.23(2). The Rhode Island exemption read as follows:

> " 'Storage' and 'use' do not include the keeping, retaining, or exercising of any right or power over tangible personal property shipped or brought into this state for the purpose of subsequently transporting the same outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state."

(Emphasis omitted.) *Safeway Systems, Inc. v. Norberg*, 115 R.I. at 130-31, 341 A.2d at 49.

The Rhode Island Supreme Court interpreted the first portion of this exemption as applying only to goods brought into the state that thereafter will be used solely outside the state. *Id.* The court held that the exemption did not apply to the taxpayer's boxes and packing materials because those items were not used solely outside of Rhode Island. Instead, the boxes and packing materials were also used within the state when they were brought to a customer's home, filled with household goods, loaded onto moving trucks, and driven to the state border. The court also concluded that the taxpayer did not satisfy the second part of the statute exempting property " 'processed, fabricated, or manufactured into' "; " 'attached to' "; or " 'incorporated into' other tangible personal property." *Id.* at 132, 341 A.2d at 50.

[7,8] We find the reasoning of *Safeway Systems, Inc. v. Norberg, supra*, to be persuasive. Under the appellants' proposed construction of § 77-2702.23(2), the only inquiry needed

to decide if the exemption applies is whether a taxpayer's purpose is to transport the property outside the state. Such a construction ignores the degree of use of such property in Nebraska. We do not believe the Legislature intended such a result. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose. *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb. 129, 629 N.W.2d 534 (2001).

The appellants make considerable use of the containers in Nebraska. The containers are delivered to a customer's home, packed with household goods, and loaded onto the appellants' moving vans before beginning their interstate journey. That is, the appellants' purpose is not merely to transport the containers out of Nebraska, but to use the containers to transport property out of the State of Nebraska.

The appellants also do not satisfy the second portion of § 77-2702.23(2). Assuming that the appellants' act of shaping the purchased bundles into boxes is "processing" or "fabricating," such an act is not performed to transport the containers outside of the state. Rather, this act is performed to first use the containers in Nebraska prior to interstate transport.

The appellants argue that our decision in *J.C. Penney Co. v. Balka*, 254 Neb. 521, 577 N.W.2d 283 (1998), is controlling. We do not agree. The issue presented in that case was whether J.C. Penney exercised any right or power over catalogs shipped from out of state to Nebraska incident to the ownership or possession of that property in Nebraska. In other words, this court was asked to decide whether a "use" of such catalogs occurred in Nebraska, a point which has been conceded in this case. *J.C. Penney Co.* did not consider whether such use was nonetheless exempt from taxation under § 77-2702.23(2), and we believe it is inapplicable to this case.

Because we determine that the containers purchased and used by the appellants are subject to Nebraska use tax, we need not address their second assignment of error.

CONCLUSION

Section 77-2702.23(2) exempts property from use tax if a taxpayer exercises any right or power over that property for the purpose of subsequently transporting it outside the state or for the purpose of being processed, fabricated, or manufactured into; attached to; or annexed to other property to be transported outside the state and thereafter used solely outside the state. We hold that because the containers purchased and used by the appellants are not only used for the purpose of transporting the containers out of the state, but are also used in the state, the exemption of § 77-2702.23(2) does not apply. The decision of the district court is affirmed.

AFFIRMED.

IN RE PROPOSED AMENDMENT TO TITLE 291, CHAPTER 3, OF THE MOTOR CARRIER RULES AND REGULATIONS. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, V. A-1 AMBASSADOR LIMOUSINE, INC., DOING BUSINESS AS AMBASSADOR LIMOUSINE AND HAYMARKET LIMOUSINE, INTERESTED PARTY, APPELLANT, AND R & F HOBBIES, INC., DOING BUSINESS AS PRINCE OF THE ROAD, INTERESTED PARTY, APPELLEE.

646 N.W.2d 650

Filed July 12, 2002. No. S-01-433.

1. **Public Service Commission: Appeal and Error.** The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing an order 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. ____: ____. 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. **Public Service Commission: Appeal and Error.** Neb. Rev. Stat. § 75-136 (Cum. Supp. 2000) authorizes appellate courts to review an order of the Nebraska Public Service Commission interpreting a rule or regulation pursuant to the commission's authority under Neb. Rev. Stat. § 75-118.01 (Reissue 1996).
5. ____: ____. In an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions

to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.

6. ____: ____. In reviewing a decision of the Nebraska Public Service Commission, it is not the province of an appellate court to weigh or resolve conflicts in the evidence or the credibility of the witnesses; rather, an appellate court will sustain the decision of the commission if there is evidence in the record to support its findings.
7. ____: ____. If there is evidence to sustain the findings of the Nebraska Public Service Commission, an appellate court cannot substitute its judgment for that of the commission.
8. ____: ____. Determinations by the Nebraska Public Service Commission are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by an appellate court in the absence of a showing that the action of the commission was arbitrary or unreasonable.
9. **Public Service Commission.** The striking of the balance between the competing interests of legitimate competition and the protection of the public interest is a matter of legislative and administrative determination peculiarly resting in the judgment of the Nebraska Public Service Commission.
10. **Administrative Law: Words and Phrases.** A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis that would lead a reasonable person to the same conclusion.
11. ____: ____. An action taken by an administrative agency in disregard of the facts or circumstances of the case and without some basis which would lead a reasonable and honest person to the same conclusion is arbitrary and capricious as a matter of law.
12. **Words and Phrases.** A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change.

Appeal from the Nebraska Public Service Commission. Affirmed.

Elaine A. Waggoner, of Waggoner Law Office, for appellant.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

John M. Boehm, of Butler, Galter, O'Brien & Boehm, for appellee R & F Hobbies, Inc.

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

MILLER-LERMAN, J.

NATURE OF CASE

A-1 Ambassador Limousine, Inc., doing business as Ambassador Limousine and Haymarket Limousine (A-1),

appeals an April 3, 2001, order of the Nebraska Public Service Commission (PSC) which, inter alia, defined the terms "limousine" and "limousine service" as contained in title 291, chapter 3, of the Motor Carrier Rules and Regulations, § 001. We affirm the order of the PSC.

STATEMENT OF FACTS

On January 9, 2001, the PSC, on its own motion, entered an order opening a docket "to conduct a review of existing Commission rules and regulations as they pertain to motor carriers in Title 291, Chapter 3, Motor Carrier Rules and Regulations." The PSC stated in the order that it found it necessary to address the definitions of "limousine" and "limousine service" because of "current ambiguity in the application of our existing granted authorities." The PSC noted that when the applicable rules were originally promulgated, limousines were presumed to be luxury class transportation used primarily for formal social functions. However, a need to define terms had arisen because (1) "holders of limousine authority have engaged a variety of vehicles to conduct their business under the granted authority including the use of regular sedans and vans" and (2) "the passengers being transported no longer are limited to persons seeking the benefits of luxury transportation." The PSC specifically noted that holders of and applicants for limousine authority were using or seeking to use limousine authority to transport clients of the Nebraska Department of Health and Human Services (DHHS).

The PSC noted in the January 9, 2001, order that it had adopted in its rules a limousine classification and had promulgated rules applicable to limousine operators. The PSC stated that it found it necessary to adopt concise definitions of "limousine" and "limousine service" in order to properly interpret the scope of authority granted to limousine certificate holders. The PSC therefore adopted the following definitions:

> **Definition of "limousine":** Limousine shall mean a luxury vehicle used to provide prearranged passenger transportation on a dedicated basis at a premium fare that has a seating of at least five and no more than fourteen persons behind the driver with a physical partition separating the driver seat from the passenger compartment. Limousine does not

include taxicabs, sport utility vehicle[s], vans, hotel or airport buses or shuttles, or buses. The term limousine does include transportation within the scope of authorities granted for "luxury limousines", "luxury limousine services", "luxury automobiles", "luxury or stretch limousines", "luxury sedan limousines", and "luxury type vehicles."

Definition of "limousine service": Limousine service shall mean the business of carrying passengers for hire by limousines providing service along a route under the control of the person who hired the vehicle and not over a defined regular route. Limousine service shall not be provided on a demand response basis.

Definition of "premium fare": Premium fare means a rate based on hourly rental of not less than one (1) hour at fifty dollars ($50.00) per hour with a minimum rental time of one hour. A mileage charge may be assessed for transportation of the vehicle for the time before and after the transportation service is provided and only in addition to the minimum hourly charge as provided by this definition.

The PSC specified that to the extent such definitions were in conflict with its findings in a September 8, 1999, order regarding the application of Running Horse Enterprises, LLC, for limousine authority (the Running Horse order), such findings in the Running Horse order were set aside and modified. In the Running Horse order, the PSC had stated that "limousine service shall mean a chauffeur-driven, non-metered passenger vehicle for hire including, but not limited to, full-sized sedans, extended-size sedans, passenger vans, and sports utility vehicles where the rate may be determined on an hourly, daily, weekly, or monthly rental or may be mileage-based."

The PSC also stated that the definitions in the January 9, 2001, order would become effective upon entry of the order and would be applied to all applications for limousine authority granted on or after that date. The PSC acknowledged that certain certificate holders with limousine authority, relying on the Running Horse order, would be operating outside the definition of the limousine authority in the January 9 order. The PSC stated that for those certificate holders, it would stay enforcement of the January 9 order for a period of 90 days in order to allow a

reasonable time for those certificate holders to comply with the definitions adopted in the order.

The PSC further indicated that the definitions in the January 9, 2001, order would become part of its overall effort to review, update, and recodify its existing rules on motor carriers. The PSC therefore gave notice that once approval to proceed was received from the Governor, it would propose amendments to title 291, chapter 3, to incorporate the definitions of "limousine," "limousine service," and "premium fare" set forth in the January 9 order. The PSC stated it would accept filed comments on the proposed amendments through February 2 and would set a public hearing on the proposed amendments once permission was received from the Governor to proceed with rulemaking. The PSC reiterated that the proposed amendments were part of its intended efforts to examine the entirety of the motor carrier rules and stated that when a final order adopting revisions to the rules was entered, it would include any revisions to the proposed amendments that were made as the result of public comments received.

The PSC concluded the January 9, 2001, order by ordering (1) that the definitions in the order were thereby adopted as proper policy interpretations of its motor carrier rules pursuant to its authority under state law, (2) that the definitions should not be enforced against holders of certificates granted prior to the order for a period of 90 days, and (3) that the proposed amendments to the motor carrier rules were open to public comment and interested parties could file initial comments on or before February 2.

On March 14, 2001, the PSC held a public hearing on the proposed amendments to the motor carrier rules and regulations. At the hearing, the PSC received into evidence written public comments which had been received from various interested parties, including holders of limousine certificates, holders of taxicab certificates, and DHHS. DHHS expressed concern that the proposed amendments would prohibit certain holders of limousine certificates from providing transportation to DHHS clients. DHHS' analysis indicated that for areas outside the Lincoln and Omaha metropolitan areas, the amendments would eliminate all carriers except for taxicab companies and two contract carriers from providing transportation for DHHS clients.

Various individuals spoke at the hearing, including attorneys representing DHHS; A-1; and R & F Hobbies, Inc., doing business as Prince of the Road (R & F Hobbies). The attorney for DHHS reiterated the concerns expressed in DHHS' written comments regarding the effect on transportation for DHHS clients.

The attorney for A-1 testified in opposition to the proposed definitions. A-1 holds a limousine certificate. The attorney for A-1 testified regarding statistics that over 50 percent of the business of the nation's top limousine services, and 60 percent of A-1's business, involved sedan-type transportation rather than the traditional stretch limousines. Such business would be eliminated under the definitions proposed by the PSC. The attorney for A-1 testified that approximately 40 to 45 percent of A-1's business came from providing transportation to DHHS clients. Although the Running Horse order had included a wide variety of vehicles in its definition of "limousine service," the attorney for A-1 testified that A-1 had not explicitly relied on the Running Horse order to determine it could provide transportation services to DHHS clients, but, rather, it had been informally advised by PSC personnel in approximately July 2000 that A-1 could provide such services under its existing certificate. The A-1 attorney indicated that A-1 had relied on such advisement. In addition, the attorney for A-1 raised concerns that the process by which the new definitions had been adopted did not comply with the Administrative Procedure Act or with due process requirements.

The attorney for R & F Hobbies testified in support of the proposed definitions of "limousine" and "limousine service." He testified that R & F Hobbies held a certificate with authority to provide passenger-van transportation. He further testified that the new definitions of "limousine" and "limousine service" would not eliminate transportation services to DHHS clients because R & F Hobbies and other carriers with proper certificates of authority were able to provide such services statewide.

Representatives of various taxicab companies testified in support of the definitions and asserted there was a need to end an expansion of the definition of "limousine service" by holders of limousine certificates. Representatives of limousine companies other than A-1 testified to express concern that the definitions

were too restrictive because they excluded luxury sedans and other luxury vehicles.

Following the hearing, the PSC entered an order on April 3, 2001, from which this appeal is taken by A-1. The PSC order stated that the PSC was focused on the objective of establishing interim policies prior to proceeding with formal rulemaking. The order had two purposes: (1) to interpret the scope of authority under existing rules as to those businesses that had been granted certificates and (2) to begin preparations for rulemaking regarding the definitions of various service categories and vehicles.

In regard to the definition of "limousine," the PSC stated in the April 3, 2001, order that from the written comments received and the testimony presented at the March 14 hearing, it was apparent that the definitions in the January 9 order should be clarified. The PSC determined the definition of "limousine" in the January 9 order was too restrictive given the growing trend in the limousine industry to use sedans and other types of vehicles for luxury transportation. The PSC reiterated its intention to limit "limousine service" to that "type of luxury transportation which has been traditionally associated with limousine transportation." The PSC found that the definitions in the January 9, 2001, order should be amended as follows:

> **Definition of "limousine":** Limousine shall mean a vehicle used to provide limousine service.
>
> **Definition of "limousine service":** Limousine service shall consist of all of the following elements: (i) the business of carrying passengers for hire by a vehicle (ii) along a route under the control of the person who hired the vehicle and not over a defined regular route (iii) on a prearranged and not on a demand basis (iv) at a premium fare.
>
> **Definition of "premium fare":** Premium fare means a rate based on an hourly rental of not less than one hour at a scheduled rate which shall be set and periodically reviewed by the Commission and which shall include a minimum rental time of one hour. A mileage charge may be assessed for transportation of the vehicle only for the time before and after the transportation service is provided and only in addition to the minimum hourly charge as provided by this definition.

The PSC ordered that effective April 3, 2001, the scheduled rate for limousine service should not be less than $50 per hour with a 1-hour minimum charge required.

The PSC specifically noted its intention in establishing the definitions that limousine operators would not be allowed to provide transportation for clients of DHHS and other similar state and federal agencies. The PSC also noted that the new definition of limousine allowed for the use of luxury sedans and other types of luxury vehicles. The PSC stated that the changes to the definitions did not justify an extension of the deadline for enforcement of the January 9, 2001, order. The PSC stated that on April 10, all certificate holders would be expected to adhere to the policy articulated in the January 9 order and that current certificate holders affected by the policy could seek new, additional, and/or modified authority under the new categories of service recommended in the second section of the April 3 order. The PSC finally noted that "detailed refinements may still be needed in the future to fully address the problems described in our January 9 order" and that the forthcoming rulemaking process would allow the opportunity to make those adjustments.

In the second section of the April 3, 2001, order, the PSC stated that its rules expressly recognized categories of passenger service in addition to limousine service, including taxi, charter, and special party services. Additional descriptions of service had also been recognized by the PSC in authorities granted. Such descriptions had been developed to accommodate an evolving industry. The PSC particularly noted that the demand for service for DHHS clients had "dramatically changed the passenger service landscape in the State." The PSC therefore proposed the formal establishment of categories of service for "taxi service" and "open class service." The categories were defined as follows:

> **Taxi Service:** Taxi service shall consist of all of the following elements: (i) the business of carrying passengers for hire by a vehicle, subject to the provisions of Rule 011.01D, (ii) along the most direct route between the points of origin and destination or a route under the control of the person who hired the vehicle and not over a defined regular route (iii) on a prearranged or demand basis (iv) at

> a metered, mileage-based or per trip fare, subject to the provision of Rule 011.01F, (v) commencing within, and/or restricted to, a defined geographic area.
>
> **Open Class Service:** Open class service shall consist of all of the following elements: (i) the business of carrying passengers for hire by a vehicle (ii) along the most direct route between the points of origin and destination or a route under the control of the person who hired the vehicle and not over a defined regular route (iii) on a prearranged or demand basis (iv) at a mileage-based or per trip fare.

The PSC then stated that it was considering the addition of various rules including a rule that would require a carrier to obtain a special designation as a carrier of clients of DHHS and other similar state and federal agencies and programs.

The PSC concluded the April 3, 2001, order by ordering (1) that the definitions of "limousine service," "premium fare," "taxi service," and "open class service" as defined within the order be adopted as proper policy interpretations of its motor carrier rules and regulations and (2) that the proposed amendments concerning taxi service and open class service be open to public comment and that initial comments be filed on or before April 20.

On April 5, 2001, A-1 filed a notice of appeal of the April 3 order. Various parties were certified as interested parties in the proceedings before the PSC. In addition to the appellee's brief filed by the PSC, an appellee's brief was filed by R & F Hobbies.

ASSIGNMENTS OF ERROR

A-1 alleges, restated, (1) that the PSC promulgated the April 3, 2001, order in excess of its authority and in violation of the Administrative Procedure Act; (2) that the order was arbitrary and capricious, not supported by competent evidence, an abuse of discretion, and contrary to law; and (3) that the order was promulgated without proper due process.

STANDARDS OF REVIEW

[1] The appropriate standard of review for appeals from the PSC is a review for errors appearing on the record. *In re Application of Neb. Pub. Serv. Comm.*, 260 Neb. 780, 619 N.W.2d 809 (2000).

[2] When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

ANALYSIS

Jurisdiction and Scope of Review.

The PSC and R & F Hobbies contend the April 3, 2001, order is not appealable by A-1. We do not agree.

Although we have stated that orders of the State Railway Commission, which is now the PSC, see *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991), are "interlocutory" and not final, where substantial rights of the parties remain undetermined and the cause is retained for further actions, we have also stated that " '[w]hether or not a decision is denominated an 'order,' it is not reviewable unless and until it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of an administrative process . . . .' " *Houck v. Beckley*, 161 Neb. 143, 150, 72 N.W.2d 664, 668 (1955) (quoting 73 C.J.S. *Public Administrative Bodies and Procedure* § 186 (1951)). The April 3, 2001, order defined the meaning of "limousine" and "limousine service" as used in the PSC's existing rules and regulations, and as a result of the April 3 order, A-1 was denied permission to transport certain individuals under the limousine certificate it held, which denial was contrary to permission previously accorded to A-1 by the PSC. The issue of the scope of A-1's authority under its certificate was not retained for further action, but instead, A-1 was directed to comply with the terms of the April 3 order.

[4] Neb. Rev. Stat. § 75-136 (Cum. Supp. 2000) generally provides for the review of orders of the PSC by this court. The April 3, 2001, order of the PSC was issued pursuant to Neb. Rev. Stat. § 75-118.01 (Reissue 1996), which authorizes the PSC "to determine . . . the scope or meaning of a certificate, . . . rule, or regulation." In *In re Petition of G. Kay, Inc.*, 219 Neb. 24, 361

N.W.2d 182 (1985), we concluded that § 75-136 authorized this court to review an order of the PSC interpreting a certificate pursuant to the PSC's authority under § 75-118.01. We logically conclude that § 75-136 also authorizes this court to review an order of the PSC, such as the April 3 order, interpreting a rule or regulation pursuant to the PSC's authority under § 75-118.01 where, as here, such order denied A-1 an existing benefit.

[5] Regarding the scope of this court's review of a PSC order pursuant to § 75-136, we have stated, "In an appeal to the Supreme Court from an order of the PSC, administrative or legislative in character, the only questions to be determined are whether the PSC acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made." *In re Application of E. Neb. Non-stock Trucking Coop*, 243 Neb. 662, 664, 501 N.W.2d 712, 713-14 (1993). A review of the April 3, 2001, order shows it to be "administrative or legislative in character," and we therefore consider A-1's assignments of error to the extent they assert (1) that the PSC acted outside the scope of its authority and (2) that the order is unreasonable and arbitrary.

Scope of Authority.

The scope of the PSC's authority is defined in chapter 75 of the Nebraska Revised Statutes. Section 75-118.01 provides that the PSC "shall have original exclusive jurisdiction to determine the validity of a rule or regulation and the scope or meaning of a certificate, permit, tariff, rule, or regulation." In addition, Neb. Rev. Stat. § 75-304 (Reissue 1996) provides that the PSC

> may establish such just and reasonable classifications of groups of carriers, included in the terms common carrier and contract carrier, as the special nature of the services performed by such carriers require and adopt and promulgate such just and reasonable rules, regulations, and requirements, to be observed by the carrier so classified or grouped, as the commission deems necessary or desirable in the public interest and as are consistent with the provisions of sections 75-301 to 75-322.

In the April 3, 2001, order, the PSC, inter alia, adopted definitions of "limousine," "limousine service," and "premium fare"

as interpretations of those terms as used in its rules and regulations which classify groups of carriers. The actions taken by the PSC in the April 3 order were generally within its authority under § 75-304 to establish just and reasonable classifications of groups of carriers and, specifically, within its authority under § 75-118.01, to determine the meaning of its own rules and regulations establishing such classifications.

A-1 asserts that the PSC acted outside the scope of its authority because it adopted rules and regulations without following the rulemaking procedures required under the Administrative Procedure Act and without due process. We reject A-1's arguments. The January 9 and April 3, 2001, orders, by their terms, both indicate that rather than establishing new rules, such orders are preliminary steps in a formal rulemaking process being undertaken by the PSC. As part of that process, in the April 3 order, the PSC adopted interpretations of certain existing rules and regulations which refer to limousines and limousine service. The PSC, in the April 3 order, did not adopt new rules or regulations, but instead, interpreted existing rules and regulations pursuant to its authority under § 75-118.01. Although such interpretations might be incorporated into rules and regulations to be adopted at some point in the future, the January 9 and April 3 orders indicate that such a rulemaking process was ongoing and was not complete at the time those orders were issued. The April 3 interim order did not adopt rules or regulations, a fortiori, the PSC did not adopt rules or regulations in violation of the rulemaking procedures required under the Administrative Procedure Act.

A-1 also argues that the April 3, 2001, order was issued without due process. In the January 9 order, A-1 and other interested parties received notice of the PSC's proposed interpretations of "limousine" and "limousine service." A-1 and other interested parties were given the opportunity to participate in the March 14 hearing prior to the PSC's issuance of the April 3 order. A-1 participated in the hearing. Assuming without deciding that A-1 had a protected interest, such notice and hearing were sufficient to satisfy the due process required in connection with the PSC's authority to interpret its rules and regulations. See *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001) (procedural due process requires that

parties deprived of liberty or property interests be provided adequate notice and opportunity to be heard).

We conclude that the PSC acted within the scope of its authority in the April 3, 2001, order. We therefore reject A-1's claims that the PSC acted outside the scope of its authority in issuing the April 3 order.

Unreasonable or Arbitrary.

Having determined the PSC acted within the scope of its authority, the only other question for this court to determine in this review of the PSC's April 3, 2001, order is "whether the order complained of is reasonable and not arbitrarily made." See *In re Application of E. Neb. Non-stock Trucking Coop*, 243 Neb. 662, 664, 501 N.W.2d 712, 714 (1993). We conclude that the April 3 order was reasonable and not arbitrarily made, and we reject A-1's claim to the contrary.

[6-9] In reviewing a decision of the PSC, it is not the province of an appellate court to weigh or resolve conflicts in the evidence or the credibility of the witnesses; rather, an appellate court will sustain the decision of the PSC if there is evidence in the record to support its findings. *In re Application of Neb. Pub. Serv. Comm.*, 260 Neb. 780, 619 N.W.2d 809 (2000). If there is evidence to sustain the findings of the PSC, an appellate court cannot substitute its judgment for that of the PSC. *Id*. Determinations by the PSC are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by an appellate court in the absence of a showing that the action of the PSC was arbitrary or unreasonable. *Id*. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest is a matter of legislative and administrative determination peculiarly resting in the judgment of the PSC. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

[10-12] A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis that would lead a reasonable person to the same conclusion. *In re Application of Neb. Pub. Serv. Comm., supra*. An action taken by an administrative agency in disregard of the facts or circumstances of the case and without some basis which would lead a

reasonable and honest person to the same conclusion is arbitrary and capricious as a matter of law. *Id*. A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change. *Id*.

Before issuing the April 3, 2001, order, the PSC had issued the January 9 order which stated proposed definitions for "limousine," "limousine service," and "premium fare." The January 9 order also stated that the PSC would take public comment on the proposed definitions, and on March 14, the PSC held public hearings to address, inter alia, the issues raised in the January 9 order. Various holders of limousine certificates, including A-1; various holders of taxicab certificates; and representatives of DHHS provided their comments on the issues either in written form, at the public hearing, or both. Certain limousine certificate holders stated that the definitions in the January 9 order were too restrictive because they eliminated the use of certain types of luxury vehicles from the definition of limousine service. A-1 and representatives of DHHS expressed concerns regarding the effect the definitions would have on the ability of holders of limousine certificates to provide transportation for DHHS clients. Certain taxicab certificate holders spoke in support of the definitions in the January 9 order and expressed concern that prior to the January 9 order, the definition of limousine service had been expanded beyond the original intent of the PSC rules and regulations creating the classification of limousine service and that such an expanded definition was harmful to the business of taxicab certificate holders. After considering the comments and testimony of the various interested parties, the PSC, in the April 3 order, modified its definitions from the January 9 order in a manner that, inter alia, included additional luxury vehicles within the scope of limousine service and excluded transportation of DHHS clients by newly defined limousine service.

Our review of the record in this case indicates that evidence in the record was adequate to sustain the findings and determinations made by the PSC in the April 3, 2001, order. The PSC was required to strike a balance between competing interests, and the striking of such balance was "a matter of legislative and administrative determination peculiarly resting in the judgment of the PSC." *In re Application of Jantzen*, 245 Neb. at 100, 511 N.W.2d

at 517. The PSC's policy determination will not be disturbed by this court in the absence of a showing that the action of the PSC was arbitrary or unreasonable. Considering the record before the PSC, the April 3 order of the PSC is not arbitrary or unreasonable. We therefore reject A-1's assignments of error claiming that the April 3 order was arbitrary and unreasonable.

CONCLUSION

We conclude that the PSC acted within the scope of its authority in issuing the April 3, 2001, order and that the order was reasonable and not arbitrarily made. We therefore reject A-1's assignments of error on appeal and affirm the order of the PSC.

AFFIRMED.

GLENDA L. PINKARD, FORMERLY KNOWN AS GLENDA L. BOLTON, APPELLANT, V. CONFEDERATION LIFE INSURANCE COMPANY ET AL., APPELLEES, AND ROSE BOLTON, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM BOLTON, DECEASED, INTERVENOR-APPELLEE.

647 N.W.2d 85

Filed July 12, 2002. No. S-01-436.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Divorce: Insurance.** The general rule is that divorce does not affect a beneficiary designation in a life insurance policy.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Benjamin M. Belmont, of Lustgarten & Roberts, P.C., for appellant.

Christian R. Blunk, of Berkshire & Blunk, for intervenor-appellee.

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

WRIGHT, J.

NATURE OF CASE

This is a declaratory judgment action involving two parties each claiming to be the beneficiary of an annuity contract. The Douglas County District Court found that the annuity benefits were payable to William Bolton's estate, and Glenda L. Pinkard, formerly known as Glenda L. Bolton (Pinkard), appeals.

SCOPE OF REVIEW

[1] 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. *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001).

FACTS

On May 16, 1989, Bolton was seriously injured when equipment he was operating rolled over on him. During Bolton's period of recovery, he and Pinkard were married. Because of Bolton's extensive injuries, Pinkard was appointed his guardian and conservator.

On March 15, 1991, the county court for Douglas County entered an order authorizing Pinkard to settle Bolton's workers' compensation claim. The settlement provided for an immediate payment of $75,000 and monthly payments of $1,900 commencing on April 1, 1991, for a period of 10 years certain. Under the terms of the order authorizing Pinkard to settle, Bolton could not assign or pledge any of the payments. The settlement was approved by both the Workers' Compensation Court and the Douglas County District Court as of April 15, 1991.

On November 3, 1992, Bolton's guardianship and conservatorship were voluntarily terminated. As a part of the termination, Pinkard agreed she would not have any access to or control over Bolton's money.

Pinkard filed for dissolution of marriage on January 22, 1993, and the parties entered into a property settlement agreement. Bolton was awarded as his sole and separate property all right, title, and interest in all pension plans, employee benefit plans, and 401K plans, including workers' compensation benefits, received by reason of his employment. Pinkard was awarded as her sole and separate property all right, title, and interest in all pension plans, employee benefit plans, and any other benefits received by reason of her employment.

As a part of the property settlement agreement, the parties executed a mutual release. The release provided that the parties accepted the benefit of the property settlement agreement in full and complete satisfaction of all financial claims. The property settlement agreement was incorporated into the decree of dissolution the same as if it had been fully set forth in the decree.

Bolton died on August 17, 1998, and his first wife, Rose Bolton, was appointed personal representative of his estate. The legal heirs of the estate are Bolton's children with the personal representative.

Pinkard commenced this action for declaratory judgment seeking the remaining balance of the annuity. She alleged that she was the designated beneficiary of the annuity. In her prayer for relief, Pinkard requested that the district court declare that she is the sole beneficiary of the annuity and that she should be paid all accrued benefits along with interest, attorney fees, and costs.

The personal representative intervened, alleging that the dissolution decree and the property settlement agreement between Bolton and Pinkard terminated Pinkard's rights in Bolton's workers' compensation benefits, including the annuity. The personal representative requested that the district court determine that the estate was the sole beneficiary of the annuity and all benefits payable thereunder.

Pinkard and the personal representative subsequently filed motions for summary judgment. In its order of April 2, 2001, the district court found that there were no genuine issues of material fact and that the estate was entitled to judgment as a matter of law. The court entered judgment in favor of the estate and ordered payment to the estate of the remaining proceeds of the annuity when

due. Pinkard's motion for summary judgment was overruled, and her petition was dismissed.

ASSIGNMENTS OF ERROR

Pinkard assigns as error that the district court erred (1) in finding as a matter of law that Bolton's estate was entitled to a judgment for the balance of the annuity payments, (2) in finding that she waived her interest in the annuity via the property settlement agreement in the dissolution decree, (3) in finding that she could not be a beneficiary under the annuity because such status was contrary to the county court's order authorizing settlement of the workers' compensation claim, and (4) in not granting her motion for summary judgment.

ANALYSIS

[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. *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001). Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Kirwan v. Chicago Title Ins. Co.*, 261 Neb. 609, 624 N.W.2d 644 (2001).

Pinkard, as Bolton's guardian and conservator, entered into a settlement with his employer through its workers' compensation carrier, Travelers Insurance Company (Travelers). The county court order approving the settlement provided in relevant part:

> (b) Travelers Insurance Companies promises to pay Glenda L. Bolton as Conservator for William C. Bolton the sum of One Thousand Nine Hundred Dollars ($1,900.00) per month beginning on April 1, 1991 for the life of William C. Bolton (hereinafter referred to as Payments). Said Payments are guaranteed for ten (10) years notwithstanding the prior death of William C. Bolton.
>
> (i) In no event and under no circumstances whatsoever shall any of the Payments set forth in subparagraph (b) be

> accelerated and due prior to the aforementioned scheduled dates of payment, furthermore, in no event and under no circumstances shall any of the Payments bear interest prior to the aforementioned date of payment.
>
> (ii) In the event of the death of said William C. Bolton before receipt of the Payments set forth in subparagraph (b), said remaining guaranteed payments still owing will be paid to the Estate of said William C. Bolton as they become due and in accordance with subparagraph (i) above.
>
> (iii) Said William C. Bolton shall not be able to assign or pledge any of said Payments.

As a part of the settlement, Travelers purchased an annuity from Confederation Life Insurance Company that was subsequently assumed by Pacific Life Insurance Company and administered through Allstate Life Insurance Company. The annuity contract contained a schedule of benefits which listed Bolton as the payee, Travelers as the owner, and "Glenda Bolton" as the beneficiary. The schedule of benefits stated that Pinkard was Bolton's wife.

The dissolution decree incorporated a property settlement agreement which contained a mutual release providing as follows:

> In consideration of the above and foregoing property and promises received, each party agrees to accept the benefit of this Property Settlement Agreement in full and complete satisfaction of all financial claims, monetary demands, support, alimony, child support or property rights of any kind, including all claims that either may have as the widow or widower of the other party or otherwise; and all claims which he or she had, now has or might hereinafter have against the other in the event of his or her death as an heir at law, surviving spouse or otherwise; and each party waives any and all claims which he or she may have in any property now owned by the other or which may hereinafter be acquired by the other, except as hereinabove provided.

The property settlement agreement further provided that each party agreed to

> cooperate in the preparation and execution of all necessary documents to effectuate the terms of this Agreement. In the event either party fails to cooperate in the execution of any

> such documents to effectuate the transfer of any property, real or personal, to the other, within thirty (30) days from the date of the Decree of Dissolution herein, this document in conjunction with such a Decree shall act in place of those necessary signatures and act to transfer said property.

The district court determined that there were no genuine issues of material fact. The court concluded that Pinkard could not be a beneficiary because such status would be contrary to the order entered by the county court providing that in the event of Bolton's death, the remaining annuity payments would be paid to his estate.

The district court further found that the property settlement contained in the dissolution decree waived any and all claims Pinkard had or might have against the estate in the event of Bolton's death. The court stated that there could be no surprise or misconception as to what status Pinkard was waiving because she was aware of her status as beneficiary of the annuity prior to the divorce. The court concluded that the estate was entitled to judgment as a matter of law and dismissed Pinkard's petition.

[3] Pinkard first argues that the district court erred in finding that she waived her interest as the designated beneficiary of the annuity by executing the property settlement agreement. The general rule is that divorce does not affect a beneficiary designation in a life insurance policy. See *Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989). "This rule is based on the notion that the beneficiary's claim to the proceeds evolves from the terms of the policy rather than the status of the marital relationship." *Larsen v. Northwestern Nat. Life Ins.*, 463 N.W.2d 777, 779 (Minn. App. 1990).

Pinkard relies upon *Schultz v. Schultz*, 591 N.W.2d 212 (Iowa 1999), in which the decedent's widow and the ex-wife both claimed an interest in the proceeds of the decedent's individual retirement account (IRA). The ex-wife remained listed as a beneficiary of the decedent's IRA after the decree of dissolution had awarded it to the husband. The decedent remarried and died 5 years later without removing the ex-wife's name as the beneficiary on the IRA. The trial court found that the dissolution decree did not specifically address the ex-wife's status as a beneficiary and, therefore, did not terminate her expectancy interest.

In affirming the trial court's decision, the Iowa Supreme Court reasoned that since the dissolution decree did not contain any stipulation or agreement concerning the IRA, the ex-wife's interest had not been disposed of by the dissolution decree and that the proceeds therefore belonged to the ex-wife. The court noted that in previous Iowa cases, the focus of the inquiry had been on the language of the dissolution decree and whether there was any stipulation or agreement that governed the parties' property rights.

In *Lynch v. Bogenrief*, 237 N.W.2d 793 (Iowa 1976), the ex-spouse was awarded retirement system death benefits because the dissolution decree made no mention of the death benefits payable and therefore did not control the contingent interest of the ex-spouse. An opposite result was reached in *Sorensen v. Nelson*, 342 N.W.2d 477 (Iowa 1984), in which the provisions of the dissolution decree disposed of the life insurance policy proceeds. The parties had relinquished all rights not expressly provided for in the agreement, and the court held that such language evidenced the parties' intent to " 'wipe the slate clean.' " *Id.* at 481.

Applying the same rationale, we believe that the focus of the inquiry should be upon the language of the dissolution decree and any agreement which sets forth the intentions of the parties concerning property rights. If the dissolution decree and any property settlement agreement incorporated therein manifest the parties' intent to relinquish all property rights, then such agreement should be given that effect. We make no distinction among IRA's, life insurance proceeds, or other types of annuities that designate the beneficiary in the event of the death of the payee. Each case must be evaluated based upon the facts indicating the parties' intent.

When Bolton and Pinkard divorced, the property settlement agreement provided that Bolton would receive as his sole and separate property all right, title, and interest in his employee benefit plans, including workers' compensation benefits. The benefits of the property settlement agreement were in full and complete satisfaction of all claims that either party might have, including claims which might later arise in the event of one party's death. Each party waived all claims in property owned or later acquired

by the other. The parties agreed that if either party failed to effectuate the transfer of any property, the settlement agreement, in conjunction with the decree of dissolution, would act in place of those necessary signatures to transfer the property.

Thus, we conclude as a matter of law that Pinkard relinquished her expectancy interest as the beneficiary of the workers' compensation annuity. The decree of dissolution, which incorporated the property settlement agreement, terminated her interest as a beneficiary of the annuity.

Having determined that the decree of dissolution effectively disposed of Pinkard's interest as a beneficiary, we do not reach her other assignments of error.

CONCLUSION

There is no material issue of fact in dispute, and Bolton's estate is entitled to judgment as a matter of law. Therefore, we affirm the judgment of the district court.

AFFIRMED.

HENDRY, C.J., not participating.

GARY RICHMOND, APPELLANT, V.
KELLY CASE, APPELLEE.

647 N.W.2d 90

Filed July 12, 2002. No. S-01-475.

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: Records: Appeal and Error.** In order to provide meaningful appellate review of an assignment of error, an appellate court must be presented with a record that elucidates the factors contributing to the trial court's decision.
4. **Summary Judgment: Evidence: Proof.** 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.

5. **Summary Judgment: Records: Appeal and Error.** Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the trial court before such evidence can be considered during appellate review of the motion.
6. **Records: Rules of the Supreme Court.** The procedure for preparation of the bill of exceptions is regulated by the rules of practice prescribed by the Nebraska Supreme Court.
7. **Appeal and Error.** 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 Kimball County: KRISTINE R. CECAVA, Judge. Reversed and remanded for further proceedings.

Monte L. Neilan, of Douglas, Kelly, Meade, Ostdiek, Bartels & Neilan, P.C., for appellant.

Don Stenberg, Attorney General, and Royce N. Harper for appellee.

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

STEPHAN, J.

This is a civil action in which Gary Richmond sought declaratory and injunctive relief as well as money damages from Kelly Case, an employee of the Nebraska Department of Health and Human Services (DHHS). Richmond alleged that Case engaged in "the unauthorized practice of law" and deprived him of his constitutional rights under color of state law in obtaining the relinquishment of his parental rights to his minor daughter, A.C. Richmond appeals from an order of the district court for Kimball County entering summary judgment in favor of Case. We moved the appeal to our docket on our own motion 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).

RECORD

PLEADINGS

Richmond's operative first amended petition includes three separately designated "causes of action." In his first "cause of

action," Richmond alleged that on July 23, 1993, the county court for Kimball County, sitting as a juvenile court, placed A.C. in the temporary custody of DHHS. He further alleged that on or about June 1, 1995, A.C. was placed in the Omaha home of her maternal grandparents. Richmond then alleged that in September 1996, a petition was filed in the county court for Kimball County seeking to terminate his parental rights and that counsel was appointed for him for the first time on July 29, 1997.

Richmond alleged that Case, whom he identifies as a "caseworker" employed by DHHS, was assigned to the juvenile case in early August 1998. He alleged that Case contacted him to request a meeting, to which he agreed. Richmond alleged that during this meeting, he participated in a telephone conference call with Case, A.C., and A.C.'s maternal grandmother. He alleged that Case then advised and counseled him, made recommendations regarding his parental rights, and provided him with certain legal documents, despite the fact that Case was not a lawyer. Richmond further alleged that Case was aware that Richmond was then represented by appointed counsel but took such actions without the consent or knowledge of such counsel. Richmond alleged he had "an attorney-client relationship" with Case and that pursuant to her advice and counsel, he executed certain documents relinquishing his parental rights, which were subsequently filed in juvenile proceedings before the county court for Kimball County. Richmond alleged that he executed these documents in order to facilitate an "open adoption" by A.C.'s maternal grandparents, which adoption would allow him to visit A.C. after his parental rights had been terminated.

Richmond alleged that upon becoming aware of these events, his appointed counsel argued to the county court that Case had engaged in the unauthorized practice of law and moved to strike the relinquishment documents as violative of Neb. Rev. Stat. § 7-101 (Reissue 1997). Richmond alleged that this motion was overruled and that his appeal therefrom was dismissed "for lack of jurisdiction." He further alleged that the Kimball County attorney declined a request to prosecute Case under § 7-101. Richmond alleged that because he had executed the relinquishment forms, he lacked standing to participate in proceedings to terminate A.C.'s mother's parental rights and that the

relinquishment forms "may be presented, asserted, and relied upon, at any time, to the Plaintiff's great detriment, by those having interests and duties adverse to the Plaintiff." He prayed for relief consisting of a declaration that Case's conduct constituted the unauthorized practice of law and further prayed that the relinquishment forms he executed be declared null and void as the "fruit of the unauthorized practice of law." Richmond also sought injunctive relief to prevent Case from engaging in similar conduct directed toward him or other unspecified individuals.

In his second "cause of action," Richmond incorporated the foregoing allegations and further alleged that Case was negligent in advising him concerning his parental rights, resulting in injury and general damages. And finally, in his third "cause of action" Richmond alleged that Case's conduct violated his constitutional rights under color of state law, thus entitling him to compensatory and punitive damages, as well as other relief, pursuant to 42 U.S.C. § 1983 (2000).

Case filed an answer that included a general denial of the allegations of improper or unlawful conduct and two affirmative defenses: (1) that she "acted reasonably and within the scope of her employment with due regard [for] the best interests of [A.C.]" and (2) that she was entitled to "qualified immunity." On the same day Case filed her answer, Richmond interposed a pleading captioned "Plaintiff's Demurrer to Defendant's Affirmative Defenses," asserting "[f]ailure, as a matter of law, to state a defense."

Richmond's Motion for Summary Judgment

Richmond also filed a motion for partial summary judgment as to the issue of liability on his first "cause of action." The motion came on for hearing on March 7, 2000, along with four other pending motions, including Richmond's motion for attorney fees. Richmond's counsel appeared personally at the hearing, while Case's attorneys participated telephonically. It appears that this was the first evidentiary hearing conducted in the case, and it is at this point that significant deficiencies in the record began to develop.

Neb. Ct. R. of Prac. 5B(6)c (rev. 2000) specifies the manner in which evidentiary exhibits are to be identified, numbered, and retained in the bill of exceptions, providing in pertinent part:

> Exhibits are to be marked in numerical order, irrespective of the party producing them, and shall show the date on which they were marked. The sequential numbering of exhibits shall begin with the first hearing held in the case and continue until final disposition. The same number shall not be given to more than one exhibit in any case. If the pages of a multipage exhibit are not otherwise numbered, the reporter shall number the pages in sequence and shall in all instances mark such an exhibit so as to indicate the number of pages it contains.

The first exhibits offered by Richmond's counsel related to his motion for attorney fees and were numbered 34, 10, 10A, 10B, 30, and 32. These included Case's deposition, marked as exhibit 30; an affidavit of Richmond, marked as exhibit 32; an affidavit of Case dated February 7, 2000, marked as exhibit 10; and copies of what purport to be excerpts from a "Nebraska Health and Human Services Manual," marked as exhibits 10A and B. It appears that exhibits 10 and 10A and B were originally a single exhibit, but they were marked and identified separately for a reason that is not apparent from the record. The court received each of these exhibits and then took the motion for fees under advisement. At that time, the parties agreed to argue a portion of Richmond's demurrer in conjunction with his motion for partial summary judgment and then submit arguments on the remaining portion of the demurrer by brief.

Richmond then offered exhibits 33, 32, 36, 37, 30, 31, and 35 in support of his motion for partial summary judgment. Two of these exhibits, numbers 30 and 32, had previously been offered on the motion for attorney fees. The remaining exhibits included an affidavit of a friend of Richmond's, marked as exhibit 33; an affidavit of the Counsel for Discipline of the Nebraska State Bar Association, marked as exhibit 36; the deposition of the county court judge who presided over A.C.'s juvenile court proceedings, marked as exhibit 31; and two affidavits by Richmond's attorney, marked as exhibits 35 and 37. The court received exhibits 30 through 33 and 36, and took the objections to exhibits 35 and 37 under advisement.

In opposition to Richmond's motion for partial summary judgment, Case's counsel offered exhibit 10, which the court

identified as "the regs and guidelines," but which appears in the record as the aforementioned affidavit of Case dated February 7, 2000. Case's counsel also offered exhibit 11, another affidavit executed by Case on February 7, 2000, and exhibit 38, an affidavit executed by Case on February 25, 2000, which included four attachments designated A through D. The court received each of these exhibits. By order filed August 1, 2000, the district court overruled, without opinion, Richmond's demurrer and his motion for partial summary judgment without opinion.

Case's Motion for Summary Judgment

On July 28, 2000, Case filed a pleading captioned "Motion for Summary Judgment Based on Qualified Immunity." A hearing on the motion was held on August 25. Richmond's counsel appeared personally, while Case's counsel again participated by telephone. Case's counsel identified 11 exhibits offered in support of the motion. However, the exhibits identified in the offer made on the record and those marked by the court reporter do not correspond. Counsel identified exhibit 1 as "an Affidavit of Kelly Case," but exhibit 1 is a document entitled "Relinquishment of Child by Parents." Counsel identified exhibit 2 as a document entitled "Relinquishment of the Child by Parent," but the document marked as exhibit 2 is entitled "Affidavit of Explanation on Nonconsent Form." Counsel identified exhibit 3 as "the Questionnaire for Relinquishment of Parental Rights," but exhibit 3 is entitled "Affidavit by Agency." Similarly, counsel identified exhibit 4 as an "Affidavit of Explanation [on] Nonconsent Form," but exhibit 4 in the bill of exceptions is entitled "Questionnaire for Relinquishment of Parental Rights." Counsel identified exhibit 5 as an "Affidavit by Agency," but, inexplicably, exhibit 5 in the bill of exceptions is a partially executed stipulation and order dealing with discovery issues in the case. Counsel identified exhibit 6 as "HHS Regulations 390 NAC 8-003 through 8-005," but the document in the bill of exceptions bearing that exhibit number is a copy of a letter from Richmond's counsel to Case's counsel. Similarly, exhibit 7 was identified as "HHS Section V on Voluntary Relinquishment," but exhibit 7 in the bill of exceptions is another letter between counsel. Exhibit 8 is identified as "Narrative of Kelly Case, the defendant perform-

ing her work," but appears in the bill of exceptions as "Plaintiffs [sic] First Set of Discovery Requests to Defendant." Case's counsel identified exhibit 9 as portions of the deposition of Case and exhibit 10 as portions of the deposition of the county judge, but exhibit 9 is a partially executed copy of a document entitled "Defendant's Answers to Interrogatories," and the only exhibit 10 appearing in the record is the affidavit of Case offered and received during the previous hearing. Finally, counsel identified exhibit 11 as "an Affidavit of Nancy Morris who is a Child Protective Service Worker." Exhibit 11 found in the bill of exceptions, however, is a deposition of Case marked and received at the March 7, 2000, hearing.

Rule 5B(6)c also provides in part:

> Ordinarily, exhibits or papers contained in the bill of exceptions should be placed in the record immediately following where they are ruled on by the court. If exhibits are frequently referred to in the testimony, they should be inserted in the record in such a manner as to be easily removed; for instance, by placing them in an attached envelope. If the exhibits are of such character or so numerous that to insert them in any volume containing testimony would make the volume cumbersome and difficult to handle while reading, then such exhibits should be contained in a separate volume. If exhibits are of such character that they cannot be inserted in a bound volume, then they should separately accompany the record.

With the possible exception of the two depositions, all of the exhibits were capable of being bound in the bill of exceptions "immediately following where they are ruled on by the court" in compliance with rule 5B(6)c. Instead, all of the exhibits were placed unbound in a manila envelope marked "Bill of Exceptions Envelope — Exhibits."

By order filed April 2, 2001, the district court granted Case's "Motion for Summary Judgment Based on Qualified Immunity" and dismissed the action. The order recites that the judge "reviewed the evidence submitted to the Court," but does not make specific reference to any item of evidence. The court concluded that Case acted "in accordance with the applicable statutes of the State of Nebraska and the regulations promulgated by her

employer" and that she "did not enter into the unauthorized practice of law."

ASSIGNMENT OF ERROR

Richmond assigns, restated, that the district court erred in granting Case's motion for summary judgment.

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*, 263 Neb. 534, 641 N.W.2d 62 (2002); *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002); *Shlien v. Board of Regents*, 263 Neb. 465, 640 N.W.2d 643 (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. *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002); *Polinski v. Sky Harbor Air Serv.*, 263 Neb. 406, 640 N.W.2d 391 (2002).

ANALYSIS

[3] In order to provide Richmond meaningful appellate review of his assignment of error, we must be presented with a record that elucidates the factors contributing to the district court's decision to grant summary judgment in favor of Case. See, *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001); *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997). Unfortunately, we are not presented with such a record here. Because of the discrepancies between the identification of exhibits offered in support of Case's motion for summary judgment and the exhibits which were actually marked by the court reporter, we cannot determine with any reasonable degree of assurance what evidence was actually before the district court when it decided the motion. For example, the depositions of Case and the county judge were offered as exhibits 9 and 10 at the August 25, 2000,

hearing on Case's motion for summary judgment. Exhibits 9 and 10 in the bill of exceptions, however, are other documents, not the depositions. The aforementioned depositions were marked as exhibits 30 and 31 at the prior hearing on March 7, but they are not shown in the bill of exceptions as being received on August 25. Also, the bill of exceptions reflects that exhibit 11, described as an affidavit of a Child Protective Services worker, was offered and received at the hearing on August 25. Again, however, exhibit 11 in the bill of exceptions is an affidavit of Case offered at the March 7 hearing, and although there is a copy of an affidavit of the Child Protective Services worker in the transcript, we find no such affidavit anywhere in the bill of exceptions. The district court's order granting the motion for summary judgment provides us no guidance because it makes no reference, either by exhibit number or substantive description, to specific evidentiary items considered and relied upon in reaching its judgment.

[4-6] The assigned error in the granting of Case's motion for summary judgment requires that we review the evidence offered in support of and in opposition to the motion. 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. *Smeal v. Olson, supra*; *Polinski v. Sky Harbor Air Serv., supra*. Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the trial court before such evidence can be considered during appellate review of the motion. *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000); *Durkan v. Vaughan*, 259 Neb. 288, 609 N.W.2d 358 (2000). The procedure for preparation of the bill of exceptions is regulated by the rules of practice prescribed by this court. *Shuck v. Jacob*, 250 Neb. 126, 548 N.W.2d 332 (1996).

[7] Because we cannot determine from this record what evidence Case presented in support of her motion for summary judgment, we cannot conclude that she met her burden of producing evidence that, if uncontroverted, would entitle her to judgment as

a matter of law. See *Morrison Enters. v. Aetna Cas. & Surety Co., supra.* We note that we are presented here with one issue of law which does not require evidentiary support, i.e., whether one may maintain a private cause of action for money damages against another based upon an alleged "unauthorized practice of law." This is an issue of first impression in this state which was neither briefed by the parties nor decided by the district court. Although it is an issue of law, we do not address it at this time based upon the principle that an appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002); *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).

CONCLUSION

This court's rules governing the numbering of exhibits and the manner of their inclusion in the bill of exceptions are designed to provide an appellate court with a clear understanding of what documentary evidence was received and considered by a trial court with respect to a particular matter submitted for decision, thus facilitating meaningful appellate review. Because those rules were not followed, we are unable to conclude, under our standard of review, that Case made the requisite factual showing which would entitle her to summary judgment. Accordingly, the judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SUSAN R. TREMAIN, NOW KNOWN AS SUSAN R. TALLANT, APPELLEE, V. CHARLES L. TREMAIN II, APPELLANT.

646 N.W.2d 661

Filed July 12, 2002. No. S-01-790.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.

2. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
3. ____. In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state.
4. ____. After the custodial parent satisfies the court that he or she has a legitimate reason for leaving the state, the custodial parent must demonstrate that it is in the child's best interests to continue living with him or her.
5. **Child Custody: Appeal and Error.** The Nebraska Supreme Court conducts a de novo review on the record in child custody determinations.
6. **Modification of Decree: Child Custody: Proof.** The party seeking modification of child custody bears the burden of showing a change in circumstances.
7. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
8. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.

Appeal from the District Court for Johnson County: DANIEL BRYAN, JR., Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Gregory D. Barton, of Harding, Shultz & Downs, for appellant, and, on brief, Charles L. Tremain II, pro se.

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

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

WRIGHT, J.

NATURE OF CASE

Charles L. Tremain II appeals from an order of the district court for Johnson County that denied his request to remove his children from the state and granted custody of the children to his ex-wife, Susan R. Tremain, now known as Susan R. Tallant.

SCOPE OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination

will normally be affirmed absent an abuse of discretion. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

[2] Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Id*.

FACTS

Charles and Susan were married in Nevada on February 16, 1992, and they have three children. A decree dissolving their marriage was entered on December 10, 1999.

In the dissolution decree, the district court awarded custody of the children to Charles, subject to a visitation schedule that included every other weekend, scheduled holidays, and 4 weeks in the summer. Both parties were restrained from removing the children from the state without the court's consent unless the other party gave written consent for a temporary removal. Based on her current income, Susan was directed to pay $50 per month in child support. Charles was directed to maintain health insurance for the children, with other medical expenses to be shared by Charles and Susan.

Susan appealed the custody determination to the Nebraska Court of Appeals, which affirmed the district court's order. See *Tremain v. Tremain*, No. A-00-067, 2000 WL 1673320 (Neb. App. Nov. 7, 2000) (not designated for permanent publication). The Court of Appeals found, upon its de novo review, that both Susan and Charles are fit parents, that the children have good relationships with both parties, and that each party can provide a suitable home for the children. The appellate court held that it could not find an abuse of discretion in awarding custody to Charles.

Following the divorce, Charles moved to Clay Center, Nebraska, where he earned $35,000 per year as a teacher and assistant coach for the Harvard public schools. Charles said he resigned the position in the spring of 2000 because he had philosophical differences with the principal and had been told his contract would not be renewed. He applied for more than 40 teaching positions but received no similar offers. He eventually took a job with a counseling center in the Hastings, Nebraska, area at a salary of $24,000 per year.

Charles married Jacque Jury on June 25, 2000. At the time of the marriage, she lived in Forest Grove, Oregon, and worked as a financial officer earning $83,000 per year. After the marriage, Jacque continued living and working in Oregon, while Charles and the children lived in Clay Center. The children attended Clay Center public schools in the fall of 2000.

In November 2000, Charles was offered a teaching position in Oregon that paid $43,500 per year. He did not tell Susan about the position. After Susan gave Charles permission to take the children to Oregon for an extended Thanksgiving holiday, he moved the children to Oregon and enrolled them in school.

In December 2000, Charles filed an application for permission to remove the children from Nebraska in which he explained that he originally sought teaching positions that would begin in January 2001. However, an Oregon school wanted him to report on November 21, 2000, and begin teaching in the first week of December. Susan filed an answer and cross-petition on January 16, 2001, in which she alleged that Charles was in contempt of court for removing the children from the state. She asked the district court to enter an order awarding her custody of the children. The court found Charles in contempt and directed him to return the children to Nebraska on or before January 15.

Charles terminated his teaching position in Oregon and returned with the children to Burchard, Nebraska, where he was able to obtain free housing from one of Jacque's relatives. He took temporary positions as a substitute teacher earning $60 per day.

After a hearing in March 2001, the district court temporarily placed the children in Susan's custody, and she enrolled the children in the Lewiston school district. Charles returned to Oregon and worked as a substitute teacher for $130 per day.

At the time of the hearing in May 2001, Charles had two interviews pending for teaching positions with starting base salaries of $47,500. Charles and Jacque were renting a five-bedroom home in Oregon. Jacque's 30-year-old daughter and a grandson also resided in the home. Jacque had been laid off when her employer downsized, but she eventually obtained a job in a real estate office in Seattle, Washington. The job was 3 hours away from Forest Grove, Oregon.

Susan married Michael Tallant in the summer of 2000. In May 2001, they were living in Liberty, Nebraska, in a two-story home with five bedrooms. Michael worked in Beatrice and earned a modest income. Susan was working as a painter and decorator. The district court found that her potential earning capacity was a minimum of $12,000 per year.

On June 11, 2001, the district court denied Charles' application to remove the children from the state and granted Susan's cross-petition for change of custody. The order included a visitation schedule that made provision for Charles' residing in either Oregon or Nebraska. Charles was ordered to pay Susan child support of $967 per month with a decreasing schedule as each child reaches the age of majority. Charles appeals.

ASSIGNMENTS OF ERROR

Charles asserts that the district court abused its discretion in placing the children in the temporary custody of Susan in March 2001, in granting permanent custody to Susan, in denying Charles permission to remove the children from Nebraska, and in basing its decision in substantial part on the court's opinion that women generally are natural nurturers. Charles also asserts that the court's finding of a material change in circumstances which justified transferring child custody is contrary to the law and the evidence.

ANALYSIS

The district court denied Charles' request to move the children to Oregon, finding that it was in the best interests of the children to award custody to Susan. This change of custody occurred just 18 months after the dissolution decree was entered by a different judge.

[3] In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). The district court found that Charles had not voluntarily given up his $35,000-per-year job in Harvard and that he was having trouble obtaining a similar job in Nebraska. The job he had taken in Oregon had a potential for increased salary compared to similar jobs in Nebraska. At the time of the hearing on Charles' request

to move the children, Charles no longer had a job in Oregon because he lost his teaching job when he was ordered to return to Nebraska. Jacque had not been able to find employment in Nebraska. The court found that although there was no evidence of a firm job offer, the evidence of present job interviews in Oregon, Charles' previous ability to obtain a job, and his marriage to Jacque met Charles' burden of showing a legitimate reason to leave Nebraska because Oregon offered Charles increased opportunities for enhanced income as a teacher.

[4] After the custodial parent satisfies the court that he or she has a legitimate reason for leaving the state, the custodial parent must demonstrate that it is in the child's best interests to continue living with him or her. See *id*. In order to determine whether it is in the children's best interests to continue living with Charles, the district court considered the factors spelled out in *Vogel*: (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation arrangements.

The district court found that neither party was seeking to frustrate the custodial rights of the other or acting in bad faith and that both parents cared about the children and were trying to do what was best, "even though it is apparent to me that these two people are not nice to each other." The court determined that each parent had valid reasons for their respective positions concerning removal of the children from the state.

The district court considered the potential that a move would enhance the quality of life for the children and Charles. The court weighed the factors set forth in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), and concluded that Charles should not be allowed to move the children.

The district court also considered the impact the move would have on the children and Susan. Charles' testimony established that he was willing to allow extensive visitation during summer and school holidays and was willing to pay some of the expenses. The court found that Susan "is the type of parent that wants to be a major part of the children's lives." This fact weighed against relocation.

The district court found that Charles had not demonstrated that it is in the children's best interests to continue to live with Charles. The court said that the only factor that weighed in favor of relocation was the expectation of enhanced income and that it had not been shown by a preponderance of the evidence that it would be in the children's best interests to relocate.

From our de novo review, we conclude that it is not in the children's best interests to move to Oregon. The only factor which weighs in Charles' favor is the possibility of enhanced income, and this factor is not sufficient to carry the burden to establish that it is in the children's best interests to be moved to Oregon. We therefore affirm that portion of the district court's order denying Charles' request to move the children.

[5] We next address whether there was a material change in circumstances that would justify a change in custody. We consider this issue separate and apart from the request to move the children to Oregon. Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Id*. This court conducts a de novo review on the record in child custody determinations. See *id*.

[6,7] The party seeking modification of child custody bears the burden of showing a change in circumstances. *Id*. A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Sullivan v. Sullivan*, 249 Neb. 573, 544 N.W.2d 354 (1996). In *Vogel*, we stated that the removal of a child from the state, without more, does not amount to a change in circumstances warranting a change of custody. We recognized that a move, considered in conjunction with other evidence, may result in a change in circumstances that would warrant a modification of the decree. In this case, the request to move the children also resulted in a change in custody of the children.

[8] The district court found a material change in circumstances based in part on the "stability" of Charles. The court found that Charles' move to Oregon reflected instability, deceit, and poor judgment regarding the children's best interests. The question is whether the district court abused its discretion in finding a material change in circumstances based upon Charles' unilateral move to Oregon without the consent of Susan or the court. A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Vogel v. Vogel, supra*.

The district court stated that several questions were left unanswered, including whether Charles and Jacque would relocate to Nebraska if the court denied the request to remove the children. Susan's cross-petition alleged a material change in circumstances, which she claimed was the instability of the children's home and school based on Charles' employment decisions. The court found that while the stability issue alone did not demonstrate a material change in circumstances, a combination of events following the decree resulted in a material change in circumstances.

The district court based its decision, at least in part, on its finding that Susan, as a woman, is a better nurturer. That finding does not demonstrate a change in circumstances because Susan made the same claim during the dissolution proceedings, when she argued that she should be awarded custody because she is more nurturing than Charles. This claim was known to the court at the time of the dissolution decree and did not persuade the court to award custody to Susan at that time. Moreover, the record does not show that this circumstance has materially changed since the original decree granting custody to Charles.

The best interests of the children are this court's paramount concern. See *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996). The evidence was sufficient to support either parent as the custodial parent because both were found to be fit. In granting Susan's cross-petition for a change in custody, the district court apparently adopted her assertion that Charles had failed to provide stability for the children. The court found that Charles had moved the children to four separate school systems since the entry of the decree and that his job changes reflected

instability. However, Charles moved the children to Oregon because he had obtained a better job, and he quit that job and moved them back to Nebraska in response to the court's order. The children were temporarily placed in Susan's custody in March 2001 and apparently have remained there.

Although we have concluded that it is in the best interests of the children to remain in Nebraska, we are not persuaded that Susan has sustained her burden of showing a material change in circumstances that would justify a change in custody. The district court noted that "this was never a question of whether or not [Charles] was a fit parent or not." The court stated:

> It was a question of whether or not he opened the door on change of custody because he moved out of Nebraska. He would have never had custody taken out of his possession if it wasn't for the fact he wanted to create this material change of circumstances and take the kids out. The mere fact he's asking to transfer them, I think that's a material change, the custody issue being b[r]ought back into the forum.

The district court abused its discretion when it determined there had been a material change in circumstances that justified granting a change in custody. The court should have ascertained whether Charles would relocate to Nebraska in order to retain custody of the children. The issue was not resolved, and the evidence does not support a finding of a material change in circumstances.

CONCLUSION

That portion of the district court's order denying Charles' request to remove the children from Nebraska was not an abuse of discretion, and it is affirmed. However, that portion of the order granting custody to Susan based on a material change in circumstances is reversed, and the cause is remanded for further proceedings to determine the custody, support, and visitation arrangements should Charles choose to reside in Nebraska.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., not participating.

HELEN VOLQUARDSON, PLAINTIFF, V. HARTFORD INSURANCE COMPANY OF THE MIDWEST, DEFENDANT.

647 N.W.2d 599

Filed July 12, 2002. No. S-01-972.

1. **Insurance: Contracts.** An insurance policy is a contract.
2. **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.
3. **Insurance: Contracts: Intent: Appeal and Error.** In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
4. **Insurance: Contracts: Words and Phrases.** A contract, such as an insurance policy, is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. However, the fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.
5. **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.
6. **Public Policy: Words and Phrases.** Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community.
7. **Statutes: Legislature: Public Policy.** It is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.
8. **Insurance: Liability: Public Policy.** It is against public policy to insure against liability for intentional acts.
9. **Insurance: Contracts: Words and Phrases.** The phrase "the insured" in an insurance policy denotes a several obligation, as distinguished from the joint obligation created by the phrase "an insured."
10. **Statutes.** Statutory interpretation presents a question of law.
11. **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.
12. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.
13. **Statutes: Legislature: Intent.** In the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying another statute.

14. ____: ____: ____. A court may examine the legislative history of the act in question in order to ascertain the intent of the Legislature.

Certified Questions from the U.S. District Court for the District of Nebraska. Judgment entered.

Ronald E. Temple, of Gatz, Fitzgerald, Vetter & Temple, for plaintiff.

Thomas H. Cellilli III and Michelle Dreesen Epstein, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for defendant.

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

STEPHAN, J.

In a pending civil action captioned "Helen Volquardson, Plaintiff vs. Hartford Insurance Company of the Midwest, Defendant," No. 4:00CV3340, the U.S. District Court for the District of Nebraska certified six questions of state law to this court under the procedure established by Neb. Rev. Stat. §§ 24-219 through 24-225 (Reissue 1995). We accepted the certification request and hereby answer the certified questions, which concern the interpretation of two insurance policies issued by Hartford Insurance Company of the Midwest (the Hartford) to Helen Volquardson and William J. Volquardson.

UNCONTESTED FACTS

Pursuant to § 24-221, the U.S. District Court included in its certification request the following uncontested facts relevant to the certified questions of law: Helen is a resident of Cedar County, Nebraska, and is married to William. The Hartford is an insurer licensed and authorized to conduct business in the State of Nebraska.

The Volquardsons owned a residence, outbuildings, and a 1984 Mercury Lynx as joint tenants with rights of survivorship on July 30, 2000. The Volquardsons' residence and outbuildings were insured by a homeowner's policy issued by the Hartford, which specifically provided insurance coverage against peril of fire. The 1984 Mercury Lynx was insured by an automobile liability policy

also issued by the Hartford. Helen and William were named insureds under both policies, and both policies were in effect on July 30, 2000. In 1994, the Hartford had the contents of the Volquardsons' homeowner's policy approved by the director of the Department of Insurance for the State of Nebraska.

On July 30, 2000, at approximately 8:30 a.m., William intentionally set fire to the residence, its contents, the outbuildings, and the 1984 Mercury Lynx. All of the aforementioned property was completely destroyed by the fire. William set the fire as part of a suicide attempt.

Helen was in no way involved in setting fire to the property, nor did she have any actual or constructive knowledge that William was going to set the fire. Furthermore, there is no evidence to indicate that William's actions on July 30, 2000, constituted an act of abuse as that term is defined by Neb. Rev. Stat. § 44-7402(1) (Reissue 1998).

After the fire, Helen timely complied with all conditions precedent to coverage and then made claims against the insurance policies to recover for the destroyed property, but the Hartford refused to pay. On December 22, 2000, Helen filed a complaint in the U.S. District Court for the District of Nebraska alleging she was entitled to a judgment requiring the Hartford to pay her claims for property damage pursuant to the policies. The Hartford filed an answer in which it affirmatively alleged that the intentional acts exclusion in the homeowner's policy precluded coverage for the damage to the residence, its contents, and the outbuildings because William had intentionally burned the property. The Hartford also affirmatively alleged that part D of the insuring agreement in the automobile liability policy, which stated that the Hartford would pay for only "direct and accidental loss" to a covered automobile, prevented Helen from recovering for the damage to the 1984 Mercury Lynx.

The U.S. District Court also provided certain documents for our review and consideration in responding to the certified questions. These documents include the complaint and answer filed in the pending federal action, the two insurance policies issued by the Hartford and identified in the uncontested facts, and the 1943 New York Standard Fire Insurance Policy (1943 NYSFIP) certified by the State of Nebraska, Department of Insurance.

CERTIFIED QUESTIONS

The U.S. District Court certified the following six questions of state law for resolution by this court:

1. Is the language of the intentional acts exclusion in SECTION [I]-EXCLUSIONS, Paragraph 1.h.1. and 1.h.2 of Hartford's Homeowner's Policy ambiguous?

2. Is the intentional acts exclusion in SECTION [I]—EXCLUSIONS, Paragraph 1.h.1. and 1.h.2 of the Hartford's Homeowner's Policy contrary to the public policy of Nebraska, as expressed by statute and case law, when applied to preclude coverage against peril of fire to an innocent co-insured?

3. Does the intentional acts exclusion in SECTION [I]—EXCLUSIONS, Paragraph 1.h.1 and 1.h.2 of the Hartford's Homeowner's Policy comply with the provisions of §44-501(6), R.R.S. 1998, and provide the substantial equivalent of the minimum provisions of the 1943 New York Standard Fire Insurance Policy?

4. If the answer to Question No. 3 is "no," did the Director of Insurance of the State of Nebraska, pursuant to § 44-501(11), R.R.S. 1998, have the lawful authority in 1994 to approve the variations in Hartford's Homeowners policy notwithstanding its noncompliance with the 1943 New York Standard Fire Insurance Policy?

5. Is the language "direct and accidental loss" in the insuring agreement in PART D—COVERAGE FOR DAMAGE TO YOUR AUTO, Paragraph A. of Hartford's Auto Policy ambiguous?

6. Is the language "direct and accidental loss" in the insuring agreement in PART D—COVERAGE FOR DAMAGE TO YOUR AUTO, Paragraph A. of Hartford's Auto Policy contrary to the public policy of Nebraska, as expressed by statute and case law, when applied to preclude comprehensive coverage to an innocent co-insured?

ANALYSIS

Introduction

[1-3] Certain well-established principles of Nebraska law form the foundation for our resolution of the questions of law

certified by the U.S. District Court. 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); Neb. Rev. Stat. § 44-102 (Reissue 1998). 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); *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998). In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contact are clear, they are to be accorded their plain and ordinary meaning. *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001); *Callahan v. Washington Nat. Ins. Co., supra*.

Question One

The first certified question asks this court to determine whether the intentional acts exclusion in the Volquardsons' homeowner's policy is ambiguous. The exclusion provides:

> **SECTION I — EXCLUSIONS**
>
> 1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss:
>
> . . . .
>
> **h**. **Intentional Loss**, meaning any loss arising out of any act committed:
>
> **(1)** By or at the direction of an **insured**; and
>
> **(2)** With the intent to cause a loss.

Helen argues that the phrase "an insured" is ambiguous as to whether an innocent coinsured may recover despite the intentional act(s) of a coinsured, because the phrase does not exclude coverage for the intentional act(s) of "any insured." The Hartford argues that the language is not ambiguous and that the plain meaning of the exclusion negates coverage to Helen based upon the intentional acts of her husband, who is "an insured" under the policy.

[4,5] In Nebraska, a contract, such as an insurance policy, is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001); *Callahan v. Washington Nat. Ins. Co., supra*. However, the fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Id.*; *Moller v. State Farm Mut. Auto Ins. Co.*, 252 Neb. 722, 566 N.W.2d 382 (1997). Moreover, 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. *Callahan v. Washington Nat. Ins. Co., supra*; *American Family Ins. Group v. Hemenway, supra*.

This court has not previously determined whether the phrase "an insured" in an insurance policy clearly and unambiguously creates joint rights and obligations on the part of coinsureds, or whether the phrase is ambiguous and should therefore be construed in favor of a coinsured who does not participate in an excluded loss. Those courts which have addressed this issue have reached strikingly dissimilar conclusions. In *Michigan Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915 (11th Cir. 1998), for example, the court held that the phrase "an insured" in the homeowner's policy under consideration was ambiguous because it did not clearly impose joint obligations on the part of coinsureds. In determining that an ambiguity existed, the *Benfield* court noted that the phrases "an insured" and "the insured" were used throughout the policy "with apparent interchangeability." *Id.* at 926. The same is true of the Hartford policy under consideration here.

In *McFarland v. Utica Fire Ins. Co.*, 814 F. Supp. 518, 525 (S.D. Miss. 1992), the court reasoned that because the intentional acts exclusion in the property insurance policy under review "with[held] coverage for 'an' act committed by 'an' insured, but not 'an' act committed by 'any' insured," the language was ambiguous and should therefore be construed to not bar an innocent coinsured from recovering. In *Brumley v. Lee*, 265 Kan. 810, 963 P.2d 1224 (1998), the Supreme Court of Kansas went even

further and concluded that the phrase "any insured" was also ambiguous. The *Brumley* court was interpreting a provision in a homeowner's policy that excluded coverage for bodily injury or property damage " 'expected or intended by any insured.' " 265 Kan. at 811, 963 P.2d at 1226. In its opinion, the *Brumley* court rejected the insurer's argument that use of the phrase "any insured" clearly created a joint obligation, reasoning that "[t]he words 'an' and 'any' are inherently indefinite and ambiguous" and "can and often do have the same meaning." 265 Kan. at 814, 963 P.2d at 1227.

Conversely, other courts have found no ambiguity in similar policy language. For example, the court in *Dolcy v. R.I. Joint Reinsurance Ass'n*, 589 A.2d 313 (R.I. 1991), examined language in a homeowner's policy to determine whether an innocent coinsured could recover for a fire loss caused by the intentional act of her spouse. The Supreme Court of Rhode Island first determined that the issue must be resolved by examining the policy language "to see whether the insureds' obligation to refrain from intentional destruction (arson) is joint rather than separate under the patent language of the contract." *Id.* at 315. The *Dolcy* court concluded that policy language stating that the carrier does " 'not insure against loss caused directly or indirectly by . . . an insured' " who commits the loss intentionally was an unambiguous pronouncement that no coverage was provided for a loss caused intentionally by any insured. 589 A.2d at 316.

The Supreme Court of Iowa employed similar reasoning in resolving questions certified to it by the U.S. District Court for the Southern District of Iowa in *Vance v. Pekin Ins. Co.*, 457 N.W.2d 589 (Iowa 1990). In the context of a claim by an innocent spouse to recover under a homeowner's policy for a fire loss intentionally caused by her husband, the *Vance* court examined a policy provision stating that coverage is excluded for " '[i]ntentional Loss . . . committed . . . by or at the direction of *an* insured.' " *Id.* at 592. Noting that the case turned on whether the word "an" was ambiguous, the court concluded that it was not, stating:

> The word "an" is a functional word used "before singular nouns when the referent is unspecified (for example, a man overboard)." *Webster's Ninth New Collegiate Dictionary* 45 (1985). The words "an insured" in the above exclusion

> means [sic] an unspecified insured who commits arson. In short, if any insured commits arson, all insureds are barred from recovering.

Id. at 593. Accord, *Bryant v. Allstate Ins. Co.*, 592 F. Supp. 39, 41 (E.D. Ky. 1984) (employing contract analysis and determining phrase "an insured" to be unambiguous and "clear as spring water"); *Utah Farm Bureau Ins. Co. v. Crook*, 980 P.2d 685 (Utah 1999) (holding phrase "an insured" in intentional acts of exclusion provision unambiguously barred innocent coinsured from recovering for damage to insured property caused by arson of coinsured); *Woodhouse v. Farmers Union Mut. Ins. Co.*, 241 Mont. 69, 785 P.2d 192 (1990) (same); *Allstate Ins v Freeman*, 432 Mich. 656, 443 N.W.2d 734 (1989) (interpreting "an insured" to unambiguously refer to "all" or "any insured" under homeowner's policy); *Farmers Insurance v. Hembree*, 54 Wash. App. 195, 773 P.2d 105 (1989) (holding "an insured" includes anyone insured under homeowner's policy).

As noted, it is well-settled Nebraska law that an insurance policy is a contract between the insurer and the insured, whose respective rights and obligations must be determined by application of contract principles. See, e.g., *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001); *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001); *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). The Hartford's homeowner's policy defines various losses for which no insurance is provided, including intentional losses "arising out of any act committed [b]y or at the direction of an **insured**." We conclude that this means, simply and unambiguously, that if a loss is caused intentionally by someone who is insured under the policy, it is not covered. Thus, in response to the first certified question, we find no ambiguity in the intentional acts exclusion found at section I exclusions, paragraph 1h(1) and (2), of the Hartford's homeowner's policy.

Question Two

The second certified question requires this court to determine whether the intentional acts exclusion, which we have now determined to be unambiguous, is nevertheless contrary to the public

policy of this state when applied to preclude coverage against peril of fire to an innocent coinsured. We understand this question to be separate and distinct from the issue of whether the exclusion complies with Neb. Rev. Stat. § 44-501 (Reissue 1998), which is the subject of the third certified question. Accordingly, in response to the second question, we consider whether Nebraska has an articulated public policy that specifically recognizes rights of an innocent coinsured with respect to application of an intentional acts exclusion in a homeowner's policy.

[6,7] "Public policy" is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community. *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000). We have also noted that " '[i]t is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.' " *Continental Western Ins. Co. v. Conn*, 262 Neb. 147, 157, 629 N.W.2d 494, 501 (2001), quoting *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994). The only Nebraska statute dealing specifically with innocent coinsureds in the context of property and casualty insurance is Neb. Rev. Stat. § 44-7406(6) (Reissue 1998), which was enacted in 1998 as part of the Unfair Discrimination Against Subjects of Abuse in Insurance Act. See 1998 Neb. Laws, L.B. 1035. The uncontested facts of this case include a statement indicating that there is no evidence of "abuse" as defined by the aforementioned act, and we therefore do not consider § 44-7406(6) in our analysis of this certified question.

[8] This court, like others, has stated that it is against public policy to insure against liability for intentional acts. See *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001). See, also, *Ohio Cas. Ins. Co. v. Clark*, 583 N.W.2d 377 (N.D. 1998); *State Farm Fire & Cas. Co. v. Falley*, 23 Kan. App. 2d 21, 926 P.2d 664 (1996); *Nationwide Mut. Ins. Co. v. Finkley*, 112 Ohio App. 3d 712, 679 N.E.2d 1189 (1996); *Waller v. Truck Ins. Exchange*, 11 Cal. 4th 1, 900 P.2d 619, 44 Cal. Rptr. 2d 370 (1995). In *Continental Ins. Co. v. Gustav's Stable Club, Inc.*, 211 Neb. 1, 12, 317 N.W.2d 734, 740 (1982), we stated: " 'The rule

as to partnerships or joint ventures is that innocent partners and joint venturers are also barred from recovery where the arson is perpetrated by a partner or a joint venturer.' " (Quoting *Erlin-Lawler Enterprises, Inc. v. Fire Ins. Exch.*, 267 Cal. App. 2d 381, 73 Cal. Rptr. 182 (1968).) However, we have never specifically considered the question of whether, in the context of homeowner's insurance, public policy would bar enforcement of an intentional acts exclusion against an innocent coinsured whose spouse commits the intentional act that results in loss.

Helen argues that this court's recent holding in *Allstate Ins. Co. v. LaRandeau*, 261 Neb. 242, 622 N.W.2d 646 (2001), indicates that Nebraska public policy requires an insurer to compensate an innocent coinsured in her situation. Although *LaRandeau* did involve a payment by an insurer to an innocent coinsured whose spouse had caused a fire loss, the issue of whether such payment was required by public policy notwithstanding an intentional acts exclusion was not presented. The insurer in *LaRandeau* voluntarily paid one-half of the loss to the innocent coinsured and then sought to recover that amount in a subrogation claim against the insured spouse who intentionally caused the loss. We held that the insurer had a right to do so, reasoning that the intentional act of arson was not covered under the homeowner's policy and that the insurer's right of subrogation served the legitimate purpose of placing ultimate responsibility for the loss upon the intentional wrongdoer. The holding in *LaRandeau* thus does not support Helen's position. We conclude that there is no public policy specifically articulated by Nebraska statutes or case law which would preclude application of the intentional acts exclusion at issue here to negate coverage against peril of fire to an innocent coinsured under the uncontested facts presented in this case.

Question Three

The third certified question asks this court to determine whether the intentional acts exclusion in section I, exclusions, paragraph 1h(1) and (2), of the Hartford's homeowner's policy complies with the provisions of § 44-501 and provides the substantial equivalent of the minimum provisions of the 1943 NYSFIP. Section 44-501 reads in pertinent part:

> No policy or contract of fire and lightning insurance, including a renewal thereof, shall be made, issued, used, or delivered by any insurer or by any agent or representative thereof on property within this state other than such as shall conform as nearly as practicable to blanks, size of type, context, provisions, agreements, and conditions with the 1943 Standard Fire Insurance Policy of the State of New York, a copy of which shall be filed in the office of the Director of Insurance as standard policy for this state, and no other or different provision, agreement, condition, or clause shall in any manner be made a part of such contract or policy or be endorsed thereon or delivered therewith except as provided in subdivisions (1) through (11) of this section.
>
> . . . .
>
> (6) . . . The Director of Insurance may approve any form of policy which includes coverage against the peril of fire and substantial coverage against other perils without complying with the provisions of this section *if such policy with respect to the peril of fire includes provisions which are the substantial equivalent of the minimum provisions of the standard policy provided for in this section* and if the policy is complete as to all its terms without reference to any other document.

(Emphasis supplied.)

The 1943 NYSFIP referred to in § 44-501 exclusively utilizes the phrase "the insured." For example, the concealment and fraud exclusion in the policy provides:

> This entire policy shall be void if, whether before or after a loss, *the insured* has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of *the insured* therein, or in case of any fraud or false swearing by *the insured* relating thereto.

(Emphasis supplied.)

[9] In resolving the first certified question herein, we determined that the phrase "an insured" in the intentional acts exclusion in the Hartford's homeowner's policy created a joint obligation among coinsureds. Thus, if a loss is caused by the intentional act of an insured, an innocent coinsured would be precluded from

recovery under the plain language of the policy. Although we have not previously addressed the issue, other courts have determined that the phrase "the insured" in an insurance policy creates a several obligation which excludes coverage only as to the individual insured who committed the proscribed act. For example, in *Lane v. Security Mut. Ins. Co.*, 96 N.Y.2d 1, 5, 747 N.E.2d 1270, 1272, 724 N.Y.S.2d 670, 672 (2001), the Court of Appeals of New York held that the consistent use of the phrase "the insured" in that state's statutory standard fire insurance policy "delineates independent liabilities and obligations as to each insured to refrain from incendiary acts." See, also, *Watson v. United Services Auto. Ass'n*, 566 N.W.2d 683, 691 (Minn. 1997) (holding use of phrase "the insured" in Minnesota's standard fire insurance policy "evinces a general intent to compensate an innocent co-insured spouse despite the intentional acts of the other insured spouse"); *Fireman's Fund v. Dean*, 212 Ga. App. 262, 441 S.E.2d 436 (1994) (holding use of phrase "the insured" must be construed to provide several obligations to each coinsured); *Osbon v. National Union Fire Ins. Co.*, 632 So. 2d 1158 (La. 1994) (holding use of phrase "the insured" is singular and refers only to insured responsible for causing loss); *Ponder v. Allstate Ins. Co.*, 729 F. Supp. 60, 61 (E.D. Mich. 1990) (holding under Michigan law that standard policy which states that it is void " 'if . . . *the* insured has willfully concealed or misrepresented' " a material fact or circumstance means that "the policy is void only as to the fraudulent insured party, and that innocent insureds may still recover" (emphasis in original)). We have found no authority to the contrary and agree that the phrase "the insured" in an insurance policy denotes a several obligation, as distinguished from the joint obligation created by the phrase "an insured."

Next, we must determine whether the Hartford's homeowner's policy provided insurance coverage against peril of fire that was the "substantial equivalent" of the fire coverage provided by the 1943 NYSFIP. There is an obvious substantive difference between joint and several obligations of multiple insureds with respect to a coverage exclusion based upon conduct. Where the obligation is joint, commission of a proscribed act by one insured voids coverage as to all. However, where the obligation is several, the proscribed conduct defeats the policy

rights of the insured who committed the act but not those of an innocent coinsured.

The Hartford argues that we need not consider this difference here because the 1943 NYSFIP does not contain an intentional acts exclusion. It relies upon *Dolcy v. R.I. Joint Reinsurance Ass'n*, 589 A.2d 313 (R.I. 1991), and *Traders & General Ins. Co. v. Freeman*, 81 F. Supp. 2d 1070 (D. Or. 2000), to support its argument. In *Dolcy,* the court concluded that the phrase "any insured" in an intentional acts exclusion unambiguously created a joint obligation which barred recovery by an innocent coinsured. In a footnote, the court noted a "developing train of thought" indicating that a joint obligation can be judicially reformed to be several if shown to be inconsistent with a state's standard fire insurance policy. *Dolcy*, 589 A.2d at 314 n.1. However, the court noted that it need not consider reformation because the intentional acts exclusion was a "nonstatutory clause" and there was no argument that it was inconsistent with statutory requirements. *Id.*

In *Traders & General Ins. Co. v. Freeman, supra*, the court similarly determined that the phrase "any insured" in an intentional acts exclusion created a joint obligation. The court rejected an argument that the exclusion, so construed, was inconsistent with Oregon's statutory standard policy language by reasoning that the standard policy did not include an intentional acts exclusion. While other exclusions in the standard policy used the phrase "the insured," the federal court applying Oregon law determined that in the absence of express legislative direction, it could not conclude that the Oregon Legislature intended to impose a several obligation requirement with respect to an intentional acts exclusion. On this point, the court in *Traders & General Ins. Co.* cited *Lane v. Security Mut. Ins. Co.*, 256 A.D.2d 1100, 682 N.Y.S.2d 777 (1998), for the proposition that a statutory standard policy would not be extended to invalidate an intentional loss exclusion "when the standard policy was 'silent with respect to such an exclusion' and did not define the term 'insured.' " *Traders & General Ins. Co.*, 81 F. Supp. 2d at 1080. The *Lane* case was subsequently reversed, however, by the Court of Appeals of New York. See *Lane v. Security Mut. Ins. Co.*, 96 N.Y.2d 1, 747 N.E.2d 1270, 724 N.Y.S.2d 670 (2001). In that opinion, the court held that the standard policy's use of the phrase

"the insured" created a several obligation for coinsureds and that the intentional acts exclusion under review, which created a joint obligation for coinsureds by its use of the phrase "an insured," was not in conformity with the statutory requirement that fire policies offer the same level of coverage as the standard policy.

In *Watson v. United Services Auto. Ass'n*, 566 N.W.2d 683 (Minn. 1997), the Minnesota Supreme Court also held that an intentional acts exclusion utilizing the phrase "an insured" conflicted with the Minnesota standard fire insurance policy, notwithstanding the fact that the standard policy did not contain an intentional loss exclusion. The court reasoned that the standard policy did contain numerous exclusions based upon conduct of "the insured" and that the standard policy therefore indicated an intent to create several obligations on the part of coinsureds. It therefore held that insofar as the policy in question excluded coverage for an innocent coinsured, it conflicted with the standard policy and must be reformed. See, also, *Borman v State Farm*, 446 Mich. 482, 498, 521 N.W.2d 266, 273 (1994) (holding intentional acts exclusion covered same subject matter as concealment or fraud exclusion in standard policy and that its use of phrase " 'you or any other insured' " was inconsistent with phrase "the insured" in standard policy); *Osbon v. National Union Fire Ins. Co.*, 632 So. 2d 1158 (La. 1994) (holding intentional acts exclusion precluding recovery by innocent coinsured conflicted with that state's standard policy despite fact that standard policy did not include intentional acts exclusion, where standard policy utilized phrase "the insured").

We are persuaded by the reasoning of the Minnesota Supreme Court in *Watson*. Although the 1943 NYSFIP does not contain an intentional acts exclusion, it does provide for various circumstances in which coverage can be defeated by conduct of "the insured." The 1943 NYSFIP states that it shall be void if "the insured has wilfully concealed or misrepresented any material fact" or in the case of "any fraud or false swearing by the insured" relating to the policy. A loss is also excluded if caused by "neglect of the insured to use all reasonable means to save and preserve the property at and after a loss." The 1943 NYSFIP further provides that the insurer shall not be liable for loss occurring "while the hazard is increased

by any means within the control or knowledge of the insured." Thus, while there is no specifically designated intentional acts exclusion in the 1943 NYSFIP, it includes other provisions dealing generally with the insurer's right to void coverage based upon conduct of "the insured." In each instance, the standard policy uses language indicative of a several obligation whereby the insured bears the responsibility for his or her own conduct. We find no provision in the 1943 NYSFIP creating a joint obligation whereby the wrongful actions of one insured could prejudice the rights of an innocent coinsured. Accordingly, in response to the third certified question, we determine that the intentional acts exclusion in section I, exclusions, paragraph 1h(1) and (2), of the Hartford's homeowner's policy does not comply with the provisions of § 44-501(6) because it does not provide the substantial equivalent of the minimum provisions of the 1943 NYSFIP.

Question Four

Having reached this conclusion, we proceed to the fourth certified question, which asks this court to determine whether the Director of Insurance of the State of Nebraska, pursuant to § 44-501(11), had lawful authority in 1994 to approve the variations in the Hartford's homeowner's policy notwithstanding its noncompliance with the 1943 NYSFIP. Section 44-501(11) provides: "The Director of Insurance may approve any form of policy with variations in terms and conditions from the standard policy provided for in this section." There is obvious tension between this provision and § 44-501(6), which authorizes the Director of Insurance to authorize fire insurance policies which are the "substantial equivalent" of the 1943 NYSFIP.

We recognized but were not required to resolve this tension in *Spulak v. Tower Ins. Co.*, 257 Neb. 928, 601 N.W.2d 720 (1999). At issue there was an exclusion in a fire insurance policy, which the Director of Insurance approved on July 14, 1988. We held that because the exclusion had the effect of reducing the coverage afforded under the 1943 NYSFIP, the Director of Insurance lacked authority to approve it under the "substantial[ly] equivalent" language of § 44-501(6). Moreover, we held that the district court erred in determining that the approval was pursuant to

§ 44-501(11) because that section did not become effective until after the date of approval.

[10-12] In the present case, both § 44-501(6) and (11) were in effect when the Hartford's homeowner's policy was approved by the Director of Insurance in 1994. Whether § 44-501(11) authorizes the Director of Insurance to approve an exclusion which reduces fire insurance coverage below the minimum provisions of the 1943 NYSFIP requires interpretation of § 44-501. Statutory interpretation presents a question of law. *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); *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001). 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., supra*. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *In re Interest of Sabrina K., supra*; *Rodriguez v. Monfort, Inc., supra*; *Hatcher v. Bellevue Vol. Fire Dept.*, 262 Neb. 23, 628 N.W.2d 685 (2001).

[13,14] If read literally to give the Director of Insurance authority to approve a fire insurance policy form without regard to whether it provides the minimum coverage afforded under the 1943 NYSFIP, § 44-501(11) would nullify the requirement in § 44-501(6) that in order to be approved, the policy forms must provide the "substantial equivalent" of the fire coverage provided by the standard policy. Indeed, if § 44-501(11) is to be given the expansive interpretation urged by the Hartford, every provision of § 44-501 except subsection (11) would be rendered meaningless. In the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying another statute. *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001); *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). A court may examine the legislative history of the act in question in order to ascertain the intent of the Legislature. S*tate ex rel. Stenberg v. Moore*, 258

Neb. 199, 602 N.W.2d 465 (1999); *In re Estate of Nelson*, 253 Neb. 414, 571 N.W.2d 269 (1997). We find it necessary to examine the legislative history of § 44-501(11) to determine its potentially nullifying effect on the rest of the provisions of § 44-501.

The provision now codified at § 44-501(11) was included in L.B. 92, which was enacted in 1989. 1989 Neb. Laws, L.B. 92. According to the Introducer's Statement of Intent, L.B. 92 was the work product of a task force appointed to conduct an interim study "on the necessity, feasibility and desirability of rewriting, updating and reorganizing Nebraska's insurance statutes." Committee on Banking, Commerce and Insurance, 91st Leg., 1st Sess. (Jan. 23, 1989). The statement of intent relates that the stated purpose of L.B. 92 was "to modernize and restructure Nebraska's insurance laws and to eliminate obsolete and redundant provisions in Chapter 44 of the Nebraska Revised Statutes."

In the introducer's opening remarks at a committee hearing on L.B. 92, he stated:

> The basic purpose of the task force was to revise and update Nebraska insurance law *not with an idea of making controversial alterations but simply to replace obsolete language, rearrange confusing language, update standards which over time have grown inadequate and which need to be raised or altered.* It has had the general obligation to make our law more readable, more contemporaneous, and to reduce unnecessary duplicative actions which over time have sprung up in our insurance law.

(Emphasis supplied.) Committee on Banking, Commerce and Insurance Hearing, 91st Leg., 1st Sess. 2 (Jan. 23, 1989). The introducer of the bill then discussed "some of the most critical" amendments embodied in the bill, *id.*, but did not discuss the provision which became § 44-501(11). He expressed the view that the proposed amendments "do not operate in anyway [sic] to harm the consumer." *Id.* at 5.

The Director of Insurance testified that L.B. 92 was just "sort of the clean-up bill." *Id.* at 7. There was no substantive discussion of the amendment to § 44-501 during the committee hearing or floor debate on L.B. 92. The only legislative history relative to the current § 44-501(11) is found in a 13-page synopsis of L.B. 92 summarizing 261 amendments included in the bill. Item No. 107

on this list reads: "[A]mend 44-501 to authorize the director to approve policy forms which deviate from the New York Standard Fire Policy." Statement of Intent, Committee on Banking, Commerce and Insurance, 91st Leg., 1st Sess. (Jan. 23, 1989). While this statement obviously makes clear that the purpose of § 44-501(11) is to give the Director of Insurance the power to approve policy forms that deviate from the 1943 NYSFIP, it says nothing about the Legislature's intent to repeal the remainder of § 44-501 by implication. In the absence of any indication of such an intent, we conclude that § 44-501(11) must be read in pari materia with § 44-501(6) to authorize the Director of Insurance to approve fire insurance policy forms differing from the 1943 NYSFIP only if the provisions are the substantial equivalent of the minimum provisions of the 1943 NYSFIP. Consequently, in response to the fourth certified question, we conclude that the Director of Insurance did not have lawful authority in 1994 to approve the variations in the Hartford's homeowner's policy because such variations were not the substantial equivalent of the minimum provisions of the 1943 NYSFIP.

Question Five

In the fifth certified question, we are asked to determine whether the phrase "direct and accidental loss" in part D, paragraph A, of the Hartford's automobile policy is ambiguous. We understand this question, in its fullest scope, to be asking this court to determine whether Helen is entitled to coverage under the automobile policy.

Part D, paragraph A, of the automobile policy provides:

> We will pay for direct and accidental loss to **your covered auto** or any **non-owned auto**, including their equipment, minus any applicable deductible shown in the Declarations. If loss to more than one [sic] **your covered auto** or **non-owned auto** results from the same **collision**, only the highest applicable deductible will apply. We will pay for loss to **your covered auto** caused by:
>
> 1. Other than **collision** only if the Declarations indicate that Other than Collision Coverage is provided for that auto.
> 2. **Collision** only if the Declarations indicate that Collision Coverage is provided for that auto.

> If there is a loss to a **non-owned auto**, we will provide the broadest coverage applicable to any [sic] **your covered auto** shown in the Declarations.

(Emphasis in original.)

The policy declarations page lists four covered automobiles, including a 1984 Mercury Lynx GS which is shown to have "other than collision" coverage only. The insuring agreement in part D also provides:

> Loss caused by the following is considered other than **collision**:
>
> 1. Missiles or falling objects;
> 2. Fire;
> 3. Theft or larceny;
> 4. Explosion or earthquake;
> 5. Windstorm;
> 6. Hail, water or flood;
> 7. Malicious mischief or vandalism;
> 8. Riot or civil commotion;
> 9. Contact with bird or animal; or
> 10. Breakage of glass.

The policy does not define the phrase "direct and accidental loss." We have defined the term "accident" in the context of liability insurance as " 'an unexpected happening without intention or design.' " *Sullivan v. Great Plains Ins. Co.*, 210 Neb. 846, 851, 317 N.W.2d 375, 379 (1982), quoting 45 C.J.S. *Insurance* § 829 (1946). More recently, in the context of uninsured motorist coverage, we stated:

> In its ordinary sense, "accident" means "a happening that is not expected, foreseen, or intended." Webster's New World College Dictionary 8 (3d ed. 1996). The term, in its ordinary sense, has no reference to anyone's perspective. Instead, it refers to an unexpected, unintended, or unforeseen happening, regardless of the perspective from which it is viewed. As such, intentional acts by definition cannot be accidents.

Austin v. State Farm Mut. Auto Ins. Co., 261 Neb. 697, 702, 625 N.W.2d 213, 217 (2001). We further noted that because uninsured motorist coverage operates as a substitute liability policy, the term "accident" should be defined in the same manner.

Unlike the uninsured motorist provision at issue in *Austin*, however, the comprehensive automobile coverage at issue here includes language which requires consideration of the perspective from which an event is deemed to be an accident. The specific perils included in the insuring agreement for "direct and accidental loss" caused by "other than collision" include such forces as earthquake, windstorm, and hail, which, by their nature, are not intended or foreseen. Also specifically covered, however, are losses caused by crimes against property such as theft, larceny, and vandalism, which are intentional acts on the part of the perpetrator but are unexpected and unforeseen by the victimized property owner. Thus, the phrase "accidental loss," read in context with the other provisions of the comprehensive coverage, may encompass damage to an insured vehicle caused by the intentional acts of third persons. See 11 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 156:20 at 156-35 (1998).

Nevertheless, while the phrase "direct and accidental loss" in this policy is more expansive than the term "accident" in the uninsured motorist policy at issue in *Austin*, it is not ambiguous. The only reasonable interpretation of the aforementioned phrase is that an insured can recover for property damage caused either by truly unforeseen events *or by the intentional act of a third party*. Therefore, a determination of whether Helen is entitled to coverage depends upon a subsequent analysis of whether the Hartford's automobile policy imputes William's intentional acts to Helen, or whether the policy considers William's intentional acts to be those of a third party with respect to Helen. In other words, to determine whether Helen is entitled to recovery, we must also decide whether the automobile policy creates joint or several obligations.

In the definitions section of the automobile policy, the following is provided: "**A.** Throughout this policy, **you** and **your** refer to: **1.** The **named insured** shown in the Declarations; and **2.** *The spouse if a resident of the same household.*" (Emphasis supplied.) This definition unequivocally indicates that the term "your" refers jointly to Helen and William, who were spouses residing in the same household. Therefore, part D, paragraph A, of the automobile policy's insuring agreement for "direct and accidental loss to ***your* covered auto**" (emphasis supplied) can only reasonably be read to apply to both Helen and William

jointly. As such, William's actions were not those of a third party, but, for purposes of the automobile policy, those of both Helen and William. Consequently, because the loss was not caused by the intentional act of a third party, but, rather, by an insured under the policy, Helen does not have coverage.

Question Six

The sixth and final certified question asks this court to determine whether the phrase "direct and accidental loss" in the insuring agreement in part D, paragraph A, of the Hartford's automobile policy is contrary to the public policy of Nebraska, as expressed by statute and case law, when applied to preclude comprehensive coverage to an innocent coinsured. We conclude, for the reasons articulated in our discussion of the second certified question, that such an application would not be contrary to public policy.

CONCLUSION

To summarize, we respond to the certified questions of law as follows:

1. The language of the intentional acts exclusion in section I, exclusions, paragraph 1h(1) and (2), of the Hartford's homeowner's policy is not ambiguous.

2. The intentional acts exclusion in section I, exclusions, paragraph 1h(1) and (2), of the Hartford's homeowner's policy is not contrary to the public policy of Nebraska, as expressed by statute and case law, when applied to preclude coverage against peril of fire to an innocent coinsured.

3. The intentional acts exclusion in section I, exclusions, paragraph 1h(1) and (2), of the Hartford's homeowner's policy does not comply with the provisions of § 44-501(6) in that it does not provide the substantial equivalent of the minimum provisions of the 1943 NYSFIP.

4. The Director of Insurance of the State of Nebraska, pursuant to § 44-501(11), did not have lawful authority in 1994 to approve the variations in the Hartford's homeowner's policy notwithstanding its noncompliance with the 1943 NYSFIP.

5. The language "direct and accidental loss" in the insuring agreement in part D, paragraph A, of the Hartford's automobile policy is not ambiguous.

6. The language "direct and accidental loss" in the insuring agreement in part D, paragraph A, of the Hartford's automobile policy is not contrary to the public policy of Nebraska, as expressed by statute and case law, when applied to preclude comprehensive coverage to an innocent coinsured.

Pursuant to Neb. Rev. Stat. § 24-225 (Reissue 1995), this opinion stating the law governing the certified questions shall be sent by the clerk under the seal of the Nebraska Supreme Court to the U.S. District Court for the District of Nebraska and to the parties.

JUDGMENT ENTERED.

DLH, INC., DOING BUSINESS AS COACHES SPORTS BAR & GRILL, APPELLEE, V. THE LANCASTER COUNTY BOARD OF COMMISSIONERS ET AL., APPELLANTS.

648 N.W.2d 277

Filed July 19, 2002. No. S-01-557.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.
2. **Political Subdivisions: Administrative Law: Words and Phrases.** In general, the terms "resolution" and "regulation" are not synonymous.

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

Gary E. Lacey, Lancaster County Attorney, and David W. Johnson, Jr., for appellants.

K.C. Engdahl, of Raynor, Rensch & Pfeiffer, for appellee.

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

STEPHAN, J.

The Lancaster County Board of Commissioners, its individual members, and Lancaster County (collectively the Board) appeal from an order of the district court for Lancaster County granting declaratory relief in favor of DLH, Inc. The district court held that resolution No. 3557, adopted by the Board in

1980, was not a "valid and subsisting ordinance or regulation" within the meaning of Neb. Rev. Stat. § 53-134(6) (Cum. Supp. 2000), which pertains to revocation of liquor licenses by the governing bodies of political subdivisions.

FACTS

This case was submitted to the district court on stipulated facts. DLH holds a valid and current Nebraska liquor license authorizing the sale of alcoholic liquor on its premises. DLH permits dancers to perform on its licensed premises nude, topless, and wearing G-strings. The premises are located within the corporate boundaries of and are under the jurisdiction of Lancaster County. The Board is a local governing body within the meaning of the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 to 53-1,121 (Cum. Supp. 2000).

On December 16, 1980, the Board adopted resolution No. 3557. The resolution refers to § 53-134 as authority for its adoption and resolves that "the following rules shall apply to all premises licensed to sell liquor under the jurisdiction of [Lancaster County]." Included in the "rules" is a prohibition against a licensee's allowing any live person to appear nude. Nudity is defined as "the showing of the human male or female genitals, pubic area or buttocks or the human female breast including the nipple or any portion of the breast below the nipple with less than a full opaque covering."

On August 3, 2000, the Board issued a cease and desist order requesting that DLH conform its business to the requirements of resolution No. 3557. On August 9, the Board issued a "Notice of Hearing for Revocation or Suspension of Liquor License" on DLH. On August 24, the Board found that DLH had violated resolution No. 3557 and voted to refer the violation to the Nebraska Liquor Control Commission (Commission). On October 3, the Board requested that the Commission conduct a formal revocation hearing. All of the actions undertaken and adopted by the Board were in reliance upon § 53-134(6). On October 19, the Commission voted to suspend DLH's liquor license and scheduled a November 3 revocation hearing.

DLH filed an amended petition for declaratory relief on October 26, 2000, naming the Board as defendants. The petition

alleged that a dispute had arisen between the parties concerning the applicability, validity, and enforceability of resolution No. 3557. The petition prayed for a declaratory judgment that resolution No. 3557 was not a valid and subsisting ordinance or regulation as defined in the Nebraska Liquor Control Act and an order permanently enjoining the Board from undertaking any future revocation or enforcement action based upon resolution No. 3557.

In an amended order dated April 12, 2001, the district court found that the resolution was not a "valid and subsisting ordinance or regulation duly enacted, adopted, and promulgated relating to alcoholic liquor" within the meaning of § 53-134(6). The court reasoned that the plain language of § 53-134 gave the Board power to take certain action relating to liquor licenses by resolution but specifically did not grant the power to revoke liquor licenses on the basis of a resolution. The district court also rejected the Board's argument that resolution No. 3557 should be considered a regulation, despite the absence of any evidence regarding the manner in which it was adopted. The Board filed 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).

ASSIGNMENTS OF ERROR

The Board assigns that the district court erred (1) in finding that resolution No. 3557 cannot be the basis by which it acts to revoke a liquor license when the district court did not address the issue of whether it was a valid regulation; (2) in finding that resolution No. 3557 was not a valid regulation or binding law because the Board did not follow other procedures, including the holding of a public hearing, when DLH did not sustain the burden of showing otherwise in attacking the validity of the resolution as a regulation; and (3) in considering that the Board offered no evidence that the resolution had become a regulation or actually was a regulation when DLH had the burden of showing the regulation was not valid.

STANDARD OF REVIEW

[1] In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its

conclusion independently of the conclusion reached by the trial court. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001); *Continental Western Ins. Co. v. Conn*, 262 Neb. 147, 629 N.W.2d 494 (2001).

ANALYSIS

The primary issue presented in this appeal is whether a violation of resolution No. 3557, if proved, could serve as a lawful basis for the Board to revoke a liquor license. In its brief, DLH argues that a county has no legal authority or basis to regulate sales of alcoholic beverages. The Board relies upon § 53-134 as the legal authorization for resolution No. 3557. At all times relevant to this action, that statute provided in relevant part:

> The local governing body of any city or village . . . and the local governing body of any county with respect to licenses not within the corporate limits of any city or village but within the county shall have the following powers, functions, and duties with respect to retail, bottle club, and craft brewery licenses:
>
> (1) To cancel or revoke for cause retail, bottle club, or craft brewery licenses to sell or dispense alcoholic liquor issued to persons for premises within its jurisdiction, subject to the right of appeal to the commission;
>
> (2) To enter or to authorize any law enforcement officer to enter at any time upon any premises licensed under the Nebraska Liquor Control Act to determine whether any provision of the act, any rule or regulation adopted and promulgated pursuant to the act, or any ordinance, resolution, rule, or regulation adopted by the local governing body has been or is being violated and at such time examine the premises of such licensee in connection with such determination;
>
> (3) To receive a signed complaint from any citizen within its jurisdiction that any provision of the act, any rule or regulation adopted and promulgated pursuant to the act, or any ordinance, resolution, rule, or regulation relating to alcoholic liquor has been or is being violated and to act upon such complaints in the manner provided in the act;
>
> (4) To receive retail license fees, bottle club license fees, and craft brewery license fees as provided in section 53-124

> and pay the same, after the license has been delivered to the applicant, to the city, village, or county treasurer;
>
> (5) To examine or cause to be examined any applicant or any retail licensee, bottle club licensee, or craft brewery licensee upon whom notice of cancellation or revocation has been served as provided in the act, to examine or cause to be examined the books and records of any applicant or licensee, and to hear testimony and to take proof for its information in the performance of its duties. For purposes of obtaining any of the information desired, the local governing body may authorize its agent or attorney to act on its behalf;
>
> (6) To cancel or revoke on its own motion any license if, upon the same notice and hearing as provided in section 53-134.04, it determines that the licensee has violated any of the provisions of the act *or any valid and subsisting ordinance or regulation duly enacted, adopted, and promulgated relating to alcoholic liquor*.

(Emphasis supplied.) § 53-134.

Subsections (2) and (3) of this statute permit certain actions by local governing bodies based upon potential violations of resolutions, as well as violations of ordinances, rules, and regulations. Subsection (6) governing license revocation is worded differently. It authorizes a local governing body to cancel or revoke a liquor license if it determines that the licensee has violated the act "or any valid and subsisting ordinance or regulation duly enacted, adopted, and promulgated relating to alcoholic liquor."

[2] Absent anything to the contrary, statutory language is to be given its plain and ordinary meaning, and a court will not look beyond the statute or interpret it when the meaning of its words are plain, direct, and unambiguous. *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994). In addition, a county, like all political subdivisions, has only that power delegated to it by the Legislature, and a grant of power to a political subdivision is to be strictly construed. *Enterprise Partners v. County of Perkins*, 260 Neb. 650, 619 N.W.2d 464 (2000). In general, the terms "resolution" and "regulation" are not synonymous. A regulation is a "rule or order, having legal force, issued by an administrative agency or a local government." Black's Law

Dictionary 1289 (7th ed. 1999). A "resolution," on the other hand, is a "formal expression of an opinion, intention, or decision by an official body or assembly." *Id.* at 1313. See, also, *Sommerfeld v. City of Seward*, 221 Neb. 76, 375 N.W.2d 129 (1985) (distinguishing resolution from ordinance). Therefore, on its face, the statute does not permit revocation of a license based upon a violation of a resolution.

In its first assignment of error, however, the Board argues that the district court erred in not addressing the issue of whether resolution No. 3557 "contained a valid regulation." Brief for appellant at 4. Relying upon *Enterprise Partners, supra*, the Board contends that a county has general authority to enact regulations by resolution. In *Enterprise Partners*, we considered whether a county board could regulate livestock confinement facilities located within the county. We stated that "[a] county board may by resolution make regulations as may be necessary to promote the health, safety, and welfare of its public if it has adopted a comprehensive development plan," but concluded that because no such plan had been adopted, the regulations were invalid. *Id.* at 659, 619 N.W.2d at 470. This reference to the county's authority to regulate by resolution was derived from Neb. Rev. Stat. § 23-174.10 (Reissue 1997), cited and quoted in *Enterprise Partners*, which states that "[i]n any county which has adopted county zoning regulations, the county board, by resolution, may make regulations as may be necessary or expedient to promote the public health, safety, and welfare . . . ." Here, the Board has directed us to no analogous statutory authority to regulate by resolution with respect to liquor licenses. In the absence of such authority, resolution No. 3557 cannot be deemed to be a regulation on its face, and the Board's first assignment of error is thus without merit.

In rejecting the claim that resolution No. 3557 was in fact a regulation, the district court reasoned that the Board offered no evidence that it held a public hearing and followed other procedures which would have been required in order to promulgate a resolution having the force of law. In its second and third assignments of error, the Board contends that the district court should have required DLH to prove that resolution No. 3557 was not a valid regulation, rather than requiring the Board to establish its

validity. The Board bases this argument upon *County of York v. Tracy*, 5 Neb. App. 240, 558 N.W.2d 815 (1996), and *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995), which hold that a zoning ordinance or regulation will be presumed valid in the absence of clear and satisfactory evidence to the contrary.

The resolution under consideration here does not pertain to zoning and, as we have noted, there is no statute which permits a county to regulate by resolution in the field of liquor license revocation. We agree with the district court that on its face, resolution No. 3557 is only what it purports to be, namely, a *resolution* by the county board that certain rules shall apply to holders of retail liquor licenses. As such, it cannot be transformed into a regulation by a claimed presumption of validity. A presumption that a resolution is a valid regulation would arise only if there were some legal authority for regulating by resolution, as in the case of a county board resolution that adopts zoning regulations. See, Neb. Rev. Stat. § 23-172 (Reissue 1997); § 23-174.10. Because it was not entitled to a presumption that resolution No. 3557 was a valid *regulation*, the Board was required to present evidence in support of its contention that the resolution was adopted in compliance with all legal requirements for adoption of a regulation. The stipulated facts provide no basis for this claim, and the Board's second and third assignments of error are therefore without merit. Because we agree with the district court that resolution No. 3557 is not a regulation within the meaning of § 53-134(6), we do not reach DLH's argument that the Board lacked legal authority to regulate with respect to the sale of alcoholic beverages within Lancaster County.

CONCLUSION

For the reasons discussed herein, we conclude that on the record presented, the district court did not err in entering a declaratory judgment that "Resolution No. 3557 does not constitute a valid and subsisting ordinance or regulation" within the meaning of § 53-134(6). The judgment of the district court is affirmed.

AFFIRMED.

SPAGHETTI LIMITED PARTNERSHIP, A NEBRASKA LIMITED PARTNERSHIP, APPELLANT, V. GLENN WOLFE, DOING BUSINESS AS WOLFE ANTIQUES, APPELLEE, AND HOCKENBERGS EQUIPMENT & SUPPLY CO., INC., A NEBRASKA CORPORATION, GARNISHEE-APPELLEE.

647 N.W.2d 615

Filed July 19, 2002. No. S-01-591.

1. **Garnishment: Appeal and Error.** Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Garnishment.** Garnishment is a legal, not equitable, remedy unknown at common law and is a purely statutory remedy.
4. **Garnishment: Statutes.** Being in derogation of common law, garnishment statutes are strictly construed and demand compliance with all prerequisites before any remedy is available under such statutes.
5. **Garnishment: Statutes: Legislature.** Because garnishment is a creature of statute, garnishment proceedings are necessarily governed by statutory provisions and specifications. Courts may not allow garnishment proceedings to follow any course other than that charted by the Legislature.
6. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
7. **Words and Phrases.** As a general rule, the word "shall" is considered mandatory and is inconsistent with the idea of discretion.
8. **Statutes: Words and Phrases.** Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
9. **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.
10. **Garnishment: Pleadings: Liability.** In a garnishment proceeding, the answers to interrogatories and the application to determine garnishee liability are the only pleadings for disposition of the liability issue.
11. **Judgments: Debtors and Creditors: Garnishment.** The claim of a judgment creditor garnishor against a garnishee can rise no higher than the claim of the garnishor's judgment debtor against the garnishee.
12. **Garnishment: Liability: Service of Process: Time.** A garnishee's liability is to be determined as of the time of the service of the summons in garnishment.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed in part, and in part reversed and remanded with directions.

W. Patrick Betterman and Dave J. Skalka, of Law Offices of W. Patrick Betterman, for appellant.

Michael L. Smart, of White, Wulff & Smart, for garnishee-appellee.

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

GERRARD, J.

Appellant, Spaghetti Limited Partnership (Spaghetti), brought this garnishment action in aid of execution of a judgment pursuant to Neb. Rev. Stat. § 25-1056 (Cum. Supp. 2000). Spaghetti had obtained a $55,879.98 judgment against Glenn Wolfe, doing business as Wolfe Antiques (Wolfe). Believing that Wolfe was performing work for the garnishee-appellee, Hockenbergs Equipment & Supply Co., Inc. (Hockenbergs), Spaghetti requested that the district court issue a garnishment summons upon Hockenbergs. Hockenbergs did not answer the garnishment summons and interrogatories issued by the district court. Spaghetti initiated a hearing to determine Hockenbergs' liability. The district court found that Hockenbergs' failure to answer the garnishment interrogatories was inadvertent and that the garnishee had rebutted the presumption of full indebtedness at the hearing, and ordered that Hockenbergs pay $396 to Spaghetti. Spaghetti now appeals.

BACKGROUND

On February 23, 2001, the district court entered a judgment in favor of Spaghetti and against Wolfe for the sum of $55,879.98. Under the belief that Wolfe worked for Hockenbergs, Spaghetti requested that the district court issue a garnishment summons upon Hockenbergs for the full amount of the judgment against Wolfe. The district court issued a summons and order of garnishment and interrogatories to Hockenbergs as garnishee on March 7. Hockenbergs received the garnishment summons and interrogatories on March 12. Section 25-1056(1) dictates that Hockenbergs should have answered within 10 days, i.e., by March 22.

On March 27, 2001, Spaghetti filed an application to determine garnishee liability, alleging that Hockenbergs failed to respond to the interrogatories and requesting a hearing on the matter. The district court issued an order finding that Hockenbergs failed to answer the garnishment interrogatories by March 22 and scheduling a hearing for April 24 to determine Hockenbergs' liability.

Hockenbergs received a copy of the order and filed a "Response of Garnishee" on April 11, 2001, claiming that it misplaced the interrogatories "through inadvertence and error" and thus did not answer. Hockenbergs filed an offer to confess judgment in the amount of $395.31. Spaghetti filed a motion to strike Hockenbergs' response, claiming that the response was irrelevant pursuant to Neb. Rev. Stat. § 25-833 (Reissue 1995) or, in the alternative, frivolous pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995), because Hockenbergs did not comply with the statutory requirements for garnishment proceedings. The district court sustained Spaghetti's motion to strike.

At the April 24, 2001, hearing, the district court received evidence to determine the amount of liability that existed from Hockenbergs to Spaghetti. Thomas Schrack, Jr., president of Hockenbergs, testified that Wolfe was employed by Hockenbergs at one time, but Wolfe had quit by the time of the hearing. Schrack, Jr., testified that his father, Thomas Schrack, Sr., received the garnishment summons several days after Wolfe informed him that he was filing for bankruptcy. When Schrack, Sr., opened the summons and saw "Spaghetti Limited Partnership against Glenn Wolfe" written on the first page, he gave the summons and interrogatories to Wolfe. The Schracks did not see the interrogatories again until they were contacted by Spaghetti's attorney, at which time they retrieved the interrogatories from Wolfe. Schrack, Jr., further testified that after initially receiving the garnishment interrogatories, Hockenbergs issued Wolfe two paychecks in the amounts of $739.50 and $841.74. Schrack, Jr., stated that he represented to Spaghetti's counsel that Hockenbergs was prepared to tender 25 percent of Wolfe's disposable earnings, i.e., $395.31, a figure apparently reached after applying the wage exemption of Neb. Rev. Stat. § 25-1558(1)(a) (Reissue 1995).

The district court found at the hearing that Hockenbergs' failure to answer the interrogatories was inadvertent and due to a misunderstanding and that Hockenbergs' "explanation [was] credible." Pursuant to Hockenbergs' offer to confess judgment, the district court found that Hockenbergs owed Spaghetti $396. The district court entered judgment via written order on May 3, 2001, restating its finding that Hockenbergs' failure to timely answer the garnishment interrogatories was inadvertent and entering judgment in the amount of $396 in favor of Spaghetti and against Hockenbergs.

Spaghetti appeals. We moved this case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Spaghetti assigns, restated, that the district court erred in (1) determining that the presumption of indebtedness in Neb. Rev. Stat. § 25-1028 (Reissue 1995) is a rebuttable evidentiary presumption, (2) determining that the garnishee's failure to timely answer the garnishment interrogatories was excusable, (3) determining that the garnishee had rebutted the presumption of indebtedness, and (4) applying § 25-1558(1)(a) in entering judgment.

STANDARD OF REVIEW

[1] Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong. *Farr v. Designer Phosphate & Premix Internat.*, 253 Neb. 201, 570 N.W.2d 320 (1997).

[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*, 263 Neb. 344, 639 N.W.2d 898 (2002).

ANALYSIS

Garnishment in aid of execution is a legal remedy unknown at common law and strictly governed by statute. See *Gerdes v. Klindt*, 253 Neb. 260, 570 N.W.2d 336 (1997). Generally, in cases where a court enters judgment in favor of a creditor, the judgment

creditor may, as garnishor, request that the court issue a summons of garnishment against any person or business owing money to the judgment debtor. See, Neb. Rev. Stat. § 25-1011 (Reissue 1995); § 25-1056. As garnishee, the person or business owing money to the judgment debtor must answer written interrogatories furnished by the garnishor to establish whether the garnishee holds any property or money belonging to or owed to the judgment debtor. See § 25-1056. Upon establishing through pleadings and trial that the garnishee holds property or credits of the judgment debtor, the garnishee must then pay such amounts to the court in satisfaction of the garnishor's judgment against the judgment debtor, subject to certain statutory exceptions with regard to wages. See, *id.*; Neb. Rev. Stat. §§ 25-1026 to 25-1031.01 (Reissue 1995); § 25-1558.

Presumption of Indebtedness

Spaghetti assigns, first, that the district court erred in finding that the presumption of indebtedness in § 25-1028 is a rebuttable evidentiary presumption. Section 25-1028 states:

> If the garnishee fails to answer, as required by section 25-1026, he shall be presumed to be indebted to the defendant in the full amount of the claim of plaintiff. Upon notice to the garnishee given within such time and in such manner as the court shall direct, judgment may be entered for such amount as the court may find due from the garnishee.

Spaghetti argues that the word "presumed" in the above statute does not, standing alone, create a rebuttable evidentiary presumption. Spaghetti asserts that because Hockenbergs did not timely respond to the interrogatories or file an appropriate answer, Hockenbergs cannot rebut the presumption of indebtedness in § 25-1028 and that the district court should have taken all the allegations in Spaghetti's pleading to be true and rendered judgment in the sum of $55,879.98 against Hockenbergs.

[3-5] Garnishment is a legal, not equitable, remedy unknown at common law and is a purely statutory remedy. *Gerdes, supra*. Being in derogation of common law, garnishment statutes are strictly construed and demand compliance with all prerequisites before any remedy is available under such statutes. *Id.* Because garnishment is a creature of statute, garnishment proceedings

are necessarily governed by statutory provisions and specifications. Courts may not allow garnishment proceedings to follow any course other than that charted by the Legislature. *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996).

[6] Because § 25-1028 does not indicate whether the presumption of indebtedness is rebuttable, we must resort to statutory interpretation. 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*, 263 Neb. 344, 639 N.W.2d 898 (2002). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002).

[7] First, § 25-1028 states that after a garnishee fails to answer, the garnishee "*shall* be presumed to be indebted" to the garnishor. (Emphasis supplied.) As a general rule, the word "shall" is considered mandatory and is inconsistent with the idea of discretion. *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985). Thus, the plain and ordinary meaning of "shall be presumed to be indebted" in § 25-1028 is that a presumption of indebtedness for the full amount of the claim of the plaintiff-garnishor arises when the garnishee fails to answer as required by statute.

[8] Second, § 25-1028 states that "judgment *may* be entered for such amount as the court *may* find due from the garnishee." (Emphasis supplied.) Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995). See, also, Neb. Rev. Stat. § 49-802(1) (Reissue 1998) ("[w]hen the word may appears, permissive or discretionary action is presumed"). Thus, § 25-1028 does not trigger automatic liability on the part of the garnishee, but instead, permissively allows the court to move forward in resolving the litigation according to its judgment.

Additionally, the Nebraska rules of evidence support our conclusion that § 25-1028 creates a rebuttable presumption. Neb. Rev. Stat. § 27-301 (Reissue 1995) states that "[i]n 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." Thus, § 25-1028 places the burden on Hockenbergs to show the nonexistence of the presumed indebtedness—a rebuttable presumption of indebtedness. Because no statute or evidentiary rule provides otherwise, the district court appropriately gave Hockenbergs the opportunity to rebut the presumption of indebtedness.

[9] 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. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). It would be absurd to conclude that if a garnishee fails to respond to garnishment interrogatories, an irrebuttable presumption of indebtedness arises—this would potentially saddle an inadvertently unresponsive garnishee with liability far in excess of the actual amount that a garnishor could have received had the garnishee properly answered. Interpreting § 25-1028 to raise a rebuttable presumption of indebtedness serves a dual purpose: it gives the garnishee incentive to answer the interrogatories so as to avoid raising the presumption while allowing the garnishor the benefit of such a presumption should the garnishee fail to answer, yet it provides appropriate due process of law to a garnishee that innocently and inadvertently fails to answer.

We conclude that § 25-1028 creates a rebuttable presumption of indebtedness, and Spaghetti's assignment of error on this ground is without merit.

Failure to Answer Garnishment Interrogatories

Spaghetti assigns, second, that the district court erred in determining that Hockenbergs' failure to answer the garnishment interrogatories was excusable. Spaghetti asserts that the trial court does not have the authority to excuse a failure to timely file answers to interrogatories.

At a hearing or trial on a garnishor's application to determine garnishee liability, the trier of fact (in this case, the district court) is entitled to receive evidence from the garnishee with regard to liability, even if the garnishee has not appropriately

answered the garnishment interrogatories. Neb. Rev. Stat. § 25-1010 (Reissue 1995) provides that upon the filing of an affidavit containing the necessary allegations, the court may direct the clerk of the court to issue a summons and order requiring the garnishee to answer written interrogatories. The garnishee is then required to answer under oath all the interrogatories put to the garnishee. § 25-1026. If the garnishee's answers are not satisfactory to the garnishor, the garnishor may file an application for determination of the garnishee's liability. See *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996). The application for determination of liability and the answers of the garnishee are the pleadings upon which trial of the issue of liability of the garnishee shall be had. § 25-1030. See *Torrison, supra.*

In this case, the district court hearing on Spaghetti's application to determine Hockenbergs' liability constituted the trial of garnishment liability, as prescribed by statute. Section 25-1030.02, in pertinent part, sets forth parameters for the garnishment trial:

> The trial of the determination of the liability of the garnishee shall be conducted the same as in a civil action. If it shall appear upon the trial of the liability of the garnishee that the garnishee was (1) indebted to the defendant, or (2) had any property or credits of the defendant, in his possession or under his control at the time of being served with the notice of garnishment, he shall be liable to the plaintiff, in case judgment is finally recovered by plaintiff against the defendant, to the full amount thereof, or to the amount of such indebtedness or property held by the garnishee.

[10] In a garnishment proceeding, the answers to interrogatories and the application to determine garnishee liability are the only pleadings for disposition of the liability issue. *Gerdes v. Klindt*, 253 Neb. 260, 570 N.W.2d 336 (1997). Accordingly, the district court in this case did not permit Hockenbergs' "Response of Garnishee" beyond the due date of the interrogatories and sustained Spaghetti's motion to strike. The district court instead allowed the garnishee to present evidence at the hearing on Spaghetti's motion to determine garnishee liability, in keeping with its correct determination that Hockenbergs was

entitled to rebut the presumption of indebtedness arising from its failure to answer the interrogatories.

In *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985), this court determined that a trial court has no authority in garnishment proceedings to permit, notwithstanding Neb. Rev. Stat. § 25-822 (Reissue 1995), a garnishor to file an application to determine liability beyond the 20-day time period provided by statute. Based on this proposition, Spaghetti argues that the court cannot excuse an untimely filing of answers to interrogatories. *NC+ Hybrids* is distinguishable from the instant case, however; it was not necessary to interpret the statute at issue in *NC+ Hybrids*, as the statute unambiguously required that the garnishor file the application for determination of liability within the 20-day statutory period.

We explained our determination in *NC+ Hybrids*, 219 Neb. at 300, 363 N.W.2d at 365, as follows:

> In view of the nature of garnishment demanding an expeditious disposition of proceedings, *it is reasonable that the Nebraska Legislature sought to protect a garnishee from often unnecessary and sometimes oppressive litigation*. . . . To achieve prompt disposition the Legislature has specified a relatively short time for counteraction by a judgment creditor or garnisher in the event of any dissatisfaction with a garnishee's disclosure contained in answers to interrogatories, namely, a written application filed within 20 days . . . .

(Emphasis supplied.)

As emphasized above, an essential element guiding the decision in *NC+ Hybrids, supra*, was the Legislature's intent to procedurally protect the garnishee. In this case, we have already determined that Hockenbergs is entitled to rebut the presumption of indebtedness in § 25-1028. Hockenbergs' failure to answer the interrogatories raised this presumption, but the hearing to determine garnishee liability still provided Hockenbergs with an opportunity to be heard in a prompt and fair proceeding. After receiving notice of Spaghetti's application to determine garnishee liability, Hockenbergs was entitled to present evidence at the trial to rebut the presumption raised by its failure to answer interrogatories.

The procedure in this case conformed to the statutory garnishment scheme set forth by the Legislature. The district court made a factual finding that Hockenbergs' failure to timely answer the interrogatories was inadvertent. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong. *Farr v. Designer Phosphate & Premix Internat.*, 253 Neb. 201, 570 N.W.2d 320 (1997). The district court did not clearly err in finding Hockenbergs' failure to timely answer the garnishment interrogatories to be excusable at the hearing to determine liability.

[11] Under the circumstances in this case, Hockenbergs cannot be liable to Spaghetti for the full judgment of $55,879.98, despite Spaghetti's assertions. The claim of a judgment creditor garnishor against a garnishee can rise no higher than the claim of the garnishor's judgment debtor against the garnishee. *Davis Erection Co. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995). Although Hockenbergs' initial failure to answer the interrogatories may have potentially subjected it to a judgment in the full amount of Spaghetti's claim against Wolfe, Hockenbergs' appearance at the hearing to determine liability defeated this claim. Thus, the most Spaghetti can garnish is the amount owed to Wolfe by Hockenbergs at the time of the service of summons in garnishment. See *id.*

Rebutting Presumption of Indebtedness

Third, Spaghetti assigns that the district court erred in finding that Hockenbergs rebutted the presumption of indebtedness. With regard to factual issues, the findings of a garnishment hearing judge will not be set aside on appeal unless clearly wrong. See *Farr, supra.*

Spaghetti asserts that Hockenbergs did not present evidence to rebut the presumption of its indebtedness for the full amount of Spaghetti's judgment against Wolfe. At the hearing to determine liability, Thomas Schrack, Jr., testified as to the amounts of Wolfe's paychecks after receipt of the garnishment summons and stated that Hockenbergs did not have any other funds subject to garnishment. Spaghetti argues that this testimony was vague and speculative to the point that it failed to rebut the presumption that

Hockenbergs owes the full amount of the judgment against Wolfe. The court, however, did not receive any evidence contrary to Schrack, Jr.'s testimony. We conclude that the evidence submitted was sufficient to rebut the presumption of indebtedness for the full amount demanded by Spaghetti. Spaghetti's contention to the contrary is without merit.

Application of § 25-1558(1)(a) in Entering Judgment

Finally, Spaghetti assigns that the district court erred in applying § 25-1558(1)(a), the wage protection statute, to the sum it found due from Hockenbergs. Hockenbergs argues that the wage exemption applies and that contrary to Spaghetti's construction of the law, the judgment creditor's debts do not become the debt of the garnishee merely because a garnishment interrogatory has been served.

Section 25-1558 states, in pertinent part:

> (1) Except as provided in subsection (2) of this section, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment shall not exceed the lesser of the following amounts:
>
> (a) Twenty-five percent of his disposable earnings for that week;
>
> . . . .
>
> (4) For the purposes of this section:
>
> . . . .
>
> (b) Disposable earnings shall mean that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

[12] Spaghetti argues that the trial court erroneously reached the sum it found due from Hockenbergs by applying this statute, because Hockenbergs had already paid the wages to Wolfe and § 25-1558 is intended to protect the judgment debtor, not the garnishee. Spaghetti urges that it is entitled to the full amount of the wages Hockenbergs owed Wolfe as of the date the garnishment summons were served. A garnishee's liability is to be determined as of the time of the service of the summons in garnishment. *Davis Erection Co. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995). According to testimony by Schrack, Jr., Hockenbergs

paid Wolfe two separate paychecks in the amounts of $739.50 and $841.74, respectively, following the service of the garnishment summons; the record is not clear as to what amount Hockenbergs actually owed Wolfe at the time Hockenbergs received the garnishment summons on March 12, 2001.

In the instant case, we encounter a situation in which Hockenbergs paid Wolfe after the service of the garnishment summons and interrogatories, because Hockenbergs did not know that Wolfe's wages had been garnished. Spaghetti asserts that the protection § 25-1558 provides to debtor wage earners is personal to the debtor and cannot be utilized for the garnishee's benefit. Under Spaghetti's argument, the exemption would not apply to Wolfe's wages, as Wolfe is already in possession of the garnished wages, and the wage exemption is in place for the protection of the debtor, not the garnishee. We agree.

The purpose of the wage exemption defense in garnishment proceedings is to protect the judgment debtor from garnishment of his or her wages; it may not be raised by the garnishee against the judgment debtor. See, e.g., *Jefferson Bank v. J. Roy Morris*, 432 Pa. Super. 546, 639 A.2d 474 (1994). A reasonable reading of § 25-1558 leads us to conclude that the wage exemption provisions are intended to protect the debtor, not the garnishee—i.e., the Legislature intended to protect judgment debtors and their families from destitution and/or bankruptcy in the event of wage garnishment. In the instant case, Hockenbergs disbursed wages to Wolfe after the garnishment summons had been served (unbeknownst to Hockenbergs); thus, Hockenbergs should not be entitled to utilize an exemption in place for the benefit of Wolfe, when Wolfe himself will receive no benefit from the exemption.

Other jurisdictions have similarly interpreted their wage exemption statutes to achieve the purpose of protecting the debtor. See, e.g., *In re Marriage of Eklofe,* 586 N.W.2d 357 (Iowa 1998); *Wilmington Trust Co. v. Barron*, 470 A.2d 257 (Del. Super. 1983); *Cadle Co. v. G & G Associates*, 757 So. 2d 1278 (Fla. App. 2000).

Hockenbergs cannot claim a wage exemption pursuant to § 25-1558(1)(a) on behalf of Wolfe, because Hockenbergs has already paid Wolfe the wages in question. The district court, therefore, erred in awarding Spaghetti only $396. The proper

amount due to Spaghetti is the amount of wages that Hockenbergs owed Wolfe at the time of the garnishment summons, without exempting the amount that would have been eligible had Hockenbergs still held the amount that it owed Wolfe. The record indicates that the amount owed is no less than $739.50 but not more than $1,581.24. Because we cannot ascertain the exact amount from the record before us, however, we must remand this cause to the district court solely for a determination of the amount of wages Hockenbergs owed Wolfe as of March 12, 2001—the date that the garnishment summons and interrogatories were served on Hockenbergs.

CONCLUSION

For the reasons stated above, we affirm the judgment of the district court insofar as it determined that the presumption in § 25-1028 is a rebuttable presumption, that Hockenbergs' failure to answer the garnishment interrogatories was excusable, and that Hockenbergs did, in fact, rebut the presumption.

We reverse the district court's judgment, however, insofar as it applied § 25-1558(1)(a) to the amount Hockenbergs owes Spaghetti. Therefore, we remand this cause to the district court to determine the amount owed by Hockenbergs to Wolfe on the date that the garnishment summons and interrogatories were served on Hockenbergs; that amount shall be the amount to be garnished by Spaghetti from Hockenbergs.

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

In re Estate of Wanda Krumwiede, deceased. Jeremy Krumwiede, Personal Representative of the Estate of Wanda Krumwiede, deceased, appellee, v. Wilhelm Krumwiede, former Personal Representative of the Estate of Wanda Krumwiede, deceased, appellant.

647 N.W.2d 625

Filed July 19, 2002. No. S-01-730.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
3. **Decedents' Estates: Appeal and Error.** In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **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.
5. **Judgments: Collateral Estoppel.** Under the doctrine of collateral estoppel, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.
6. **Collateral Estoppel: Proof.** The doctrine of collateral estoppel is not applicable in a subsequent proceeding when the burden of persuasion is different.
7. **Records: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned.
8. **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.
9. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
10. **Decedents' Estates: Criminal Law: Words and Phrases.** An acquittal on a charge of murder is the absence of a conviction for purposes of Neb. Rev. Stat. § 30-2354 (Reissue 1995).

Appeal from the County Court for Burt County: Daniel J. Beckwith, Judge. Affirmed.

David A. Domina and James F. Cann, of Domina Law, P.C., for appellant.

John D. Feller and Sam Houston, of Feller & Houston, for appellee.

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

HENDRY, C.J.

INTRODUCTION

Wilhelm Krumwiede petitioned the Burt County Court pursuant to Neb. Rev. Stat. § 30-2207 (Reissue 1995) to declare his wife, Wanda Krumwiede, legally dead and appoint him as personal representative of Wanda's estate. After Wilhelm was informally appointed, Jeremy Krumwiede, son of Wanda and Wilhelm, filed an objection pursuant to Neb. Rev. Stat. § 30-2354 (Reissue 1995), which is Nebraska's homicide probate statute. Determining that Wilhelm intentionally and feloniously killed Wanda, the court removed Wilhelm as personal representative and appointed Jeremy as successor personal representative. Wilhelm appealed, and 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

Wanda Krumwiede was last seen alive on Tuesday, June 13, 1995, between 8:30 and 9 p.m., walking through her neighborhood in Lyons, Nebraska.

In December 1994, 6 months prior to her disappearance, Wanda had filed for divorce from Wilhelm after over 20 years of marriage. The couple had two children of the marriage, Jacinda Romano and Jeremy, and a son, Jarrod Krumwiede, who was born to Wanda from a previous marriage and adopted by Wilhelm. At the time of Wanda's disappearance, Wilhelm had moved out of the couple's home in Lyons and was living nearby. Wanda was living in the home and renting out a portion of the residence to a lodger.

On June 13, 1995, Wanda worked her normal shift at the Safeco Market and had lunch with her sisters. Wanda told her sisters that she was looking forward to babysitting Jarrod's two young sons that weekend and that she was excited that

Jacinda was going to have a new baby. At about 7 p.m., Wanda called Jarrod from her home and spoke with him about the upcoming visit.

The next day, June 14, 1995, was Wanda's regular day off from work. Jeremy telephoned Wanda at home but was unable to reach her. He became concerned and called Jacinda. On June 15, Wanda did not show up for work. Jacinda eventually contacted Wanda's sister, Mardelle Connealy, on Friday, June 16, and asked her to check on Wanda. Mardelle and her husband went to Wanda's home that same day. They found both of Wanda's vehicles in the garage. There was no sign of a disturbance at the house, and Wanda was not there.

Law enforcement officials conducted an investigation, but Wanda was never located, nor was a body ever discovered. Based on evidence uncovered during the investigation, Wilhelm was charged with first degree murder.

Wilhelm's first trial in 1997 ended in a mistrial. The mistrial was granted prior to the State's completing its case in chief. The basis for the mistrial was Wilhelm's allegation that the State had failed to disclose certain photographs during pretrial discovery. A second trial on the first degree murder charge commenced in 1998. At the close of the State's evidence, Wilhelm made a motion for a directed verdict. The court sustained the motion, finding that "[t]he evidence adduced by the State against the Defendant is insufficient as a matter of law to permit submission of First Degree murder or lesser-included offenses to the jury" and, further, that "[t]he Information filed against the Defendant, including all lesser-included offenses, is dismissed with prejudice, and the Defendant is acquitted." The court did not set forth specific findings in support of its directed verdict.

On June 28, 2000, Wilhelm filed a petition for informal probate seeking appointment as personal representative and a determination of Wanda's death pursuant to § 30-2207(3). Wilhelm was informally appointed as personal representative on July 18. Thereafter, Jeremy filed an objection to the appointment, asserting that under § 30-2354, Wilhelm was not entitled to appointment or to any benefits from Wanda's estate. Section 30-2354 states in relevant part:

> (a) A surviving spouse, heir or devisee who feloniously and intentionally kills or aids and abets the killing of the decedent is not entitled to any benefits under the will or under this article . . . .
>
> . . . .
>
> (e) A final judgment of conviction of felonious and intentional killing or aiding and abetting therein is conclusive for purposes of this section. In the absence of a conviction of felonious and intentional killing or aiding and abetting therein, the court may determine by a preponderance of evidence whether the killing or aiding and abetting therein was felonious and intentional for purposes of this section.

A hearing was held on Jeremy's objection in May 2001. The evidence presented at the hearing consisted of numerous exhibits, the testimony of several witnesses, and the record of the proceedings from the 1997 criminal trial. A number of witnesses testified at the 1997 criminal trial. We recount only that portion of the testimony from the various witnesses which is most salient for purposes of this appeal.

Jeremy's 1997 testimony disclosed that on June 12, 1995, the day before Wanda's disappearance, she took him out to dinner and shopping and that they had had a pleasant time:

> [Jeremy:] If anything, she was happier than she usually is.
>
> Q Did you have any indication that she might leave?
>
> A None at all.
>
> Q Did you have any idea that you would never see her again?
>
> A None at all.
>
> Q Jeremy, do you believe your mother would just up and leave without telling anybody?
>
> A There's no way she would have done that.
>
> Q And why do you say that?
>
> A She loved us.
>
> Q What things were important to your mother?
>
> . . . .
>
> [Jeremy:] Her family was very important to her, especially through the time that she was going through. She wanted us to be happy.

> Q Had she ever taken off without notice before?
> A No.
> . . . .
> Q Has your mother ever taken any kind of extended trip without letting you know where she was going?
> A Never. We always knew where she was at. We always knew where we could find her.

Jarrod's 1997 testimony also showed that Wanda seemed happy when she talked with him the evening of June 13, 1995, about the upcoming visit with her two grandsons and that she gave no indication that she might leave. Jarrod further stated that Wanda would not leave without telling anyone because "She was — She was too close to us. She — not me, but the whole family, her grandkids. She wouldn't have left."

Jacinda also testified at the 1997 trial. She said that she and Wanda would talk on the telephone at least twice a week and see each other once every couple of weeks. She described Wanda as "a very good grandmother. She was very close, very doting." Jacinda testified that Wanda would not leave without telling her friends and family because "She just always was considerate. She wanted people to know where she was. If one of us kids were to look for her, we would know where she was."

Joey Brehmer, one of Wanda's neighbors, testified at the 1997 trial that he saw Wilhelm between 6 and 8 p.m. on June 13, 1995, running down the street in a direction away from Wanda's house. Brehmer was mowing his grass at the time. Brehmer stated that he noticed Wilhelm was wearing normal work clothes, not a jogging suit. As Brehmer watched, Wilhelm stopped and walked for a bit, then started running again. Brehmer had never seen Wilhelm run previously.

Cheryl Huffman testified that she worked as a postal clerk at the Lyons post office. She stated that she had known Wanda all her life. She said she saw Wanda on June 13, 1995, between 8:30 and 9 p.m., walking by Burlington Park in Lyons. Huffman was driving out of town with her husband when she saw Wanda and waved to her. Wanda waved back.

Brenda Wheaton testified at the 1997 trial that she was a resident of Lyons and that around 8:30 on the evening of Thursday, June 15, 1995, she was in downtown Lyons and drove through

dark smoke coming across Main Street. She was concerned that something might be on fire, so she drove around the block to see if she could locate the source of the smoke. She observed the smoke coming from the smokestack of Wilhelm's shop. Wilhelm, a self-employed carpenter, used the shop for his work. The shop was a "quonset" building with a wood-burning furnace-type heating stove in the center. As Wheaton drove by the shop, she saw Wilhelm get into his truck, then get out and go back into the building. She further testified that she had lived in the community for over 30 years and had never seen "any burning or smoke" coming from Wilhelm's shop in the summertime, noting that June 15 was a warm day.

Lyons police officer James Buck also testified at the 1997 trial. He stated that he saw smoke coming from Wilhelm's shop around midnight on June 15, 1995.

Investigator Bruce Motley, a law enforcement officer involved in the investigation of Wanda's disappearance, testified at the 1997 trial that on June 23, 1995, he and other officers searched Wilhelm's shop, including the contents of the stove. After removing the ashes from the stove, Motley examined the stove's interior and discovered a piece of an eyeglass frame wedged inside the stove. The eyeglass piece was in a little groove or crack between the fire bricks, about two-thirds of the distance between the back of the stove and the opening. There were also burned pieces of paper in the stove, some of which were identified by another investigator as the remains of a wedding announcement from the Krumwiede's 1969 wedding.

Mary Lauritzen's testimony at the 1997 trial revealed that she was the office manager for Family Vision Center in West Point, Nebraska. She testified that in August 1994, Wanda came in for a regular eye examination and was diagnosed as "need[ing] glasses." She further explained that because Wanda "hadn't worn glasses before" they "spent a lot of time talking about the type of lenses." Wanda then purchased a pair of "no-line bifocal" glasses, style No. GY 552, and color code 5079, for $340. Lauritzen stated that as far as she was aware, Wanda had never lost or damaged the glasses and, further, that the glasses were still under warranty in June 1995. The warranty provided that any broken parts would be replaced at no cost for 1 year.

Lauritzen also testified that the piece of eyeglass frame found in the stove of Wilhelm's shop was style No. GY 552. She indicated that they had sold only two sets of eyeglasses of this frame style, one to Wanda and one to another customer. Wanda purchased only one pair of glasses from Family Vision Center.

Wanda's sister Mardelle testified at the 1997 trial that she saw Wanda wearing these glasses on June 13, 1995. Several witnesses recognized pictures of the GY 552-style eyeglasses as the style Wanda wore.

Shelly Howard, a criminal analyst for the State of Nebraska, testified at the 1997 trial that her investigation determined only 25 pairs of GY 552 eyeglasses had been sold to consumers by the manufacturer. Of those 25 pairs, only 8 were color code 5079.

Dr. Reena Roy, a forensic serologist, testified at the 1997 trial that she examined Wilhelm's pickup for forensic evidence. She stated that her examination revealed small bloodstains on the exterior of the pickup around the driver's-side door and in the tailgate area on the lining of the interior of the "topper door." The stains were small, spatter-like drops or smears. In the area around the tailgate, DNA from the bloodstains in Wilhelm's pickup matched bloodstains contained on several pairs of women's underwear collected from the clothes hamper at Wanda's home. No DNA analysis was made of the bloodstains around the driver's-side door.

Officer Donald Shepherd's testimony at the 1997 trial disclosed that a person named "Nolan Lasovich" contacted law enforcement in the summer of 1995, stating that he had possibly seen Wanda on June 20, 1995, at a lounge in Council Bluffs, Iowa. Lasovich, who was thereafter shown a photographic lineup by Shepherd, identified two photographs as resembling the woman he saw on June 20. The first was a photograph of a female who was not Wanda. Regarding this photograph, Lasovich stated that the woman's hairstyle and facial features resembled the woman he saw on June 20. The second was a photograph of Wanda. With respect to this photograph, Lasovich indicated that the woman's hairstyle as depicted in the photograph resembled that of the woman he saw on June 20.

Linda Vetick, Wanda's hairdresser, testified at the 1997 trial. She stated that Wanda's hairstyle, prior to June 6, 1995, was full

and bouffant, with a lot of height or "poofiness." However, on June 6, Linda cut about 1½ to 2 inches of hair from the top of Wanda's head and trimmed the sides, generally changing Wanda's hairstyle to "really short and real wispy . . . that real modern, wispy look." The photograph of Wanda identified by Lasovich showed her with a bouffant hairstyle.

The State also called Don Slotsky, then-president of Northwestern Iowa Credit Bureaus, Inc., during the 1997 trial. Slotsky testified that his company was in the business of providing credit reports and processing check verifications. He explained that in 1997, he had been asked by the State to run a credit report for Wanda. He then proceeded to testify regarding the contents of the credit report. According to Slotsky, the report showed that Wanda had four lines of credit: First Card, Citibank, Bank One, and J.C. Penney Company. He testified that according to the credit report, there was no activity on any of the accounts after June 1995. The Citibank and First Card accounts were never used and were closed in 1996. The J.C. Penney account was shown as open but not active, with no balance owing. The Bank One account showed that the account was paid off in June 1995, and the account was closed.

Ray Earl Peterson, an acquaintance of Wilhelm and Wanda, testified at the probate hearing in 2001. He stated that his testimony at the probate hearing was consistent with his testimony in 1997 and 1998. Peterson related at the probate hearing that the Sunday prior to Wanda's disappearance, he spoke with Wilhelm after church about the upcoming divorce. Wilhelm told Peterson that the upcoming week was "property settlement week." However, the evidence showed that no proceedings regarding the divorce were scheduled for that week. Peterson described Wilhelm as "quite agitated" about the situation, saying with a clenched jaw that he "was going to make sure and not lose his house." Wilhelm's manner was intense enough that Peterson responded by telling Wilhelm "more or less" that " ' "No property is worth injuring anyone." ' "

Wilhelm also testified at the probate hearing and, in addition, offered his affidavit which was received into evidence. Regarding the fire in his shop, Wilhelm stated that on June 13, 1995, Wanda left a bag of trash in his pickup for him to burn. He

burned it in the shop stove that same day. He testified that Wanda would often leave mail and other items for him in his pickup, including any trash she wanted burned. He also testified that throughout the marriage, they had used the shop stove to burn personal papers and similar items.

Wilhelm further explained that on June 13, 1995, at around 5 p.m., he returned an automobile he had been using to its owner in Lyons and walked back to his shop. His walk took him to within a block of the family home. He stated that he walked for a while and jogged for a while because that "was my way of transportation to get back to my shop . . . I was running for exercise and was on my way back to the shop."

According to Wilhelm, he then returned to his shop and continued working until about 9 p.m. At 9 p.m., he went to see a friend, staying about 10 to 15 minutes. Wilhelm then drove to see another friend, but no one was home. Wilhelm then drove to his brother's home, arriving about 10 p.m. Wilhelm helped his brother change a tire on a tractor, which took at least 3 hours, then went to bed. On June 14, 1995, he awoke at approximately 6 a.m. and went into Lyons for breakfast. At approximately 9 a.m., he left for a jobsite in Winner, South Dakota, returning to Lyons the following day.

Wilhelm testified that he did not kill Wanda and that he had no idea as to her whereabouts.

Jeremy testified at the probate hearing. He said that he had often helped his father in the shop and had never seen his father burn any papers in the stove. Jeremy further stated that his father did not typically use the stove in the summertime.

On cross-examination, Jeremy acknowledged that he was aware that around 10 p.m. on June 13, 1995, someone observed an unknown vehicle in Wanda's driveway, occupied by two unknown men. Jeremy further acknowledged that Wanda had been diagnosed as an alcoholic in 1986, while hospitalized for an unrelated surgery. Jeremy stated that he had never seen Wanda take a drink after the diagnosis and that he had no explanation for the fact that beer was found in Wanda's refrigerator after she disappeared.

Mardelle also testified at the probate hearing. She stated that Wanda set out her trash every week at the curb, where it was

picked up by the city. She further agreed that Wanda had been diagnosed as an alcoholic in 1986 and that she had not seen Wanda take a drink since her diagnosis.

Among the exhibits received at the probate hearing was a receipt for the rental of a post office box in Wanda's name, signed by a postmaster with what appears to be the last name of "Webster." The receipt bears the stamp of the Lyons post office and is dated November 14, 1996. The receipt was also admitted at the 1997 trial. The foundation for admission of the receipt was provided by Huffman, a Lyons postal employee, who simply testified that the document was "a receipt for [a post office] box fee payment." No other evidence was offered at either the 1997 criminal trial or the probate proceedings regarding the circumstances surrounding the post office box receipt.

Slotsky again testified at the probate hearing. He reiterated and further explained his testimony concerning Wanda's credit card accounts based on his company's 1997 credit report. Slotsky explained the process used to obtain Wanda's credit information, stating that the 1997 report was drawn from a computer data bank located in Chicago and maintained by a company named "Trans Union." Slotsky further explained that the various "credit grantor[s]" provided information to Trans Union and that Trans Union then stored this information in its computer system. To produce Wanda's credit report, Slotsky drew the information from Trans Union's databank.

Slotsky testified that according to the 1997 report, Wanda's Bank One, Citibank, and First Card accounts were all marked "closed by consumer." He further testified that the Bank One account was "closed by consumer" in June 1995, while the First Card and Citibank accounts were closed in 1996, after Wanda's disappearance.

Slotsky stated that it appeared the Bank One account was a joint-contractual account with more than one authorized user, while the Citibank and First Card accounts appeared to be individual liability accounts, with Wanda as the only authorized user. However, he was not certain about this information, which was gleaned from letter codes contained in the 1997 report. He further stated that the Bank One account at one time had a balance of $11,000, which had been paid off. The Citibank and

First Card accounts were never used. When asked "whether anyone, other than Wanda Krumwiede would have been authorized to close these accounts," Slotsky responded "None of these accounts specifically state that there is joint liability on them. And therefore I cannot tell whether or not the party might have had any co-liability or be also authorized to close the account." He also stated that credit card companies in general would "not be real demanding" regarding proof of identity when closing an account. No one from Bank One, Citibank, First Card, or J.C. Penney testified regarding these accounts.

Finally, the affidavit of Lasovich was offered and received at the probate hearing. In his affidavit, dated April 5, 2001, Lasovich averred that he remained "convinced the women [sic] I saw in the hotel and described to the police was the same woman described in the missing person report I saw on television." Lasovich described this woman as "having a 'poofy' dark, out of date hairstyle."

The court entered its order on June 11, 2001, finding:

> Wanda Krumwiede was last positively identified as being alive on June 13, 1995 at approximately 9:00 p.m. . . .
>
> Wanda Krumwiede filed for divorce in December, 1994. Wilhelm Krumwiede did not want the divorce nor the loss of the house he purchased prior to marriage and maintained in his own name only. Evidence shows that an identifiable piece of Wanda Krumwiede's only pair of glasses was found in the wood burning stove of Wilhelm Krumwiede, on property controlled by him. Small amounts of dried blood belonging to Wanda Krumwiede were found on the back tailgate of Wilhelm Krumwiede's pickup. These findings of fact in conjunction with the extensive evidentiary record before the court is proof by a preponderance of the evidence that Wilhelm Krumwiede intentionally and feloniously killed his wife, Wanda Krumwiede.

The court then sustained Jeremy's objection, removed Wilhelm as personal representative of Wanda's estate, and appointed Jeremy as successor personal representative. Wilhelm appeals.

ASSIGNMENTS OF ERROR

Wilhelm asserts, renumbered and rephrased, that the probate court erred in (1) determining that the directed verdict in the

1998 criminal trial did not bar application of Nebraska's homicide probate statute to Wilhelm based on either issue preclusion, the "legal effect" of the directed verdict, or the language of § 30-2354; (2) finding that Jeremy had proved by a preponderance of the evidence that Wilhelm intentionally and feloniously killed Wanda, in that such findings "are arbitrary, capricious, or unreasonable"; and (3) determining Wilhelm should be removed as personal representative and Jeremy appointed as successor personal representative.

STANDARD OF REVIEW

[1-3] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Estate of Watkins*, 243 Neb. 583, 501 N.W.2d 292 (1993). In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *Id.* In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

[4] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001).

ANALYSIS

Wilhelm initially suggests that the standard of review for errors appearing on the record in probate proceedings "has not been explained" and that this court should "review this case *de novo* on the facts, and make independent determinations on legal issues," similar to the standard of review employed in parental termination cases. Brief for appellant at 32-33. We disagree.

This court has previously held that in probate proceedings which do not raise "equitable matters," an appellate court reviews the decision of the county court for errors appearing on the record and does not conduct a de novo review of the facts. *In re Estate of Watkins, supra.*

In *In re Estate of Watkins*, 243 Neb. at 587, 501 N.W.2d at 295, we set forth the standard of review as follows:

> In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. . . .
>
> "In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence."

(Citations omitted.) Quoting *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992). See, also, *In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993) (claim of fraud in probate proceedings, being matter of equity, reviewed de novo on appeal).

It is also the case that "[o]n a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below." *In re Estate of Mecello*, 262 Neb. at 504, 633 N.W.2d at 901. Accordingly, in the present appeal, which does not involve any equitable claims, we review the probate court's findings of fact under a "clearly erroneous" standard of review, considering the evidence in the light most favorable to Jeremy, who is entitled to every reasonable inference deducible from the evidence. See *In re Estate of Watkins, supra*. On questions of law, we reach a conclusion independent of the determination of the probate court. See *In re Estate of Mecello, supra*.

FIRST ASSIGNMENT OF ERROR

COLLATERAL ESTOPPEL

[5,6] Wilhelm contends in his first assignment of error that "Issue Preclusion Rules Apply To . . . *Neb Rev Stat* § 30-2354" and that as such, his acquittal "forecloses any proceedings against him" under § 30-2354, Nebraska's homicide probate statute. Brief for appellant at 29. Under the doctrine of collateral

estoppel, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). However, this court has also held that the doctrine of collateral estoppel is not applicable in a subsequent proceeding when the burden of persuasion is different. *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996); *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995). See, also, *Congleton v. Sansom*, 664 So. 2d 276 (Fla. App. 1995) (acquittal on criminal charges based on insanity does not foreclose same evidence from meeting lesser civil standard under homicide probate statute); *Matter of Estate of Congdon*, 309 N.W.2d 261 (Minn. 1981) (collateral estoppel not applicable in proceedings under homicide probate statute regarding daughter's prior acquittal of murder and conspiracy charges). The burden of persuasion in § 30-2354 is "by a preponderance of evidence." This is a different burden of persuasion than in a criminal trial. Accordingly, this argument is without merit.

Legal Impact of Directed Verdict in Criminal Trial

Wilhelm further argues in conjunction with his first assignment of error that the directed verdict in the 1998 criminal case constituted "absolute proof from a previous murder prosecution that the district court concluded no homicide had been committed," and accordingly "the very same evidence" before the probate court was not legally "sufficient to prove 'felonious' and 'intentional' killing by the greater weight of the evidence." Brief for appellant at 26-27. Wilhelm contends that the probate court must give conclusive effect to the directed verdict in Wilhelm's second criminal trial because the district court had to find a " 'complete failure' " of the evidence on an essential element of the crime charged, or that the evidence was so doubtful in character and lacking in probative value that a finding of guilt on such evidence could not be sustained. *Id.* at 27. See, *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002); *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001).

Wilhelm's contention is that because he was acquitted of killing Wanda as the result of the directed verdict in the 1998 trial, the probate court is legally precluded from reaching a different

conclusion on the same evidence in that the probate court had "no new inculpatory evidence," and "the very same evidence" submitted at the second criminal trial was before the probate court. Brief for appellant at 26-27. Wilhelm then asserts that "where a district judge dismisses a criminal prosecution upon the State's rest, the court has, by definition, found a failure of proof by the greater weight of the evidence." *Id.* at 27.

However, we cannot reach the merits of Wilhelm's argument as it relates to the directed verdict because this court cannot determine from this record whether, as Wilhelm asserts, the "inculpatory" evidence submitted at the 1998 criminal trial was "the very same evidence" before the probate court. *Id.* at 26-27. The order of the district court directing a verdict for Wilhelm states that the evidence upon which the directed verdict was granted was presented to the court between January 12 and 16, 1998. The only criminal record before this court is from the first criminal trial, which took place from August 18 through August 22, 1997, ending in a mistrial. Aside from the witnesses who testified at the probate hearing that their evidence was the same in the two previous criminal trials, the record does not show what evidence was presented at the 1998 criminal trial.

The only identifiable portion of the 1998 criminal trial contained in the record is the order of the district court directing a verdict. The record does not disclose either a list of witnesses for the State in the 1998 trial or the content of their testimony. Additionally, while there are stipulations in the record, none of these stipulations address whether the evidence at the 1997 trial was "the very same evidence" offered in the 1998 trial. While Wilhelm's counsel asserted at oral argument that exhibits 15 through 78 submitted at the probate hearing were common to both the 1997 and 1998 trials, this assertion, which cannot be determined from the record, would still not establish that these exhibits represent all of the evidence from the 1998 trial.

[7] Wilhelm has failed to present either this court or the probate court below with a record demonstrating that the evidence adduced by the State in the 1998 trial was "the very same evidence" adduced by Jeremy in the 2001 probate proceeding. It is incumbent upon the party appealing to present a record which supports the errors assigned. *J.B. Contracting Servs. v. Universal*

Surety Co., 261 Neb. 586, 624 N.W.2d 13 (2001); *In re Application of SID No. 384*, 259 Neb. 351, 609 N.W.2d 679 (2000). Such presentation is necessary because "[m]eaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision." *J.B. Contracting Servs.*, 261 Neb. at 593, 624 N.W.2d at 19-20, citing *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997). Accordingly, this argument is without merit.

Legal Interpretation of § 30-2354

[8] Finally, Wilhelm argues under his first assignment of error that the dismissal of the criminal case against him forecloses application of § 30-2354, based on the language of § 30-2354. This issue presents a question of law regarding the interpretation of a statute. 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*, 263 Neb. 700, 641 N.W.2d 644 (2002).

Section 30-2354 became operative in 1977 as part of Nebraska's Uniform Probate Code and was enacted virtually verbatim from the Uniform Probate Code, § 2-803. Section 30-2354(e) states that a conviction for felonious and intentional killing, or aiding and abetting in such killing, is "conclusive for purposes of this section." The statute goes on to state that "[i]n the absence of a conviction," the statute will apply when the preponderance of the evidence shows that the decedent was killed intentionally and feloniously. Wilhelm argues that the plain language of § 30-2354 limits the applicability of the statute to two situations: (1) where there has been a conviction or (2) where "there has been no prosecution against the one who would otherwise inherit." Brief for appellant at 31. Wilhelm contends that § 30-2354 "does not address circumstances where there is a judgment of acquittal" and that the "logical interpretation of [§ 30-2354] is to conclude that acquittal judgments, like are [sic] produced in the district court in a criminal case, preclude its invocation." *Id*. We disagree.

[9] The plain language of § 30-2354 requires simply the "absence of a conviction." Wilhelm would have us read into the

statute an additional requirement, the absence of a prosecution ending in acquittal. However, it is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001); *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999). The statute on its face is designed to apply to killings which result in the conviction of the wrongdoer, and to killings in the "absence of a conviction."

Our reading of the plain meaning of § 30-2354 is supported by the comment to § 2-803 of the Uniform Probate Code, which states in relevant part:

> While conviction in the criminal prosecution under this section is treated as conclusive on the matter of succession to the murdered person's property, acquittal does not have the same consequences. This is because different considerations as well as a different burden of proof enter into the finding of guilty in the criminal prosecution. Hence it is possible that the defendant on a murder charge may be found not guilty and acquitted, but if the same person claims as an heir or devisee of the decedent, he may in the probate court be found to have feloniously and intentionally killed the decedent and thus be barred under this section from sharing in the estate. An analogy exists in the tax field, where a taxpayer may be acquitted of tax fraud in a criminal prosecution but found to have committed fraud in a civil proceeding.

Unif. Probate Code § 2-803, comment, 8 U.L.A. 460 (1998). Compare *United States v. Real Estate Boards*, 339 U.S. 485, 70 S. Ct. 711, 94 L. Ed. 1007 (1950) (relying on federal tax cases to hold that directed verdict in criminal price-fixing trial did not bar civil suit, where civil suit was based solely on record made in criminal trial).

[10] The plain unambiguous language of § 30-2354 does not support Wilhelm's argument. We determine that Wilhelm's acquittal of criminal liability for the murder of Wanda is the "absence of a conviction" for purposes of § 30-2354 and that the probate court was not bound by the directed verdict granted in Wilhelm's 1998 criminal trial.

SECOND ASSIGNMENT OF ERROR

In his second assignment of error, Wilhelm argues that the probate court erred in finding that Jeremy had proved by a preponderance of the evidence that Wilhelm killed Wanda. Wilhelm also contends that the findings of the county court were arbitrary, capricious, or unreasonable.

In reaching its conclusion that Wilhelm had intentionally and feloniously killed Wanda, the court found, inter alia, that (1) Wilhelm did not want the divorce; (2) Wilhelm did not want to lose the house he purchased prior to the marriage; (3) a portion of Wanda's only pair of eyeglasses was found in Wilhelm's shop stove after Wanda's disappearance, on property controlled by him; and (4) small amounts of dried blood belonging to Wanda were found on Wilhelm's truck.

These findings by the probate court were not clearly erroneous. The testimony of Peterson and others showed that Wilhelm did not want the divorce and did not want Wanda to receive the family home in the divorce proceedings. Testimony and physical evidence also supported the probate court's finding that a portion of Wanda's only pair of eyeglasses was found in Wilhelm's shop stove shortly after her disappearance. Forensic evidence further supported the probate court's finding that traces of Wanda's blood were found on Wilhelm's pickup after Wanda's disappearance.

Wilhelm argues that there is "no proof that Wanda was killed, and certainly not that she was killed by [Wilhelm]." Brief for appellant at 22. The record shows otherwise. The eyeglasses and bloodstains, as noted by the probate court, are evidence that Wanda was murdered, and this evidence was directly linked to Wilhelm through his pickup and shop stove.

Additionally, the fact that Wanda abruptly and without explanation disappeared sometime after 9 p.m. on June 13, 1995, and has not been seen by any of her family, friends, or acquaintances since that time is further evidence supporting the county court's finding. This evidence is particularly significant given the unrefuted testimony regarding Wanda's love for her children and grandchildren and her ongoing involvement in their lives.

Wilhelm asserts that evidence adduced in the probate hearing shows that Wanda was alive after June 13, 1995. This evidence

includes Lasovich's affidavit in which he states that he "remain[s] convinced" that he saw Wanda on June 20, 1995, and describes the woman he saw as "having a 'poofy' dark, out of date hairstyle." However, Vetick testified that on June 6, she changed Wanda's hairstyle to "really short and real wispy . . . that real modern, wispy look."

Wilhelm also points to the testimony of Slotsky that Wanda's Citibank and First Card credit accounts were closed "by the consumer" in 1996, after Wanda disappeared. However, Slotsky testified that he could not determine, based on the information provided by Trans Union, whether Wanda or someone else closed the accounts. There is also no evidence in the record from a representative of First Card or Citibank regarding their specific procedures for closing inactive accounts. In particular, regarding the First Card account, Slotsky testified:

> Q Over to the right [of the credit report] it says, "Account closed by consumer"?
>
> A Correct.
>
> Q Does that mean that someone would have to actually contact them to close that account?
>
> A That would indicate that the cardholder or the account holder actually contacted the creditor and affirmatively said to close this account.
>
> Q Are you familiar with that process for that specific cardholder — or for that card company?
>
> A Only, generically, not specifically, no.
>
> Q So, you wouldn't know what process they use to verify whether an individual was who they represented themselves to be?
>
> A Oh, no. I would expect just general industry knowledge that they would not be real demanding about identification. If someone says, "I'm the consumer," maybe had the account number — it's not something that's going to be terribly damaging to anyone. If I call up and cancel your credit cards and you try to use it, you get mad and call the credit company and work it out. You haven't been harmed. So, yeah, I would — It would surprise me to learn that a credit grantor would go to extensive identity verification procedures for that.

While Wilhelm would have us conclude that Wanda herself closed these two accounts in 1996, the record, construed in the light most favorable to Jeremy, does not support such a finding.

Wilhelm further contends that there was beer in Wanda's refrigerator after she disappeared, indicating she may have "relapsed into alcoholism." Brief for appellant at 26. However, those witnesses who testified regarding Wanda's alcoholism, including Wilhelm, stated that they had never seen Wanda take a drink after she was diagnosed in 1986.

Wilhelm also relies on the receipt for the rental of a post office box in Wanda's name, taken out in 1996 in Lyons. However, there is no supporting evidence indicating who actually rented the post office box or the procedures required to rent the box. Although the name "Wanda Krumwiede" is handwritten in printed letters on the receipt as the "*Name of Customer*" renting the box, there was no other evidence offered to establish who filled out the receipt, whether the handwriting on the receipt was Wanda's, or whether Wanda normally signed her name as it appeared on the receipt. The only evidence regarding the receipt was provided by Huffman, who testified in the 1997 criminal trial:

> Q Could I show you Exhibit No. 112, please? . . .
>
> . . . .
>
> Q . . . [D]o you recognize that as a document of the kind that you'd use at the postal — at the post office?
>
> A Yes.
>
> Q And what is that particular kind of form used for?
>
> A It's for a post office — when we pay our post office box fees.
>
> Q It's a box —
>
> A It's a receipt.
>
> Q A receipt for the box fee payment?
>
> A (Witness nodded affirmatively.)

As with the credit report, Wilhelm would have us conclude that the post office box receipt shows that Wanda was alive in 1996. However, given the state of the record as to the manner in which the receipt was obtained, this piece of evidence, considered in the light most favorable to Jeremy, does not support Wilhelm's contention.

Finally, Wilhelm argues that the record supports several alternative theories to explain Wanda's disappearance, including the possibility that Wanda relapsed into alcoholism and suddenly left, that Wanda was abducted by the two unknown men seen in her driveway on June 13, 1995, or that Wanda was killed by someone other than Wilhelm. However, these theories do not explain why Wanda's only pair of eyeglasses, which she was wearing on the day she disappeared and which were still under warranty at the time, were found burned in Wilhelm's shop stove, along with a 1969 wedding announcement. These theories also do not explain Wanda's bloodstains on the interior of Wilhelm's pickup.

The issue before us on appeal is not whether there was evidence to support Wilhelm's claim of innocence, but whether the record shows that the probate court's findings are clearly erroneous. See *In re Estate of Watkins*, 243 Neb. 583, 501 N.W.2d 292 (1993). Based upon our review of the record, we cannot conclude that the probate court was clearly erroneous in finding that Jeremy met his burden in showing by a preponderance of the evidence that Wilhelm intentionally and feloniously killed Wanda. As such, the court also did not err in removing Wilhelm as personal representative and appointing Jeremy as successor personal representative.

CONCLUSION

The decision of the probate court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM P. RICKABAUGH, RESPONDENT.

647 N.W.2d 641

Filed July 19, 2002. No. S-01-941.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

On August 20, 2001, formal charges were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, William P. Rickabaugh. Respondent's answer disputed certain allegations. His answer admitted other allegations, but pled a defense to those allegations. A referee was appointed and heard evidence. The referee filed a report on March 8, 2002. With respect to both counts I and II, the referee concluded that respondent's conduct had breached disciplinary rules of the Code of Professional Responsibility. The referee made no finding as to whether respondent had violated his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended disbarment. Neither relator nor respondent filed exceptions to the referee's report.

FACTS

Respondent was admitted to the practice of law in Nebraska on September 14, 1992. He has practiced law in Douglas County.

The substance of the referee's findings may be summarized as follows: In regard to count I, respondent advised Randall Davis and his business associate David Mutum (the clients) regarding collective bargaining agreements but failed to inform them that he was not qualified, either by experience or training, to give such advice. Respondent also represented the clients and their companies as defendants in a lawsuit concerning the collective bargaining agreements which was filed in federal court. Respondent failed to inform the clients that he was not qualified, either by experience or training, to handle the representation of a lawsuit in federal court. Respondent failed to keep the clients advised of developments in the case, including settlement negotiations, and failed to review settlement documents with the clients or to explain to them the import of such documents.

In regard to count II, respondent created fictitious pleadings and forged a judge's signature in an attempt to persuade Davis that respondent had filed a lawsuit and obtained a judgment in favor of one of Davis' companies against another company. The referee rejected respondent's asserted defense that he had created the fictitious pleadings to appease Davis in order to prevent

possible unspecified violence by Davis. Respondent could not identify any specific threat of violence which had been made.

In his report, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary rules, "DR 1-102, DR 6-101, and DR 7-102 as set forth in the Relator's Formal Charges." The specific provisions alleged in the formal charges are in regard to count I, Canon 1, DR 1-102(A)(1), violating a disciplinary rule, and DR 1-102(A)(4), dishonesty; Canon 6, DR 6-101(A)(1), handling matter not competent to handle, DR 6-101(A)(2), handling matter without adequate preparation, and DR 6-101(A)(3), neglect; and Canon 7, DR 7-102(A)(3), concealing or failing to disclose facts, and DR 7-102(A)(5), false statement. In regard to count II, the charges are DR 1-102(A)(1), violating a disciplinary rule, DR 1-102(A)(4), dishonesty; DR 1-102(A)(5), conduct prejudicial to administration of justice; DR 1-102(A)(6), conduct adversely reflecting on fitness to practice; DR 6-101(A)(3), neglect; and DR 7-102(A)(5), false statement. We understand the referee's statement to be a finding that these specific provisions were violated. With respect to the sanction which ought to be imposed for the foregoing violations, the referee recommended disbarment.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion under Neb. Ct. R. of Discipline 10(L) (rev. 2001). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence.

A proceeding to discipline an attorney is a trial de novo on the record. *Apker, supra*. To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id*. Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id*.

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by

clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1), (4), (5), and (6); DR 6-101(A)(1), (2), and (3); and DR 7-102(A)(3) and (5). Although the referee made no finding in this regard, we conclude that respondent has violated the attorney's oath of office. See § 7-104.

We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.' " *Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Apker, supra*; *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of

any mitigating factors. *Apker, supra*; *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

The evidence in the present case establishes, inter alia, that respondent handled legal matters which he knew or should have known he was not competent to handle, without associating with a lawyer who was competent to handle the matters, and without adequately preparing himself to handle the matters. Respondent failed to keep his clients informed of the progress of the pending matters and negotiated and entered into a settlement agreement on behalf of the clients without the clients' knowledge. In addition, respondent knowingly made false statements of fact by representing to his client that he had filed a lawsuit and gained a favorable judgment on behalf of the client. In perpetrating this falsehood, respondent went so far as to create fictitious pleadings and to forge the signature of a judge. Respondent's asserted defense to count II was not believed by the referee, and respondent was unable to provide specific evidence to substantiate his claimed defense.

Respondent does not appear to have established factors to mitigate his breach of disciplinary rules, although the referee noted that he was generally cooperative with respect to the disciplinary proceeding. Respondent admitted the allegations of count II, and in regard to count I, according to an exhibit in the record, respondent admitted to the clients that his handling of the collective bargaining agreement matter amounted to "attorney malpractice." Respondent eventually paid the litigation settlement and other costs on behalf of the clients.

With respect to the seriousness of respondent's offenses, we conclude that the manner in which respondent mishandled the matters discussed above, especially the forging of a judge's signature, amount to conduct that was prejudicial to the administration of justice. See, e.g., *State ex rel. NSBA v. Ebersold*, 253 Neb. 19, 567 N.W.2d 307 (1997) (disbarring attorney where attorney falsely indicated judge had signed decree when in fact judge had not). We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court agrees with the referee's recommendation and finds that respondent should be disbarred.

CONCLUSION

The motion for judgment on the pleadings is granted. It is the judgment of this court that respondent should be disbarred, and we therefore order him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. § 7-114 (Reissue 1997) and Neb. Ct. R. of Discipline 23 (rev. 2001).

JUDGMENT OF DISBARMENT.

McCORMACK, J., not participating.

JOSEPH AND ANTOINETTE WASIKOWSKI ET AL., APPELLEES AND CROSS-APPELLANTS, V. THE NEBRASKA QUALITY JOBS BOARD, A NEBRASKA ADMINISTRATIVE AGENCY, ET AL., APPELLEES AND CROSS-APPELLANTS, AND NEBRASKA BEEF, INC., A NEBRASKA CORPORATION, AND NEBRASKA BEEF LTD., A NEBRASKA LIMITED PARTNERSHIP, APPELLANTS AND CROSS-APPELLEES.

648 N.W.2d 756

Filed July 26, 2002. No. S-00-573.

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. **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. **Actions: Equity: Public Meetings: Appeal and Error.** Actions for relief under the Nebraska public meetings laws are tried as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. Thus, the approach taken is that such cases are tried and reviewed by the appellate courts as equity cases.
4. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
5. **Administrative Law.** The Administrative Procedure Act applies only to agencies authorized by law to make rules and regulations.

6. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal must be properly designated, pursuant to Neb. Ct. R. of Prac. 9D(4) (rev. 2000), if affirmative relief is to be obtained.
7. **Judgments: Final Orders: Appeal and Error: Words and Phrases.** Affirmative relief, for purposes of appeal, is a reversal, vacation, or modification of a lower court's judgment, decree, or final order.
8. **Appeal and Error.** An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered.
9. ____. An appellee may not raise arguments independent of or not responsive to an appellant's assignments of error without cross-appealing because they will fall beyond the scope of the case as presented in the appellant's brief.
10. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reason.
11. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction so as to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
12. **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.
13. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
14. **Public Meetings: Notice: Waiver: Time.** Any person who has notice of a meeting and attends the meeting must object specifically to the lack of public notice at the meeting, or that person will be held to have waived the right to object on that ground at a later date.
15. ____: ____: ____: ____. A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given.
16. **Public Meetings: Statutes: Words and Phrases.** The "public interest" mentioned in Neb. Rev. Stat. § 84-1410 (Reissue 1999) is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities.
17. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
18. **Public Meetings: Statutes.** Public meetings laws are broadly construed so as to obtain the objective of openness in favor of the public.
19. ____: ____. The Nebraska public meetings laws are a statutory commitment to openness in government.
20. **Public Meetings: Legislature.** The Legislature has made a policy determination that most of the information in applications under the Quality Jobs Act should be kept confidential, without exception or limitation.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

William M. Lamson, Jr., and Robert A. Mooney, of Lamson, Dugan & Murray, L.L.P., for appellants.

Patricia A. Knapp, and D. Milo Mumgaard, of Nebraska Appleseed Center for Law in the Public Interest, for appellees Joseph and Antoinette Wasikowski et al.

Don Stenberg, Attorney General, and L. Jay Bartel for appellees Nebraska Quality Jobs Board et al.

Kermit A. Brashear and Mary P. Galligan for amici curiae Greater Omaha Chamber of Commerce and Nebraska Chamber of Commerce and Industry.

Amy A. Miller for amicus curiae American Civil Liberties Union Foundation of Nebraska.

Vincent M. Powers, of Vincent M. Powers & Associates, for amicus curiae Common Cause Nebraska.

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

GERRARD, J.

The Nebraska Quality Jobs Board (the Board); Board members E. Benjamin Nelson, David Heineman, and Dennis Jorgensen; the Nebraska Department of Revenue and the State Tax Commissioner, M. Berri Balka (collectively the State defendants); and Nebraska Beef, Inc., and Nebraska Beef, Ltd., appeal from the district court's order (1) voiding the Board's approval of Nebraska Beef, Ltd.'s application for wage benefit tax credits under the Quality Jobs Act and (2) ordering that Nebraska Beef, Ltd., return all credits to the State because the Department of Revenue failed to promulgate regulations as required under the Quality Jobs Act. The resident taxpayer plaintiffs cross-appeal the district court's determination that the plaintiffs waived all rights to contest the Board's alleged violation of the public meetings laws.

I. FACTUAL BACKGROUND

The Nebraska Legislature enacted the Quality Jobs Act (the Act), Neb. Rev. Stat. § 77-4901 et seq. (Reissue 1996, Cum. Supp. 2000 & Supp. 2001), to encourage new and existing businesses to

relocate to and expand in Nebraska, and to provide appropriate inducements to encourage them to do so if it aided in the economic and population growth of the state and created better jobs for state citizens. § 77-4902. The Act provides that companies may apply for a wage benefit credit; upon the Board's approval of such application, the company enters into a written project agreement with the State. § 77-4928(4) and (7).

Nebraska Beef, Inc., is a Nebraska corporation with its principal place of business in Omaha, Nebraska. Nebraska Beef, Ltd., is a Nebraska limited partnership with its principal place of business in Omaha, and is owned by Nebraska Beef, Inc. Although not originally named as a defendant, the parties agreed at trial to add Nebraska Beef, Ltd., as a party defendant. The two entities are referred to hereafter as "Nebraska Beef."

On October 13, 1995, Nebraska Beef filed an application for wage benefit credits under the Act. As set forth in the Act, the Board determines whether to approve an application by majority vote, based on the Board's determination of whether the project will enable the State to accomplish the purposes of the Act. The Board is an administrative state government entity created pursuant to the Act; the members of the Board are the Governor, the State Treasurer, and the chairperson of the Nebraska Investment Council. § 77-4908. At all times relevant to this action, the Board members were Nelson, Governor; Heineman, State Treasurer; and Jorgensen, chairperson of the Nebraska Investment Council.

The Board met on August 14, 1996, to consider Nebraska Beef's application for wage benefit credits. The Board convened a closed session, after which it voted unanimously to request an Attorney General's opinion addressing certain questions regarding the Act. The Board stated that the closed session was necessary to "consider confidential information that should be maintained confidential so that obviously competitors don't learn more about [Nebraska Beef's] business than they are able to find out in the ordinary way." The Board took no other action on Nebraska Beef's application at the August 14 meeting.

Various Nebraska newspapers published notice of the Board's next scheduled meeting. On November 25, 1996, the Board met again to resume consideration of Nebraska Beef's application.

Plaintiff Antoinette Wasikowski appeared at the meeting and read a letter in opposition to the Board's granting Nebraska Beef's application. Wasikowski also submitted into the record two letters opposing Nebraska Beef's application. The Board reconvened in closed session "to consider confidential information as permitted by law" in reviewing Nebraska Beef's application, after an uncontested and unanimous vote to do so. Upon returning from closed session, a majority of the Board voted to approve Nebraska Beef's application. Based on the Board's approval of the application, the State and Nebraska Beef entered into a Quality Jobs Act project agreement, executed on June 2, 1998, by a general partner of Nebraska Beef, Ltd., and Balka, State Tax Commissioner.

II. PROCEDURAL BACKGROUND

1. Rules and Regulations Petition—Case No. 558-163

On July 15, 1997, resident Nebraska taxpayers Joseph and Antoinette Wasikowski, Janet Bonet, Wayne Weston, Fay Maloley, and Rodney Krogh (collectively the plaintiffs) filed a petition in the Lancaster County District Court contesting the Board's decision to approve Nebraska Beef's application. The case was assigned as docket 558, page 163 (case No. 558-163). The petition included as defendants the Board; Board members Nelson, Heineman, and Jorgensen; the Nebraska Department of Revenue; Balka, State Tax Commissioner; and Nebraska Beef, Inc.

After the district court sustained demurrers to the plaintiffs' first petition, the plaintiffs filed an amended petition. The first cause of action, brought pursuant to the Administrative Procedure Act (APA), Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1994 & Cum. Supp. 1998), alleged that the Department of Revenue failed to promulgate rules and regulations as required by the Quality Jobs Act. As relief, the plaintiffs requested a declaration that the department had a mandatory obligation to implement rules and regulations and that because the department failed to do so, the Board's approval of Nebraska Beef's application was null and void. Further, the plaintiffs requested an injunction enjoining the Board from approving wage benefit tax credit applications until the department implemented rules and regulations.

Under the second cause of action, the plaintiffs alleged that pursuant to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1995), the Board acted without statutory authority, without factual foundation in the record, and without proper rules and regulations in place, violating the Due Process Clauses of the Nebraska and U.S. Constitutions. On the second cause of action, the plaintiffs requested a declaratory judgment voiding the Board's approval of Nebraska Beef's application, and an injunction enjoining Balka, his successors in interest, or anyone acting on his behalf, from executing an agreement between Nebraska Beef and the State of Nebraska.

2. Public Meetings Laws Petition—Case No. 562-086

On October 10, 1997, the plaintiffs filed another petition against the Board in the Lancaster County District Court, assigned as docket 562, page 86 (case No. 562-086). The petition named as defendants Board members Nelson, Heineman, and Jorgensen, and Nebraska Beef. The petition alleged that the Board acted in violation of public meetings laws by conducting closed sessions at its meetings. The plaintiffs requested that the district court void any action taken by the Board, including its November 25, 1996, decision to approve Nebraska Beef's application.

3. District Court Consolidated Order

Based upon a stipulation by the parties, the district court consolidated cases Nos. 558-163 and 562-086. Trial took place in January 2000, and the district court entered its orders on May 1, 2000. After considering motions for a new trial filed by the State defendants and Nebraska Beef, the district court amended its May 1 order in each case. In its amended orders, the district court first determined that it had jurisdiction to hear the case because the Board's decision was a "contested case" within the meaning of the APA, § 84-917.

Next, the district court considered the plaintiffs' public meetings laws claims. The district court concluded that the August 14, 1996, closed session was not in substantial violation of the public meetings laws because the reasons given for closed session "seem[ed] valid" and the Board did not take any final action.

Additionally, although the district court intimated that the closed session at the November 25, 1996, meeting might have been improper, it determined that Antoinette Wasikowski (hereafter Wasikowski) waived any claim on this ground because she attended the meeting but did not object to a closed session. Thus, the district court concluded that the plaintiffs' complaint under the public meetings laws failed.

The district court next considered the plaintiffs' cause of action stated pursuant to the Uniform Declaratory Judgments Act. Sovereign immunity defeated claims against the Board and the Department of Revenue; thus, the district court analyzed this cause of action with regard to the individual defendants only. The district court determined that the allegation that the Board acted without statutory authority in approving Nebraska Beef's application failed because although Nebraska Beef was "already operating" in Nebraska when it received the tax credits, this fact was not dispositive; the district court found that the Board takes other factors into account under § 77-4928(4) in reviewing a wage benefit credit application.

The district court lastly considered the plaintiffs' cause of action pursuant to the APA and concluded that the Board's approval of the application was invalid as a violation of the plaintiffs' due process rights because (1) the Department of Revenue had not promulgated rules or regulations prior to the Board's approval of the application and (2) § 77-4932 mandates such rules and regulations. The district court rejected the defendants' equitable estoppel, laches, and waiver defenses. In conclusion, the district court declared the wage benefit credits given to Nebraska Beef void and ordered Nebraska Beef to return the wage benefit credits to the State.

The State defendants and Nebraska Beef appeal to this court; the plaintiffs cross-appeal. Pursuant to Neb. Ct. R. of Prac. 2B (rev. 2000), we granted Nebraska Beef and the State defendants' petition to bypass the Nebraska Court of Appeals.

III. ASSIGNMENTS OF ERROR

Nebraska Beef assigns that the district court erred in (1) reversing the decision of the Board granting wage benefits to Nebraska Beef because (a) the decision of the Board was not a

"contested case" within the meaning of the APA and (b) the case did not involve an "agency" subject to the act, the court did not have jurisdiction under § 84-917, and the plaintiffs waived any right to contest the absence of regulations by failing to raise the issue at the Board's meeting; (2) determining that the Board's lack of regulations resulted in a violation of the plaintiffs' due process rights; and (3) expanding the scope of its authority under the APA by ordering that Nebraska Beef repay credits received pursuant to a facially valid agreement, as well as granting relief not requested or mandated.

On cross-appeal, the State defendants incorporate and adopt Nebraska Beef's three assignments of error. Further, the State defendants assign that the district court erred (1) in finding that it had jurisdiction under § 84-917 of the APA to consider the plaintiffs' claim that the Board's approval of Nebraska Beef's application for wage benefit tax credits was void because the Department of Revenue had not adopted rules and regulations and (2) in finding that the absence of rules and regulations promulgated by the Department of Revenue prior to the Board's approval of Nebraska Beef's application violated the APA and that the department's failure to adopt rules and regulations required the court to void the Board's approval of Nebraska Beef's application.

On cross-appeal, the plaintiffs assign that the district court erred in (1) determining that Wasikowski waived her right to challenge closed sessions by the Board by attending the meeting on November 25, 1996, and failing to object; (2) determining that Wasikowski, by failing to object at the Board's meeting on November 25, waived the rights of the other plaintiffs to challenge closed sessions by the Board; (3) ruling that the Board had not committed a substantial violation of the public meetings laws by holding a closed session on August 14, 1996, to discuss the merits of granting wage benefit tax credits to Nebraska Beef; and (4) failing to void the Board's decision to grant Nebraska Beef wage benefit tax credits after finding that the Board substantially violated the public meetings laws by holding a closed session on November 25 to discuss the merits of granting those tax credits.

IV. 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. *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002).

[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002).

[3,4] Actions for relief under the public meetings laws are tried as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. Thus, the approach taken is that such cases are tried and reviewed by the appellate courts as equity cases. *Hansmeyer v. Nebraska Pub. Power Dist.*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), *aff'd* 256 Neb. 1, 588 N.W.2d 589 (1999). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002); *Hansmeyer, supra.*

V. ANALYSIS

This appeal requires consideration on two distinct grounds: (1) the consequences of the Department of Revenue's failure to promulgate rules and regulations for the Board prior to the Board's approval of Nebraska Beef's application for wage benefit tax credits and (2) the Board's alleged violations of the public meetings laws, which occurred when the Board convened closed sessions to consider Nebraska Beef's application.

1. Department of Revenue's Failure to Promulgate Rules and Regulations Prior to Board's Approval of Nebraska Beef's Application

(a) Jurisdiction: "Contested Case" under APA

Nebraska Beef and the State defendants assign that the district court erred in finding that the plaintiffs' petition constituted

a "contested case" under the APA. The APA defines a "contested case" as a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing. § 84-901(3). Section 84-917 outlines the process by which an aggrieved party can pursue an appeal of a final decision in a contested case.

The district court found the Board's decision to be a "contested case" within the definition of the APA. The district court relied on our statement in *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998), that a proceeding becomes a contested case when a hearing is required. See, also, *Central Park Pharm. v. Nebraska Liq. Cont. Comm.*, 216 Neb. 676, 344 N.W.2d 918 (1984). We determined in *Stoneman, supra*, that when an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings. Further, *Stoneman* stated that the exercise of discretion to grant or deny a license, permit, or other type of action is a quasi-judicial function. *Id.* The district court compared the Board's proceedings to the Department of Banking and Finance's approval of a banking application in *Stoneman, supra*, and *First Fed. Sav. & Loan Assn. v. Department of Banking*, 187 Neb. 562, 192 N.W.2d 736 (1971), and a Liquor Control Commission decision to approve a liquor license. Thus, the district court concluded that the Board's decision was a contested case under the APA.

[5] The Board, however, is not an agency subject to the APA. Section 84-901(1) defines an agency as a board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules and regulations. The district court determined that because the Board was not specifically excluded from the APA under § 84-901(1), it is an entity covered by the APA and all provisions therein. This court has recognized, however, that the APA applies only to agencies authorized by law to make rules and regulations. See *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). In *Hoiengs*, for example, this court determined that the Public Employees Retirement Board was not an agency subject

to the APA because the act creating the retirement board did not grant the authority to make rules and regulations. See *id.*

The Board does not have this rulemaking authority; the Act provides that the Department of Revenue, in consultation with the Governor and the Department of Economic Development, shall adopt and promulgate all rules and regulations to carry out the purposes of the Act. See § 77-4932. The Department of Revenue is clearly an agency subject to the APA. We conclude, however, that because the Board does not promulgate rules and regulations, and because Nebraska Beef's application submission to the Board does not involve a quasi-judicial "contested case" requiring review pursuant to § 84-917, the Board is not an agency subject to the APA. The district court did not have jurisdiction under the APA to void the Board's approval of Nebraska Beef's application based on the absence of rules and regulations.

The plaintiffs agree with the State defendants and Nebraska Beef that their petition was not an appeal of a "contested case" under the APA. Instead, the plaintiffs assert that their lawsuit is an original equity action seeking to enjoin public officials from expending funds. Therefore, we next examine the district court's jurisdiction with regard to equity actions.

(b) Equity Jurisdiction

The plaintiffs' second cause of action, brought under the Uniform Declaratory Judgments Act, requested a declaratory judgment that the Board's actions were void because the Board acted without statutory authority, and without rules and regulations. The district court rejected the plaintiffs' request for a declaratory judgment. In rejecting this request, the district court addressed only the plaintiffs' allegation that the Act intended to encourage business relocation and expansion in Nebraska, but because Nebraska Beef was already operating in Nebraska, the Board could not justify its decision on this statutory ground. The district court stated, however, that this was only one of several factors for the Board to consider in reviewing an application under § 77-4928(4), and denied the plaintiffs' request for declaratory judgment pursuant to the Uniform Declaratory Judgments Act.

Although the district court denied the plaintiffs' request for relief under their second cause of action, it did not specifically address the plaintiffs' request for a declaratory judgment to void the Board's decision based on a lack of rules and regulations. Thus, the plaintiffs urge that although the district court incorrectly granted them relief under the APA, the judgment should still be affirmed because the court reached the correct decision. See *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000). This argument fails, however; although the plaintiffs noted that the district court did not have jurisdiction for the grounds upon which it granted them relief, they did not attempt to rectify this error on cross-appeal.

[6-9] 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. *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001). Affirmative relief, for purposes of appeal, is a reversal, vacation, or modification of a lower court's judgment, decree, or final order. *McDonald v. DeCamp Legal Servs.*, 260 Neb. 729, 619 N.W.2d 583 (2000). An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered. *Id*. An appellee may not raise arguments independent of or not responsive to an appellant's assignments of error without cross-appealing because they will fall beyond the scope of the case as presented in the appellant's brief. *Workman, supra*.

In this case, the district court rejected the plaintiffs' request for relief under the Uniform Declaratory Judgments Act, although it did not specifically consider the request for relief on the ground that the Board acted without rules and regulations. Even though the district court found that the Board's actions in the absence of rules and regulations were void under the APA, we concluded above that the district court did not have jurisdiction to make such a determination under the APA.

[10,11] The plaintiffs argue that the district court correctly found that the Board's actions should be void, even if the district court lacked the jurisdiction to consider the plaintiffs' petition as an appeal of a "contested case" under the APA, and specifically rejected their declaratory judgment action below. A proper result

will not be reversed merely because it was reached for the wrong reason. *Gestring, supra.* This case, however, does not present a problem of errant reasoning, but one of jurisdiction. When a lower court lacks the authority to exercise its subject matter jurisdiction so as to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001). The plaintiffs did not cross-appeal to receive a declaratory judgment pursuant to the Uniform Declaratory Judgments Act based on their rules and regulations argument, despite agreeing with Nebraska Beef and the State defendants that the district court did not have "contested case" jurisdiction under the APA.

We note that parties cannot confer or concede subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created or conceded by waiver, estoppel, consent, or conduct of the parties; thus, the plaintiffs' statement that the district court did not have jurisdiction does not constitute an admission subjecting them to the consequences of such. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). However, because the district court lacked jurisdiction to enter a declaratory judgment under the APA, and because the plaintiffs did not cross-appeal the district court's denial of a declaratory judgment under the Uniform Declaratory Judgments Act, we cannot consider whether the district court should have entered a declaratory judgment on grounds other than a "contested case" appeal from the APA.

[12] The plaintiffs assert that their case arises from an original equity action. We have determined above that relief is not available in the form of a declaratory judgment; injunctive relief is not available either. The plaintiffs' petition sought an injunction enjoining the Board from approving any applications until the Department of Revenue promulgated rules and regulations, and a permanent injunction enjoining Balka, his successors in interest, and anyone acting on his behalf from executing an agreement between the State and Nebraska Beef allowing the wage benefit credits approved by the Board. The plaintiffs have standing to bring this cause of action: 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. See, *Chambers v. Laughtenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002); *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993); *Martin v. City of Lincoln*, 155 Neb. 845, 53 N.W.2d 923 (1952). The district court, however, did not issue any of the requested injunctions, and the plaintiffs did not cross-appeal on this ground.

[13] In conclusion, the district court did not consider the plaintiffs' prayer for an injunction, but instead found their cause of action to be a "contested case" under the APA. 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). Based on this established rule and the plaintiffs' failure to cross-appeal, we will not consider whether the district court could have properly entered a declaratory judgment based on grounds other than a "contested case" under the APA. Because we determine that the district court lacked subject matter jurisdiction under the APA, we cannot reach the merits of the questions presented regarding the lack of rules and regulations when the Board rendered its approval of Nebraska Beef's application for wage benefit tax credits. See *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

2. Closed Session Under Public Meetings Laws

The plaintiffs' cross-appeal assigns four errors related to the district court's rejection of their cause of action under the public meetings laws. First, the district court found that the Board's meeting on August 14, 1996, did not constitute a substantial violation of the public meetings laws, as the Board took no final action and its reasons for convening a closed session "seem[ed] valid." Second, the district court determined that although the Board did not give a legitimate reason for discussing Nebraska Beef's application in closed session at the November 25 meeting, Wasikowski's presence at the meeting and failure to object waived the plaintiffs' right to complain under the public meetings laws.

(a) Waiver of Right to Object to Closed Session

[14,15] Wasikowski attended the Board's November 25, 1996, meeting and did not object to its convening a closed session; the

district court concluded that her failure to object waived her ability to do so at a later date. This court has stated that any person who has notice of a meeting and attends the meeting must object specifically to the lack of public notice at the meeting, or that person will be held to have waived the right to object on that ground at a later date. See, *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992); *Witt v. School District No. 70*, 202 Neb. 63, 273 N.W.2d 669 (1979). A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given. *Id.*

Neb. Rev. Stat. § 84-1414(3) (Reissue 1999) states that "[a]ny citizen of this state may commence a suit . . . for the purpose of requiring compliance with or preventing violations of [the public meetings laws], for the purpose of declaring an action of a public body void . . . ." In *Otey, supra*, and *Witt, supra*, this court considered a lack of sufficient public notice pursuant to Neb. Rev. Stat. § 84-1411 (Cum. Supp. 1998); the present case deals with objection to a closed session under Neb. Rev. Stat. § 84-1410 (Reissue 1999). Both sufficient notice and closed sessions, however, relate to § 84-1414, under which citizens may commence lawsuits regarding compliance with or violations of the public meetings laws. Thus, despite the difference in grounds for objection, the logic in *Otey, supra*, and *Witt, supra*, applies equally to this case: If a person present at a meeting observes an alleged public meetings laws violation in the form of an improper closed session and fails to object, that person waives his or her right to object at a later date.

[16-18] Contrary to the district court's conclusion, however, Wasikowski's failure to object should not be imputed to the other plaintiffs in this case—to do so would eviscerate the language of § 84-1414, in that "[a]ny citizen of this state" may commence a suit for public meetings laws violations. The "public interest" mentioned in § 84-1410 is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities. *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984). If we were to conclude that Wasikowski's failure to object at the meeting waived the right of the other plaintiffs to object, the unintended result would be that Wasikowski's failure to object waived the right of all potential

plaintiffs to do so. The statute does not support that result. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002). Additionally, public meetings laws are broadly construed so as to obtain the objective of openness in favor of the public. See *Rauert v. School Dist. 1-R of Hall Cty.*, 251 Neb. 135, 555 N.W.2d 763 (1996). Thus, although Wasikowski may have waived her individual right to object to the closed session, the other plaintiffs' rights to object are intact. The district court erred in concluding otherwise.

(b) Closed Session Meetings

The plaintiffs assign that the district court erred in determining that the Board did not commit a substantial violation of the public meetings laws by holding closed sessions during its August 14 and November 25, 1996, meetings.

[19] The Nebraska public meetings laws are a statutory commitment to openness in government. *Grein, supra.* The public meetings laws allow meetings to be closed only under limited circumstances. Neb. Rev. Stat. § 84-1408 (Reissue 1999). Any public body may hold a closed session by the affirmative vote of a majority of its voting members, if a closed session is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual. § 84-1410(1). Closed sessions may be held for, but not limited to: strategy sessions with respect to collective bargaining, real estate purchases, pending or imminent litigation, discussion regarding deployment of security personnel or devices, investigative proceedings into allegations of criminal conduct, or evaluation of the job performance of a person when necessary to protect the reputation of that person, and the person has not requested a public meeting. § 84-1410(1)(a) through (d).

In contrast, § 77-4928(3) of the Act states: "The application [for wage benefit tax credits] and all supporting information shall be confidential except for the name of the company, the location of the project, the amounts of increased employment and investment, the result of the net benefit calculations, and whether the application has been approved." The plaintiffs argue that this confidentiality requirement applies only to the application itself

and did not create an exception to the public meetings laws for the Board's decisionmaking process.

[20] We disagree. The Legislature holds the power to decide the scope of citizen access to governmental meetings. Through the public meetings laws, the Legislature committed state agencies, boards, and other public bodies to an open interaction between state citizens and state government. However, the Legislature retains the power to limit access to public meetings through provisions such as § 77-4928(3). The presence of the public meetings laws does not prevent the Legislature from later limiting the scope of those laws in specific situations, such as application reviews under the Act. In the absence of a constitutional claim, we do not judicially consider the Legislature's enacted limitations on public access to meetings. Statutory language is to be given its plain and ordinary meaning. See *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002). A plain reading of § 77-4928(3) reveals that the Legislature determined that most of the information in applications under the Act should be kept confidential, without exception or limitation. The extent of protection of confidential information for potential applicants under the Act is a policy determination within the province of the Legislature.

Although the district court erred in finding that Wasikowski waived the rights of all other plaintiffs by failing to object at the Board's November 25, 1996, closed session, we conclude that the court did not err in determining that the Board did not violate the public meetings laws when it went into closed session for the purpose of considering confidential portions of Nebraska Beef's wage benefit credit application at its meetings on August 14 and November 25, 1996.

VI. CONCLUSION

For the reasons stated above, we conclude that the district court erred in finding that it had "contested case" jurisdiction under the APA such that it could void the agreement between Nebraska Beef and the State defendants. We also determine that the district court erred in finding that Wasikowski waived the rights of all other plaintiffs to object to the Board's closed session by failing to object at the meeting she attended. We conclude, however, that

the district court did not err in its other determinations with regard to the plaintiffs' public meetings laws claims. We, therefore, reverse the judgment of the district court and remand this cause with directions to dismiss all claims brought in case No. 558-163, i.e., the APA, Uniform Declaratory Judgments Act, and due process claims relating to the lack of rules and regulations. We affirm the district court's judgment dismissing the plaintiffs' public meetings laws claims in case No. 562-086.

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

STATE OF NEBRASKA, APPELLEE, V.
EARNEST D. JACKSON, APPELLANT.

648 N.W.2d 282

Filed July 26, 2002. Nos. S-00-1055, S-01-051.

1. **Convictions: Evidence: 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. ____: ____: ____. 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. **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.
4. **Witnesses.** A witness testifying to objective facts must have had means of knowing the facts from the witness' personal knowledge.
5. **Trial: Evidence: Appeal and Error.** An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion.
6. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
7. **Witnesses: Appeal and Error.** Witness credibility is not to be reassessed on appellate review.

8. **Jury Instructions.** If it becomes necessary to give further instructions to the jury during deliberation, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel.
9. **Jury Misconduct: Proof.** The State has the burden to prove that a defendant was not prejudiced by any improper communication between the judge and the jury.
10. **Motions for New Trial: Jury Misconduct: Records: Appeal and Error.** If the record affirmatively shows that the defendant has been prejudiced by private communication between the trial court and jurors, it is reversible error, and a new trial should be granted. Reversal is not required if the record affirmatively shows that the communication had no tendency to influence the verdict.
11. **Motions for New Trial: Evidence: Proof.** One moving for new trial on the basis of newly discovered evidence must show that the evidence was uncovered since the trial, that the evidence was not equally available before the trial, and that the evidence was not simply discovered by the exercise of belated diligence.
12. **Evidence: Words and Phrases.** Generally, newly discovered evidence is evidence material to the defense that could not with reasonable diligence have been discovered and produced in the prior proceedings.
13. **Testimony: Evidence.** When a codefendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a defendant, the evidence is not newly discovered; the substance of the codefendant's testimony is not, in fact, new evidence if it was known by the defendant at the time of the initial trial.
14. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeals from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

James J. Regan 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.

I. NATURE OF CASE

On August 31, 1999, Larry Perry was killed outside his home at the Redman Apartments in Omaha. Earnest D. Jackson was charged with first degree murder and use of a deadly weapon to commit a felony in connection with Perry's death. A jury found Jackson guilty of first degree murder and not guilty of use of a deadly weapon to commit a felony. Jackson appeals his conviction in case No. S-00-1055. In case

No. S-01-051, Jackson appeals the district court's refusal to grant a new trial based on newly discovered evidence. The cases were consolidated for oral argument.

II. FACTUAL BACKGROUND

1. Case No. S-00-1055

In the early evening of August 31, 1999, Robert Sommerville was riding in a gray Cadillac owned by Shawon McBride. Sommerville and McBride picked up Jackson and Dante Chillous at Chillous' home. The four men drove around without a particular destination. They ended up near the Redman Apartments, where they conversed in the parking lot with a group of people. Sommerville testified that they saw and spoke with Shalamar Cooperrider, then followed Cooperrider to his aunt's house, where Chillous and Jackson got out of the car. At some point, McBride picked up Cooperrider and Jackson at Jackson's house and dropped them off at an alley a block south of Redman Avenue.

Perry shared an apartment at 4614 Redman Avenue with his mother, Margaret Parrott, and his sister Elizabeth Williams. On the evening of August 31, 1999, Parrott and Perry were outside the apartment. Parrott went inside at 11:30 p.m., but Perry stayed outside with Elexsis Fulton.

While Perry was outside with Fulton on August 31, 1999, Cooperrider approached Perry and the two began talking. Fulton, who had not seen Cooperrider before, described him as "light brown" with a brush haircut, wearing a tan shirt and tan pants. During the conversation, two more men, whom Fulton described, respectively, as light-skinned with a ponytail and dark-skinned with braided hair and a blue "FUBU" brand shirt, came out of the apartment building one door north of Perry's door. At trial, Fulton identified the ponytailed man as Chillous and the man with braids and a FUBU shirt as Jackson. The jury received other testimony that Jackson did not have his hair in braids, but that Chillous wore his hair in a ponytail. Fulton observed Jackson, Cooperrider, and Chillous leave the Redman Apartments in a gray Cadillac after Cooperrider's conversation with Perry.

After the Cadillac departed, Perry entered his apartment and retrieved a .22-caliber Ruger handgun. Parrott and Williams

followed Perry out of the apartment, and Parrott observed Perry for some reason bending down beside a bush by 4612 Redman Avenue, the apartment building opposite 4614 Redman Avenue. Parrott reentered the apartment.

Fulton testified that later, the gray Cadillac returned and that Jackson, Cooperrider, and Chillous got out of the Cadillac. Fulton stated that Cooperrider had changed from tan clothing to black clothing. Fulton observed the three men approach Perry, and Cooperrider and Perry began arguing. Chillous and Jackson went across the street to Chillous' home, and on their way back, Fulton saw Chillous try to hand Cooperrider a gun. Fulton testified that Jackson got involved in the argument, then pulled out a gun and struck Perry in the head three times. Fulton then ran inside the building and continued to watch from an upstairs window. Fulton testified that Chillous was the first to fire a gun and that he saw Perry being shot in the back while he lay on his stomach.

Fulton testified at Jackson's trial that he had no doubt that Jackson shot Perry. Fulton had not known the names of Jackson, Chillous, or Cooperrider before bystanders (who had not witnessed the shooting) told Fulton the names of the three men. Jackson's counsel read into evidence Fulton's testimony from the preliminary hearing that Fulton had learned Jackson's, Cooperrider's, and Chillous' names from the police. Fulton testified that he had identified Jackson, Cooperrider, and Chillous at the preliminary hearing as the men who shot Perry. Fulton had not previously identified Jackson in a photographic or police lineup.

Parrott heard 20 to 30 shots that sounded as if they were coming from different types of guns at different distances; Williams testified that the sound resembled firecrackers. Parrott and Williams ran outside after hearing gunshots and found Perry on the sidewalk with bullet wounds in his stomach. Parrott removed the gun from Perry's belt and gave it to Williams, telling her to get rid of it. Parrott testified that when she removed Perry's gun by the handle, it was not warm.

Williams testified to seeing a man, dressed in black with dark skin and a brush haircut, fleeing the scene after Perry's shooting, but she did not know and could not identify Jackson. McBride also testified that he saw a man in black firing a gun, standing by the bushes located near 4612 Redman Avenue. Although

McBride did not see the shooter's face, he stated that the shooter wore the same kind of clothing Cooperrider had been wearing. McBride confirmed that he had seen Jackson with Cooperrider shortly before the shooting.

Jackson's aunt testified that at 11:19 p.m. on August 31, 1999, Jackson knocked on her door, entered her home, talked with her, and went into her basement around 11:30 p.m. to play a video game. Approximately 20 minutes later, Jackson's cousin knocked on the aunt's bedroom door to get the cordless telephone and asked her if she had heard gunshots. She had not. Jackson's aunt and cousin testified that Jackson had stayed at the aunt's home that night.

Officer Harold Scott of the Omaha Police Department arrived at the scene of the shooting at approximately 12:30 a.m. and discovered Perry's body on the sidewalk in front of 4614 Redman Avenue, surrounded by a crowd of people. Omaha police officer Stefan Davis, upon nearing the scene of the murder, was notified of people who had fled the area. Later, Davis received notification that all suspects were in custody. Jackson, however, was not arrested until October 9, 1999.

Dr. Jerry Jones, who performed the autopsy on Perry's body, determined that Perry died of the multiple gunshot wounds that perforated his heart, both lungs, liver, spleen, colon, and kidney. Jones testified that he had examined Perry's body thoroughly and that he did not see abrasions on Perry's head or scalp.

Identical informations were filed against Jackson, Cooperrider, and Chillous in Douglas County District Court, charging each of them with first degree murder and use of a deadly weapon during the commission of a felony in the death of Perry. The cases were consolidated for trial on the State's motion, but the district court subsequently vacated this order on the State's motion. Jackson's trial, having the lowest docket number, began first, followed by Cooperrider's and Chillous' trials.

A jury found Jackson guilty of first degree murder and not guilty of use of a deadly weapon to commit a felony. Jackson filed a motion for new trial, claiming that Fulton's testimony regarding Cooperrider and Chillous did not have proper foundation, that the jury's verdict was inconsistent and self-contradictory, that the court addressed the jury outside the parties' presence after the jury

retired for deliberations, and that there was insufficient evidence to sustain a conviction of first degree murder. The district court overruled Jackson's motion and sentenced him to life imprisonment. Further facts surrounding Perry's shooting are set forth below as necessary.

2. Case No. S-01-051

Following his conviction and sentencing, Jackson filed a motion for new trial based on newly discovered evidence, i.e., testimony given at Cooperrider's and Chillous' trials. Cooperrider testified at his own trial that he did not see Jackson at the scene of Perry's shooting and that Jackson was not one of the people who shot Perry. Instead, Cooperrider testified that Sommerville and one of Sommerville's friends were present at Perry's shooting. Cooperrider testified that Sommerville wore his hair in braids at the time of Perry's death, in a hairstyle similar to Jackson's. At Chillous' trial, Cooperrider again testified that Sommerville and a friend of Sommerville's were present at the scene of Perry's shooting, but he did not see Jackson or anyone else at the scene. Juries acquitted both Cooperrider and Chillous.

Stephen Kraft, Cooperrider's attorney, submitted an affidavit stating that prior to Jackson's trial, Jackson's counsel contacted Kraft to inform Kraft of his intent to subpoena Cooperrider as a witness on Jackson's behalf for Jackson's trial. Kraft informed Jackson's counsel that because Cooperrider was awaiting trial on identical charges in the same matter, he would not be willing to testify and would invoke his Fifth Amendment right against self-incrimination and refuse to testify if called. Jackson served Kraft with a subpoena directing Cooperrider's presence as a witness at Jackson's trial, but Kraft again advised Jackson's counsel that Cooperrider would, if called, invoke his right against self-incrimination.

Jackson filed a motion for new trial, alleging that Cooperrider's testimony from Cooperrider's and Chillous' trials provided new evidence that would have changed the jury's verdict in Jackson's trial. The district court overruled Jackson's motion for new trial, finding that Cooperrider's testimony was not newly discovered, but only newly available—Cooperrider merely controlled the dissemination of his testimony for tactical

reasons. In its order, the district court referred to telephone conversations in which Cooperrider discussed coordinating his testimony with Chillous and other witnesses testifying at Chillous' trial. The district court concluded that even if Cooperrider's testimony had been presented at Jackson's trial, the jury still heard enough evidence to convict Jackson.

Pursuant to Neb. Rev. Stat. § 24-1106(1) (Reissue 1995), we acquired jurisdiction over this appeal because of Jackson's sentence to life imprisonment. Cases Nos. S-00-1055 and S-01-051 were consolidated for oral argument.

III. ASSIGNMENTS OF ERROR

Jackson assigns, restated, that the district court erred in (1) allowing Fulton to testify using the names of Cooperrider and Chillous, as there was insufficient foundation for such testimony; (2) failing to notify Jackson's counsel before responding to questions the jury presented during its deliberation; (3) refusing to grant Jackson a new trial because the jury's verdicts of guilty of first degree murder but not guilty of using a deadly weapon during the commission of a felony were inconsistent, incongruous, and irreconcilable; (4) determining that sufficient evidence was adduced at trial to sustain a conviction for first degree murder; and (5) refusing to grant Jackson a new trial based upon (a) a determination that the testimony of Cooperrider was not newly discovered for the purposes of Neb. Rev. Stat. § 29-2101 (Reissue 1995), (b) a determination that if a jury heard the testimony of Cooperrider in addition to evidence already offered, it would not reach a different verdict, and (c) facts not properly before the court concerning conversations between Chillous and Cooperrider characterized by the court as an agreement to coordinate Cooperrider's testimony with other witnesses called at Chillous' trial.

IV. STANDARD OF REVIEW

[1] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence,

viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Long, ante* p. 85, 645 N.W.2d 553 (2002).

[2] 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. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002).

[3] 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. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002).

V. ANALYSIS

1. Case No. S-00-1055: Jackson's Trial

(a) Foundation for Fulton's Testimony

Jackson assigns, first, that the district court erred in overruling his objections at trial to Fulton's use of the names "Shalamar" and "Dante" in his testimony, because the State did not provide a sufficient foundation for the use of the names. Jackson argues that allowing Fulton to refer to "Shalamar" and "Dante" by name tied together the State's theory of the case that Cooperrider, Chillous, and Jackson acted together to kill Perry. Fulton used these names to identify people present on the night of the shooting, although he testified that he had never met "Shalamar" or "Dante." Fulton stated that he only knew the names "Shalamar" and "Dante" because he had heard them from the police and bystanders at the apartment complex.

[4,5] Jackson alleges that, pursuant to Neb. Rev. Stat. §§ 27-104 and 27-602 (Reissue 1995), Fulton did not possess the foundational personal knowledge necessary to testify regarding the names of "Shalamar" and "Dante." Section 27-602 states, in pertinent part, that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony

of the witness himself. *Id.* Section 27-104(1) states, in pertinent part, that preliminary questions concerning the qualification of a person to be a witness, or the admissibility of evidence, shall be determined by the trial judge. A witness testifying to objective facts must have had means of knowing the facts from the witness' personal knowledge. See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion. See *State v. Irish*, 223 Neb. 578, 584, 391 N.W.2d 137, 141 (1986) ("[t]he admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, whose ruling will be upheld absent an abuse of discretion").

In this case, Fulton saw Cooperrider, Chillous, and Jackson at the scene of Perry's shooting, although he did not know their names. By the time of the preliminary hearing, Fulton had learned the names of the three men from the police and from bystanders who knew the three men. Fulton testified that seeing Cooperrider, Chillous, and Jackson at the preliminary hearing allowed him to link the names with the faces that he recognized from the night of Perry's shooting. In other words, while Fulton later learned Cooperrider's, Chillous', and Jackson's names, that did not affect his testimony, as an eyewitness, that they were present at the scene of the shooting.

[6] A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Dean, ante* p. 42, 645 N.W.2d 528 (2002). The facts above demonstrate that the district court had a tenable basis upon which to allow Fulton's testimony to go to the jury. Thus, the district court did not abuse its discretion in overruling Jackson's objection. This assignment of error is without merit.

(b) Sufficiency of Evidence

Jackson argues that the evidence adduced at trial was not sufficient to support a conviction of first degree murder. Jackson bases this argument on the allegedly erroneous admission of Fulton's testimony, but Jackson argues in the alternative that the

evidence is insufficient to support Jackson's conviction even with Fulton's testimony.

In support of his argument, Jackson notes that forensic evidence of bullet casing locations was presented to demonstrate that Perry was shot many times from a variety of angles, which conflicts with Fulton's testimony that Perry was shot by three people standing over Perry, 3 feet away. Further, Jackson asserts that the autopsy did not reveal bruising or abrasion to Perry's head, in contradiction of Fulton's testimony that Jackson struck Perry on the head with a gun three times with enough strength to cause a bruise. Additionally, Jackson argues that Fulton changed his testimony from the preliminary hearing, had never identified Jackson prior to appearing in court, had never seen any of the parties about whom he was testifying, and had learned the parties' names from the police and bystanders who did not see the shooting.

Fulton, however, testified that he had no doubt that Jackson was the person that he saw shoot Perry. Further, a firearms expert testified that bullet casing locations cannot be used to conclusively establish the location of a firearm's discharge. Finally, although Jones testified that there were no abrasions to Perry's head or scalp, the autopsy photographs reveal an abrasion beneath Perry's left eye.

[7] In essence, Jackson's assignment of error attacks the credibility of the witnesses. Witness credibility, however, is not to be reassessed on appellate review. See *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (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. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002). Here, relevant and sufficient evidence exists to support Jackson's conviction, and this assignment of error is without merit.

(c) Instructing Jury Outside Counsel and Parties' Presence

Jackson assigns that the district court erred in refusing to grant him a new trial because the court instructed the jury outside the

presence of the parties and counsel when the jury, after retiring, submitted three requests for clarification or additional instructions to the court. The State argues that the record does not establish that the court failed to notify the parties and their counsel and that even if the allegation is supported by the record, the communications did not result in prejudice to Jackson.

The first communication stated: "After debilerating (sic) Monday, juror went home and put on paper her points she would like to make during deliberations on Tuesday. Can a juror refer to her notes that were made at home?" The court responded, "As long as the notes are based upon the evidence that was adduced at trial, those notes can be used by a juror." In the same communication, the jury asked, "Is reasonable doubt 70% 30%?" The court responded, "I am not permitted to expand upon the instructions that you have already been given. Please refer to your instructions, including the definition of 'reasonable doubt' which appears at Instruction No. 9."

The second communication stated: "Juror instruction sheet states use of a firearm to commit a felony. The verdict sheet states use of a weapon . . . which are we to use in our decision — weapon or firearm?" The court responded, "The terms are interchangeable." The third communication read: "May the jury replace its foreperson?" to which the court responded, "Yes."

Jackson claims that the court should not have addressed the jury outside the presence of the parties, pursuant to Neb. Rev. Stat. § 25-1116 (Reissue 1995). Section 25-1116 states:

> After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel.

[8-10] If it becomes necessary to give further instructions to the jury during deliberation, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel. See *State v. Owen*, 1 Neb. App. 1060, 510 N.W.2d 503 (1993), citing

Nebraska Depository Inst. Guar. Corp. v. Stastny, 243 Neb. 36, 497 N.W.2d 657 (1993). The State has the burden to prove that a defendant was not prejudiced by any improper communication between the judge and the jury. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). If the record affirmatively shows that the defendant has been prejudiced by private communication between the trial court and jurors, it is reversible error, and a new trial should be granted. Reversal is not required if the record affirmatively shows that the communication had no tendency to influence the verdict. See *id.*

Although communication between the trial judge and jurors should always take place with the parties and their counsel present (unless waived), the record before us does not affirmatively show that the communications in this case resulted in prejudice. The communication regarding the jury foreperson did not relate to the evidence or the law and, thus, does not implicate § 25-1116. The court should have dealt with the other three questions after notice to the parties. The court's responses, however, were legally correct answers to which Jackson, if present, could have raised no valid complaint. Any issue of juror misconduct implied by the jury's questions was waived by Jackson's failure to object on that basis or specifically raise the issue at the hearing on his motion for new trial. The district court did not abuse its discretion in refusing to grant a new trial on the basis of the communications between the jury and the judge.

(d) Contradictory and Inconsistent Verdict

Jackson assigns that the district court erred in refusing to grant him a new trial because the verdicts of guilty of murder in the first degree, but not guilty of use of a deadly weapon to commit a felony, are contradictory. Jackson argues that if the jury found Jackson guilty of murdering Perry, who died from gunshot wounds, but not guilty of using a deadly weapon to commit the murder, such a verdict is illogical and inconsistent. Jackson's argument, however, is without merit.

The court's instructions to the jury included instruction No. 10, which stated:

> A Defendant can be guilty of a crime even though he personally did not commit every act involved in the crime so

> long as he aided someone else to commit it. A Defendant aided someone else if:
>
> (1) He encouraged or intentionally helped another person to commit the crime; and
>
> (2) The Defendant knew that the other person intended to commit the crime; and
>
> (3) The crime in fact was committed by that other person.

Pursuant to this instruction, which accurately states the law and to which Jackson did not object, the jury could feasibly find Jackson guilty of first degree murder without finding that Jackson used a deadly weapon to do so. The verdicts reached by the jury are not necessarily inconsistent—the above instruction reveals that there was a logical and consistent manner in which the jury could have reached its verdict. Based on the evidence presented, the jury could have concluded that Jackson aided in the murder of Perry and was thus guilty of murder under instruction No. 10, but did not personally fire a deadly weapon. Thus, we conclude that the district court did not abuse its discretion in refusing to grant Jackson a new trial on this ground.

2. Case No. S-01-051: Newly Discovered Evidence

Jackson assigns that the district court erred in failing to grant him a new trial based on the alleged newly discovered evidence provided by Cooperrider at Cooperrider's and Chillous' subsequent trials. Section 29-2101 stated, in pertinent part:

> A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following reasons affecting materially his substantial rights: . . . (5) newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial.

Cooperrider testified at his trial and at Chillous' trial that Jackson was not present at Perry's shooting.

[11,12] One moving for new trial on the basis of newly discovered evidence must show that the evidence was uncovered since the trial, that the evidence was not equally available before the trial, and that the evidence was not simply discovered by the exercise of belated diligence. *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994). Generally, newly discovered

evidence is evidence material to the defense that could not with reasonable diligence have been discovered and produced in the prior proceedings. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999); *Hirsch, supra*.

Jackson argues that because Cooperrider indicated a refusal to testify, if called as a witness, Cooperrider's testimony was not available to Jackson at the time of Jackson's trial. Jackson further asserts that the import of Cooperrider's testimony would likely have changed the outcome of Jackson's trial. Cooperrider's status as a codefendant of Jackson's, however, raises a novel legal question before this court.

[13] We have not addressed whether testimony of a codefendant who offers testimony at a subsequent trial, after refusing to testify at a defendant's previous trial, constitutes newly discovered evidence requiring a new trial for the defendant. We now determine that when a codefendant, such as Cooperrider, who has chosen not to testify subsequently comes forward to offer testimony exculpating a defendant, such as Jackson, the evidence is not newly discovered. See *U.S. v. Moore*, 221 F.3d 1056 (8th Cir. 2000). This is because the codefendant's testimony is not newly discovered evidence, but only newly *available* evidence which does not provide a basis for the granting of a new trial.

The clear policy behind concluding that newly available evidence, such as Cooperrider's testimony, does not constitute newly discovered evidence is that

> [i]t would encourage perjury to allow a new trial once co-defendants have determined that testifying is no longer harmful to themselves. They may say whatever they think might help their co-defendant, even to the point of pinning all the guilt on themselves, knowing they are safe from retrial. Such testimony would be untrustworthy and should not be encouraged.

U.S. v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992).

Further, Jackson failed to demonstrate that he was not aware of Cooperrider's testimony prior to trial such that it would be newly discovered evidence. The fact that Jackson attempted to secure Cooperrider's testimony reveals that Jackson knew that Cooperrider's testimony could have been beneficial to his case—even though Jackson filed no formal motion to compel

Cooperrider's testimony and force him to invoke the Fifth Amendment. The substance of the codefendant's testimony is not, in fact, new evidence if it was always known by the defendant seeking a new trial. See *State v. Jackson*, 188 Wis. 2d 187, 525 N.W.2d 739 (Wis. App. 1994). We, therefore, conclude that the district court did not err in determining that Cooperrider's testimony does not constitute newly discovered evidence for the purposes of Jackson's motion for new trial.

We note that our conclusion is consistent with the many state and federal jurisdictions which have determined that the requirement that evidence be discovered since trial is not met by offering the posttrial testimony of a coconspirator or codefendant who refused to testify at trial. See, e.g., *U.S. v. Freeman*, 77 F.3d 812 (5th Cir. 1996); *U.S. v. Theodosopoulos*, 48 F.3d 1438 (7th Cir. 1995); *U.S. v. Muldrow*, 19 F.3d 1332 (10th Cir. 1994); *U.S. v. Dale*, 991 F.2d 819 (D.C. Cir. 1993); *Reyes-Alvarado, supra*; *State v. Bright*, 776 So. 2d 1134 (La. 2000); *State v. Warren*, 592 N.W.2d 440 (Minn. 1999); *State v. Redford*, 248 Kan. 130, 804 P.2d 983 (1991); *Yarbrough v. State*, 57 S.W.3d 611 (Tex. App. 2001); *State v. Dunlap*, 187 Ariz. 441, 930 P.2d 518 (Ariz. App. 1996); *Jackson, supra*. But see, *U.S. v. Montilla-Rivera*, 115 F.3d 1060 (1st Cir. 1997); *Totta v. State*, 740 So. 2d 57 (Fla. App. 1999).

[14] Jackson did not argue, and we will not consider, the assignment that the district court erred in relying upon facts not properly before the court concerning telephone conversations between Chillous and Cooperrider. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Siddens*, 263 Neb. 751, 642 N.W.2d 791 (2002).

Cooperrider's testimony does not constitute newly discovered evidence that would warrant granting Jackson a new trial. We conclude, therefore, that the district court did not abuse its discretion in refusing to grant Jackson a new trial.

VI. CONCLUSION

For the reasons set forth above, Jackson's assignments of error are without merit. We, therefore, affirm the district court judgments in cases Nos. S-00-1055 and S-01-051.

AFFIRMED.

American Family Mutual Insurance Company, a Wisconsin corporation, appellee and cross-appellant, v. Richard Hadley and Natalie Hadley, and Richard Hadley and Natalie Hadley, on behalf of Rainier Hadley, a minor and protected person, appellants and cross-appellees, and Linda Hughes, appellee.

648 N.W.2d 769

Filed July 26, 2002. No. S-00-1092.

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. **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.
3. **Insurance: Contracts: Intent.** An insurance policy is a contract. 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.
4. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
5. **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.
6. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.
7. **Pleadings: Appeal and Error.** As a general rule, an appellate court disposes of a case on the theory presented in the district court.
8. **Insurance: Declaratory Judgments: Pleadings.** An insurer may petition a court to declare, pursuant to Neb. Rev. Stat. § 25-21,149 (Reissue 1995) of Nebraska's Uniform Declaratory Judgments Act, whether an insured's conduct or a specific event is excluded from coverage under a policy of insurance.
9. **Insurance: Declaratory Judgments.** A court may not enter declaratory judgment where there is an unknown potential for liability to an insured and the declaratory judgment would not end the controversy between the parties, or where another equally serviceable remedy is available to the insurer.
10. **Insurance: Declaratory Judgments: Proof.** Where it is proved, however, that a specific event or type of conduct is beyond the terms of an insurance policy, a court may enter a declaratory judgment that the insurer is not obligated to provide coverage to the insured for the event or conduct.

11. **Insurance: Contracts.** In the interpretation of an insurance policy, the reasonable expectations of an insured are not assessed unless the language of the insurance policy is found to be ambiguous.
12. **Public Policy: Words and Phrases.** Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community.
13. **Contracts: Public Policy.** The determination of whether a contract violates public policy presents a question of law.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Terry M. Anderson and Gordon R. Hauptman, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellants.

Michael G. Mullin, of McGrath, North, Mullin & Kratz, P.C., for appellee American Family Mutual Insurance Company.

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

STEPHAN, J.

American Family Mutual Insurance Company (American Family) brought this declaratory judgment action against one of its policyholders and Richard Hadley and Natalie Hadley. In another action, the Hadleys have asserted a civil claim against the insured to recover damages for injuries sustained by their minor child, Rainier Hadley, while in her care. American Family sought a declaration that under the homeowner's and personal liability umbrella insurance policies it had issued to its insured, there was no duty to defend or indemnify her with respect to the Hadleys' suit. The Hadleys appeal from an order of the district court for Douglas County entering summary judgment in favor of American Family, based upon its determination that policy exclusions for damages arising out of violations of criminal law were applicable and enforceable.

I. BACKGROUND

The insured provided childcare in her Omaha home for six minor children, the youngest of whom was Rainier, born on October 30, 1995. An American Family homeowner's policy and

an American Family personal liability umbrella policy, both issued to the insured, were in force and effect at all relevant times. On January 23, 1996, Rainier suffered severe injuries while under the insured's care. The insured subsequently contacted American Family to report a claim under the aforementioned insurance policies for the injuries to Rainier. American Family responded by letter, stating that it was investigating the claim under a full reservation of rights.

As a result of Rainier's injuries, the insured was charged with knowing and intentional child abuse under Neb. Rev. Stat. § 28-707(5) (Reissue 1995), a Class III felony. The insured subsequently pled guilty to an amended charge of negligent child abuse under § 28-707(3), a Class I misdemeanor.

On January 23, 1997, the Hadleys filed suit against the insured in the district court for Douglas County seeking damages for the injuries sustained by Rainier under a theory of assault and battery. The record also contains an amended petition in which the Hadleys allege a second cause of action for negligence, but this document does not bear a file stamp, and there is no other indication that it was ever filed. American Family hired counsel to defend the insured in the Hadleys' lawsuit under its previously stated reservation of rights.

On January 6, 1998, American Family filed this action seeking a declaration that it had no duty to defend the insured in the Hadleys' pending lawsuit and no duty to indemnify the insured for any claim arising from that lawsuit. In its petition, American Family alleged, inter alia, that the "violation of law" exclusions in the homeowner's and personal liability umbrella policies issued to the insured negated coverage for the claims made in the Hadleys' lawsuit. In their answer, the Hadleys specifically denied that coverage was excluded and, by counterclaim, sought a declaration that the policies provided coverage for the insured in their pending action against her. The insured also answered and alleged that the exclusions relied upon by American Family violated public policy insofar as they applied to her circumstances and further alleged that the Hadleys were not "necessary parties" to the declaratory judgment action and prayed that they be dismissed.

The district court entered an order sustaining American Family's motion for summary judgment on September 21, 2000. In a subsequent order nunc pro tunc, the district court reiterated the findings in its previous order and specifically found that American Family had no duty to defend the insured in the Hadleys' lawsuit and no duty to indemnify the insured for any claim arising from that lawsuit.

The Hadleys perfected this timely appeal. American Family cross-appealed on an evidentiary issue related to the summary judgment proceedings. The insured did not appeal. We removed the case to our docket on our own motion 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).

II. ASSIGNMENTS OF ERROR

The Hadleys assign, restated and consolidated, that the district court erred in concluding (1) that the exclusions in the insured's insurance policies applied to negate coverage in this situation and (2) that no genuine issues of material fact were raised concerning coverage under either policy. On cross-appeal, American Family assigns that the district court erred in overruling its objection to the affidavit of the insured, which was received over objection in the summary judgment proceedings.

III. STANDARD 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. *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002); *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001).

[2] 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

The issue before this court is whether insurance coverage for the claim which the Hadleys have asserted against the insured is excluded under the terms of the insurance policies issued by American Family to the insured. Familiar principles of contract interpretation form the framework for our analysis.

[3-6] An insurance policy is a contract. *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). 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. *Ohio Cas. Ins. Co. v. Carman Cartage Co., supra*; *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. *Ohio Cas. Ins. Co. v. Carman Cartage Co., supra*; *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, supra*; *Callahan v. Washington Nat. Ins. Co., supra.* Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute. *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000).

1. Homeowner's Policy

[7] The homeowner's policy issued to the insured includes an optional endorsement which extends liability coverage to an insured who provides home daycare service for which compensation is received. The policy provides that American Family "will pay, up to our limit, compensatory damages for which any insured is legally liable because of bodily injury or property damage caused by an occurrence covered by this policy." "Occurrence" is defined by the policy to mean "an accident, including exposure to

conditions, which results during the policy period, in: a. bodily injury; or b. property damage." The policy includes several exclusions from liability coverage, including the following: "17. Violation of Law. We will not cover bodily injury or property damage arising out of: a. violation of any criminal law for which any insured is convicted . . . ." The policy also includes exclusions for intentional acts and abuse which, along with the violation of law exclusion, were pled by American Family as grounds for its position that the Hadleys' claims against its insured are not covered under the policy. However, the motion for summary judgment was submitted to the district court solely on the violation of law exclusion. As a general rule, an appellate court disposes of a case on the theory presented in the district court. See, *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992); *Donahoo v. Nebraska Liquor Control Comm.*, 229 Neb. 197, 426 N.W.2d 250 (1988). We do so here.

The Hadleys do not contend in this appeal that the language of the violation of law exclusion is ambiguous, and we conclude on the basis of our independent review that it is not. The plain meaning of the policy language clearly excludes coverage where the alleged liability of the insured is based upon conduct which is also the basis for a criminal conviction. Notably, courts from other jurisdictions have also held similar coverage exclusions in homeowner's insurance policies to be unambiguous. See, e.g., *Allstate Ins. Co. v. Brown*, 16 F.3d 222 (7th Cir. 1994); *Allstate Ins Co v Fick*, 226 Mich. App. 197, 572 N.W.2d 265 (1997); *Allstate Ins. Co. v. Peasley*, 131 Wash. 2d 420, 932 P.2d 1244 (1997); *Horace Mann Ins. v. Drury*, 213 Ga. App. 321, 445 S.E.2d 272 (1994); *Hooper v. Allstate Ins. Co.*, 571 So. 2d 1001 (Ala. 1990).

Having concluded that the exclusion is unambiguous, we now turn to the question of whether it is applicable to the Hadleys' claim against the insured. On this point, the Hadleys raise four principal arguments. First, they argue that the record does not contain sufficient facts to make this determination as a matter of law. Second, they argue that the exclusion applies only to intentional criminal acts and not to criminal negligence. Third, they contend that application of the exclusion in this case would be contrary to the reasonable expectations of the insured at the time

she purchased the homeowner's policy. Finally, they contend that applying the exclusion in this case would be contrary to public policy. We address each of these arguments separately.

(a) Factual Sufficiency of Record

[8-10] An insurer may petition a court to declare, pursuant to Neb. Rev. Stat. § 25-21,149 (Reissue 1995) of Nebraska's Uniform Declaratory Judgments Act, whether an insured's conduct or a specific event is excluded from coverage under a policy of insurance. *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999). See, also, *Columbia Nat. Ins. v. Pacesetter Homes*, 248 Neb. 1, 532 N.W.2d 1 (1995); *State Farm Fire & Cas. Co. v. van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990). A court may not enter declaratory judgment where there is an unknown potential for liability to an insured and the declaratory judgment would not end the controversy between the parties, or where another equally serviceable remedy is available to the insurer. See, *Farm Bureau Ins. Co. v. Witte, supra*; *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998); *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 518 N.W.2d 124 (1994). Where it is proved, however, that a specific event or type of conduct is beyond the terms of an insurance policy, a court may enter a declaratory judgment that the insurer is not obligated to provide coverage to the insured for the event or conduct. *Farm Bureau Ins. Co. v. Witte, supra.* See, also, *Columbia Nat. Ins. v. Pacesetter Homes, supra*; *State Farm Fire & Cas. Co. v. van Gorder, supra*; *State Farm Fire & Cas. Co. v. Victor*, 232 Neb. 942, 442 N.W.2d 880 (1989).

In this case, it is undisputed that the Hadleys' tort claim is based upon the same conduct for which the insured was convicted of the crime of negligent child abuse. The record includes a transcribed statement which the insured gave to police on January 24, 1996, the day following the incident. The insured admitted the accuracy of the statement in answers to requests for admission which are included in the record. In the statement, the insured admitted that she "flipped out" when Rainier was crying and refused to take a bottle and that she shook him and "forcibly threw him on the bed." When the infant developed symptoms of injury soon thereafter, she realized her responsibility and admitted to his

family that "I threw him on the bed." These undisputed facts provide a sufficient basis for determining whether the coverage exclusion is applicable.

(b) Applicability to Criminal Negligence

The Hadleys' principal argument is that the policy exclusion applies only where the insured is convicted of a criminal offense requiring intent and does not apply to a conviction based upon criminal negligence. The offense of "child abuse" is defined by § 28-707, which is included within the Nebraska Criminal Code. See Neb. Rev. Stat. §§ 28-101 through 28-1348 (Reissue 1995). Section 28-707(1) provides:

> A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> (a) Placed in a situation that endangers his or her life or health; or
>
> (b) Cruelly confined or cruelly punished; or
>
> (c) Deprived of necessary food, clothing, shelter, or care.

When committed negligently, child abuse is a Class I misdemeanor, punishable by not more than 1 year's imprisonment, a $1,000 fine, or both. § 28-106(1). When committed intentionally, at the time of Rainier's injury, child abuse was a Class IB, III, or IV felony depending upon whether serious bodily injury or death results from the act and may be punishable by up to life imprisonment. See, § 28-707(4), (5), and (6); § 28-105. Thus, whether committed negligently or intentionally, child abuse is a crime.

The language of the homeowner's policy before us does not make a distinction between criminal acts requiring a specific intent and those which do not; it simply states that coverage is excluded for harm arising out of "[v]iolation of *any criminal law* for which any insured is convicted . . . ." (Emphasis supplied.) Affording this language its plain and ordinary meaning, as we must, it applies to any criminal conviction, whether or not the underlying offense includes an element of intent to cause injury. Other courts have reached the same conclusion with respect to similar policy language. For example, in *Horace Mann Ins. v. Drury*, 213 Ga. App. 321, 445 S.E.2d 272 (1994), the insured lit a firecracker and threw it out of a car window. It reentered the vehicle through a rear window, exploded, and

severely burned a passenger. The court held that there was no coverage under a homeowner's policy which excluded coverage for liability based on acts which constitute "a violation 'of any criminal law or statute.' " *Id.* at 322, 445 S.E.2d at 274. The court rejected the insured's contention that the exclusion should apply only to felonies of a serious nature, such as robbery and murder, reasoning that "crime" was generally understood to exclude violations of municipal ordinances and administrative regulations, but to include "all other violations of penal statutes, including misdemeanors." *Id.* The court reasoned that the exclusion in the homeowner's policy "can only reasonably be read to exclude injuries caused by illegal possession of firecrackers." *Id.*

In *Hooper v. Allstate Ins. Co.*, 571 So. 2d 1001 (Ala. 1990), the insured, who had been drinking, accidentally fired a shotgun while handing it to a friend visiting in his home as they were discussing a hunting trip, severely injuring the friend. The insured was originally charged with first degree assault and later pled guilty to second degree assault. The court held that the injured party's tort claim was not covered under the insured's homeowner's policy, which excluded liability for " 'criminal acts.' " *Id.* at 1003. Based upon the language of the exclusion, the court specifically rejected the insured's contention that it applied to only intentional criminal acts. Similarly, in *Allstate Ins Co v Fick*, 226 Mich. App. 197, 201, 572 N.W.2d 265, 267 (1998), the court held that an exclusion in a homeowner's policy stating that there was no coverage for bodily injury resulting from " 'a criminal act or omission' " applied in the circumstance where the insured unlawfully obtained a prescription drug from her employer and gave it to a friend, who died from an adverse reaction. Affirming a judgment that the exclusion applied whether or not the harm which resulted from the criminal act was actually intended, the Michigan Court of Appeals reasoned that because there was no dispute that the insured had committed a criminal act in obtaining the medication, the homeowner's policy did not provide coverage for a wrongful death action brought against the insured. See, also, *Allstate Ins. Co. v. Sowers*, 97 Or. App. 658, 776 P.2d 1322 (1989) (holding criminal acts exclusion in

homeowner's policy applicable where insured unintentionally injured police officer while unlawfully resisting arrest).

Our conclusion that the violation of law exclusion in the homeowner's policy is not limited to specific intent crimes is also based on the fact that the policy includes a separately numbered and stated exclusion of coverage for injury or damage "caused intentionally by or at the direction of any insured even if the actual bodily injury . . . is different than that which was expected or intended from the standpoint of any insured." The fact that "criminal" acts and "intentional" acts are enumerated as separate and distinct exclusions, considered in conjunction with the fact that the criminal acts exclusion contains no language regarding intent, leads logically to the conclusion that coverage for injury or damage arising from criminal acts is excluded regardless of the actor's intent. See *Liebenstein v. Allstate Ins. Co.*, 517 N.W.2d 73 (Minn. App. 1994). Compare *Young v. Brown*, 658 So. 2d 750, 752 (La. App. 1995) (holding exclusion for injuries " 'which may reasonably be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person' " to be ambiguous and therefore susceptible to construction in favor of insured).

(c) Reasonable Expectations of Insured

Next, the Hadleys contend that application of the "violation of law" exclusion to negate coverage for negligent child abuse defeats the insured's reasonable expectations with respect to her homeowner's insurance. Although the insured did not appeal from the district court's judgment, the Hadleys rely upon the affidavit she offered in opposition to American Family's motion for summary judgment in which she averred that she "purchased the homeowner's policy and the umbrella policy for the specific purpose of providing coverage for bodily injury and property injury that may occur as a result of negligence or inadvertence." Relying on *Tower Ins. Co., Inc. v. Judge*, 840 F. Supp. 679 (D. Minn. 1993) (applying Minnesota law), and *Young v. Brown, supra*, the Hadleys argue that this court should construe the exclusion in accordance with the reasonable expectations of the insured and thus provide coverage for the consequences of actions which may constitute a violation of the criminal code but are nevertheless negligent in nature.

[11] However, we need not consider the law of other states on this point because this court has recently stated that

> the reasonable expectations of an insured are not assessed *unless the language of the insurance policy is found to be ambiguous*. When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.

(Emphasis supplied.) *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 757, 635 N.W.2d 112, 120 (2001). See, also, *Moller v. State Farm Mut. Auto. Ins. Co.*, 252 Neb. 722, 566 N.W.2d 382 (1997). Because we have concluded that the exclusion in the homeowner's policy is unambiguous, we do not take into consideration whether application of the exclusion to the facts of this case would be consistent with the reasonable expectations of the insured who purchased the policy with knowledge of it content.

(d) Public Policy

Finally, the Hadleys argue that reading the exclusion to include negligently committed criminal acts would violate public policy because it would allow an injured child to go uncompensated. They contend that the homeowner's policy was actually a "business liability policy" because the insured operated a childcare business in her home. Brief for appellant at 21. The Hadleys further argue that "[t]he state clearly has an interest in providing a source of compensation for children injured by childcare providers, particularly where those injuries occur as a result of conduct as to which no public policy prohibits such a source of compensation." *Id.*

[12,13] As noted, an insurer may restrict its liability under a contract of insurance if the restriction is not inconsistent with public policy. *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000). Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community. *Hood v. AAA Motor Club Ins. Assn., supra*; *Ploen v. Union Ins. Co.*, 253 Neb.

867, 573 N.W.2d 436 (1998). The determination of whether a contract violates public policy presents a question of law. *Ploen v. Union Ins. Co., supra.*

The Hadleys have identified no statute or regulation which would preclude an insurer from issuing a homeowner's policy to a home childcare provider that excluded coverage for child abuse, whether negligent or intentional. Indeed, we have been directed to no legal requirement that a home childcare provider must have liability insurance in force. As a general rule, the majority of courts that have addressed the issue hold that a provision in a homeowner's policy which excludes coverage for claims arising from criminal acts, whether committed intentionally or not, does not violate public policy. See, e.g., *Allstate Ins. Co. v. Burrough*, 914 F. Supp. 308 (W.D. Ark. 1996) (holding exclusion in homeowner's policy which applied to all criminal acts, regardless of mens rea required for their commission, did not violate public policy of Arkansas law); *Allstate Ins. Co. v. Norris*, 795 F. Supp. 272, 275 (S.D. Ind. 1992) (holding exclusion in homeowner's policy negating coverage for "any 'criminal act or omission' " both applied to unintentional criminal acts and did not violate public policy); *Allstate Ins. Co. v. Peasley*, 131 Wash. 2d 420, 932 P.2d 1244 (1997) (holding exclusion of coverage for injuries resulting from unintentional criminal acts of insured, such as reckless endangerment, did not violate public policy); *Horace Mann Ins. v. Drury*, 213 Ga. App. 321, 322, 445 S.E.2d 272, 274 (1994) (holding exclusion in homeowner's policy for claims arising from insured's "violation 'of any criminal law or statute' " applied to accidental injury resulting from unlawful possession of fireworks, and did not violate public policy); *Hooper v. Allstate Ins. Co.*, 571 So. 2d 1001, 1002 (Ala. 1990) (holding exclusion in homeowner's policy for " 'intentional or criminal acts of an insured' " extended to all criminal acts, whether or not insured intended to commit act or to cause harm, and did not contravene public policy); *Allstate Ins. Co. v. Schmitt*, 238 N.J. Super. 619, 623, 570 A.2d 488, 490 (1990) (holding exclusion in homeowner's policy for " 'intentional or criminal acts' " applied to unintended result of criminally reckless conduct and did not offend public policy).

The Hadleys rely on *Young v. Brown*, 658 So. 2d 750 (La. App. 1995) for the contrary position. In that case, the court considered

a homeowner's policy provision excluding coverage for " 'any bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person.' " *Id.* at 752. The issue was whether this provision excluded coverage for an accidental shooting in which the insured was convicted of "negligent injuring" under Louisiana law. *Id.* The court found the exclusion to be ambiguous and further stated that it would violate Louisiana's "public policy established for the protection of innocent injury victims." *Id.* at 754. We do not find this case persuasive. It involves different policy language that, unlike the language at issue here, the court found to be ambiguous. Given this finding of ambiguity, the *Young* court's statement regarding public policy appears to be dictum.

The issue is not whether public policy favors compensation of crime victims, but whether public policy *requires* an insurer to indemnify the insured for the consequences of his or her criminal behavior, notwithstanding a provision in the policy that such coverage is not provided. We limit our analysis of this question to the specific facts presented in this case. The record does not demonstrate that the homeowner's policy, including the extended endorsement for operation of a home daycare service, is insurance which is mandated by law. The violation of law exclusion does not apply unless the insured has been convicted of a criminal act. The insured was convicted of a crime which involves placing a child in a situation that endangers his or her life or health; cruelly confining or punishing a child; or depriving a child of necessary food, clothing, shelter, or care. See § 28-707(1). The Legislature has determined, as a matter of public policy, that such conduct is a crime whether committed knowingly, intentionally, or negligently. *Id.* It is undisputed that the alleged civil liability of the insured is based upon the same conduct that formed the factual basis for her criminal conviction. That conduct consisted of shaking a fussy infant and then forcibly throwing him on a bed. Regardless of whether harm is subjectively intended, such conduct has no innocent purpose. See *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999). Where, as here, an insurer has unambiguously stated in the contract of insurance that it will not provide coverage for

injury arising out of a violation of criminal law for which the insured has been convicted, we can discern no public policy which would require abrogation of that contractual provision under the facts of this case.

2. Personal Umbrella Policy

The personal liability umbrella policy at issue in this case contained various exclusions, including the following: "23. Violation of Law. We will not cover injury arising out of violation of a penal law or ordinance by or with the knowledge or consent of an insured when an insured is convicted of such violation." The umbrella policy states that it will cover the insured's provision of a "child home day care service" if the insured has applicable underlying coverage, but further provides that any coverage provided for such activity "will be no broader than the underlying insurance."

The Hadleys argue that the violation of law exclusion in the umbrella policy is ambiguous because of its reference to the term " 'penal' law" and its inclusion of the phrase " 'by or with the knowledge or consent of an insured.' " Brief for appellant at 19. With respect to the term " 'penal' law," the Hadleys suggest that "[i]t is doubtful a man or woman purchasing childcare liability insurance would understand 'penal' to mean any criminal law." *Id*. We disagree. The word "penal" is defined as "of, pertaining to, or involving punishment, as for crimes or offenses." Webster's Encyclopedic Unabridged Dictionary of the English Language 1065 (1994). Therefore, "penal law" is synonymous with "criminal law" and is both easily understandable and unambiguous. Regarding the phrase "by or with the knowledge or consent of an insured," the Hadleys argue that this phrase is confusing to the average reader. Again, we disagree. When read in its ordinary grammatical context, the phrase simply modifies the words "violation of a penal law or ordinance" and thus defines the scope of the exclusion to include offenses actually committed by an insured, as well as those, for example, to which an insured is convicted of aiding, abetting, or conspiring with the actual perpetrator.

As for its application, the "violation of law" exclusion found in the umbrella policy, like the "violation of law" exclusion found in

the homeowner's policy, does not contain language narrowing its scope to intentional violations. The intentional acts exclusion in the umbrella policy is separately stated and numbered and specifically excludes coverage for intentional acts that are "fraudulent, criminal or malicious." If the "violation of law" exclusion were read narrowly to include only intentional violations of a penal law, it would be redundant with the intentional acts exclusion. Therefore, when viewed as a whole, we conclude that the umbrella policy unambiguously excludes coverage for an injury arising out of conduct for which the insured was convicted of negligent child abuse. Furthermore, and for the reasons discussed with respect to the homeowner's policy, we also conclude that this exclusion is not contrary to public policy and may therefore be enforced by the insurer.

V. CONCLUSION

The "violation of law" exclusions set forth in both insurance policies issued by American Family are unambiguous and include within their scope the conduct of the insured upon which the Hadleys' claim is based. Neither exclusion contravenes public policy. Based upon our independent review of these issues, we conclude that the district court did not err in granting American Family's motion for summary judgment, and we affirm. Because of this disposition, we need not reach the issue raised by the cross-appeal.

AFFIRMED.

HENDRY, C.J., concurring.

I concur with the result reached by the majority. However, I write separately as I believe it unnecessary to decide this case on the violation of law exclusion. In my view, the intentional acts exclusion excludes coverage. I therefore reserve judgment on whether the violation of law exclusion violates the public policy of Nebraska. While the majority notes that the violation of law exclusion was the sole basis argued by American Family in the hearing on the motion for summary judgment, the motion for summary judgment contains no such limitation, stating only that American Family was entitled to judgment as a matter of law. In addition, the intentional acts exclusion was pled by American Family in its operative petition in the district court as one of the

bases for declaring there was no coverage. Finally, American Family argues in its brief that the insured's actions were "intentional." Brief for appellee at 29.

The policy at issue states in pertinent part: "10. Intentional Injury. We will not cover bodily injury or property damage caused intentionally by or at the direction of any insured even if the actual bodily injury or property damage is different than that which was expected or intended from the standpoint of any insured." A similar exclusion is contained in the umbrella policy.

American Family offered the insured's statement at the hearing on the motion for summary judgment. This statement was taken by police on January 24, 1996, the day after Rainier was injured, and received by the court as exhibit 6. In this statement, the insured said:

> A. . . . [A]nd I . . . and I'm looking at him in the eye and I'm going, what am I doing wrong. Why won't you take the bottle? Why won't you burp? What's going on?
>
> Q. . . . [Y]ou were shaking him?
>
> A. . . . [N]ot violently, like that. I was you know . . . .
>
> Q. . . . [B]ut shaking[?]
>
> A. . . . [J]iggling him.
>
> Q. Okay.
>
> A. Now why won't you take this bottle. You know. And I . . . I could see myself getting' [sic] real tense and I thought, okay, LINDA, calm down and I . . . you know, put him on the bed.
>
> Q. Okay, you told me earlier you had . . .
>
> A. . . . [Y]ou know, forcibly threw him on the bed. But I mean it wasn't like I threw him up in the air. I didn't do that.
>
> Q. But you forcibly threw him down on the bed? Is that correct?
>
> A. Yeah . . . .

Together with the statement, the insured's answers to requests for admission were also received at the summary judgment hearing. In these answers, the insured admitted: "Exhibit [6] accurately sets forth your responses to each of the questions asked of you by Officer Mailander during the statement given by you on January 24, 1996." No evidence was offered at the summary judgment hearing that the insured was incapable of

formulating the intent to shake Rainier or forcibly throw him on the bed, or that the insured was incapable of understanding the nature of her acts.

I recognize that in these same requests for admission the insured also denied that she "intentionally shook" or "forcibly threw Rainier Hadley down on a bed on January 23, 1996." However, " ' " ' [w]here a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded.' " ' " *Neill v. Hemphill*, 258 Neb. 949, 954, 607 N.W.2d 500, 504 (2000), quoting *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981). I would therefore disregard the inconsistent denials.

In my view, the record is undisputed that the insured shook Rainier and threw him on the bed. Based on the policy's intentional acts exclusion, there is no coverage. See, *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999); *Columbia Nat. Ins. v. Pacesetter Homes*, 248 Neb. 1, 532 N.W.2d 1 (1995). I would therefore affirm the district court's decision, albeit on other grounds. The majority's decision to do otherwise, in my view, is not compelled by this record. Furthermore, the majority's holding that the violation of law exclusion does not offend Nebraska's public policy is troubling for several reasons.

The plain language of the violation of law exclusion permits the denial of coverage upon the conviction of the insured. I have found no other court which has been called upon to interpret the specific exclusionary language utilized in these policies. While the majority concludes, based in part on the conduct of the insured in this case, that such exclusions are not violative of public policy, under the plain language of the exclusion the insured's underlying conduct *plays no part* in determining the applicability of the exclusion. The conviction is the sole determinative factor.

I agree the trend regarding "criminal acts" exclusions follows the reasoning that public policy is not offended when a homeowner's liability policy excludes coverage for reckless, as well as intentional, criminal acts. See *Allstate Ins. Co. v. Peasley*, 131 Wash. 2d 420, 932 P.2d 1244 (1997). However, as noted in *Swift*

v. Fitchburg Mut. Ins. Co., 45 Mass. App. 617, 627, 700 N.E.2d 288, 295 (1998):

> In situations where the offense of which the insured was guilty verges toward the unintentional—say criminal negligence or recklessness—courts might possibly hesitate about holding that the criminal acts exclusion applies, for here the historic justification for the exclusion falters. See *Allstate Ins. Co. v. Zuk*, 78 N.Y.2d 41, 46-47, 571 N.Y.S.2d 429, 574 N.E.2d 1035 (1991); *Tower Ins. Co. v. Judge*, 840 F.Supp. 679, 692-693 (D.Minn.1993); *Young v. Brown*, 658 So.2d 750, 753-754 (La.Ct.App. 1995).

In *Swift*, the insured was not convicted of an intentional or even a reckless violation of the criminal law, but, rather, a negligent one.

The majority assumes in its analysis that the term "criminal act" as used in the cases cited in support of its conclusion is synonymous with the terms "violation of any criminal law" and "violation of a penal law or ordinance" used in the policy exclusions at issue in this case. The problem with trying to equate the category of "criminal act" with the category of "any conviction for violation of a criminal law or ordinance" was highlighted in *Allstate Ins. Co. v. Raynor*, 93 Wash. App. 484, 969 P.2d 510 (1999). In *Raynor*, the insured shot and killed his neighbor and her daughter. He then killed himself. The court held that the insured's actions constituted criminal acts. Therefore, the victims' estates could not recover against the insured's homeowner's policy, which excluded coverage for " 'bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured.' " *Id.* at 492, 969 P.2d at 515. The court nonetheless stated in a footnote:

> We do not hold, however, that every violation of a Washington criminal statute will constitute a "criminal" act releasing an insurer from liability for an insured's act or omission. As noted in *Peasley*, 131 Wn.2d at 434-36 (Madsen, J., concurring), some violations of criminal statutes would certainly not be contemplated by the average purchaser of insurance as precluding coverage under a "criminal acts" exclusion in a homeowners policy. But [the insured]'s actions here were so extreme as to constitute

> clearly excluded "criminal acts" in the minds of an average purchaser of insurance.

93 Wash. App. at 496 n.10, 969 P.2d at 516 n.10.

I agree with the Washington Court of Appeals. The breadth of the majority's holding with respect to this exclusion would cause me to "hesitate." See *Swift*, 45 Mass. App. at 628, 700 N.E.2d at 295.

Under its plain meaning, this policy excludes coverage for any acts committed by the insured, if the insured is convicted of violating any "criminal" law, "penal" law, or "ordinance" in connection with the incident. The problem with such broad exclusionary language was addressed in *Safeco Ins. Co. of America v. Robert S.*, 26 Cal. 4th 758, 28 P.3d 889, 110 Cal. Rptr. 2d 844 (2001). In that case, the policy excluded coverage for bodily injury " 'arising out of any *illegal act* committed by or at the direction of an insured.' " *Id.* at 763, 28 P.3d at 893, 110 Cal. Rptr. 2d at 848. The court concluded that this exclusion was too broad, reasoning that

> the homeowners policy that the insureds here bought from Safeco expressly provided that Safeco would defend and indemnify them for bodily injury caused by "an occurrence," which the policy defines as "an accident . . . which results, during the policy period, in bodily injury or property damage." Because the term "accident" is more comprehensive than the term "negligence" and thus includes negligence (Black's Law Dict[ionary 14 (5th ed. 1979)], Safeco's homeowners policy promised coverage for liability resulting from the insured's negligent acts. That promise would be rendered illusory if, as discussed above, we were to construe the phrase "illegal act," as contained in the policy's exclusionary clause, to mean violation of any law, whether criminal or civil.

Safeco Ins. Co. of America, 26 Cal. 4th at 764-65, 28 P.3d at 894, 110 Cal. Rptr. 2d at 850.

Applying this reasoning, the *Safeco* court refused to apply the illegal act exclusion. The court held that because "the illegal act exclusion cannot reasonably be given meaning under established rules of construction of a contract, it must be rejected as invalid." *Id.* at 766, 28 P.2d at 895, 110 Cal. Rptr. at 852. Nebraska has a

similar definition of the term "accident." See *City of Kimball v. St. Paul Fire & Marine Ins. Co.*, 190 Neb. 152, 154, 206 N.W.2d 632, 634 (1973) ("[t]he word 'accident' as used in liability insurance is a more comprehensive term than 'negligence' and in its common signification the word means an unexpected happening without intention"). See, also, *Columbia Nat. Ins. v. Pacesetter Homes, Inc.*, 248 Neb. 1, 532 N.W.2d 1 (1995); *Sullivan v. Great Plains Ins. Co.*, 210 Neb. 846, 317 N.W.2d 375 (1982).

The majority's holding would, in my view, exclude from coverage situations "for which people classically seek insurance coverage." See *Tower Ins. Co., Inc. v. Judge*, 840 F. Supp. 679, 693 (D. Minn. 1993). *Tower Ins. Co., Inc.* involved a homeowner's insurance policy which excluded coverage for bodily injury which " 'result[s] from the criminal acts of an insured.' " 840 F. Supp. at 683. The insured accidentally electrocuted a friend while attempting to play a practical joke. The insurer asserted that there was no coverage because the insured's actions constituted a criminal act. The court found that the criminal act exclusion violated public policy, noting:

> The court is convinced that it would be bad policy to find that the exclusion applies in this case just because the state of Wisconsin decided to pursue criminal charges. . . . Persons who suffer unintended and unexpected injuries should not be denied compensation because of such a discretionary decision by the state.

Id. at 693. The concern recognized in *Tower Ins. Co., Inc., supra*, is even greater here, wherein the exclusionary language of the policy is applicable to *any* conviction.

Under the majority's holding, one can foresee "accidents" involving a child who is injured by placing his or her hand on a hot heat register, falling out of a swing, or accidentally pulling over a bookcase while playing. These are the types of accidents for which a daycare provider would typically purchase insurance to both protect themselves and provide compensation for the innocent child. In each of the above "accidents," there is no conduct by the daycare provider which fits into the traditional concept of a "criminal act." However, if the daycare provider is convicted of negligent child abuse, then the insured has committed a violation of law under the terms of this policy. There is

no room to debate whether the daycare provider committed a criminal act, intentional or otherwise. There will be no coverage. The conviction is all that is needed.

Another concern which would cause me to hesitate is that under this exclusion, the insured would not know, and could not know at the time of entering into the contract, what "accidents" would be covered under the insurance policy. That determination could be made only after the fact, depending on whether any conviction arises in connection with an occurrence for which coverage is sought. See *Safeco Ins. Co. of America v. Robert S.*, 26 Cal. 4th 758, 28 P.3d 889, 110 Cal. Rptr. 2d 844 (2001).

Neb. Rev. Stat. § 44-102 (Reissue 1998) defines an insurance policy as

> a contract whereby one party, called the insurer, for a consideration, undertakes to pay money or its equivalent or to do an act valuable to another party, called the insured, or to his or her beneficiary, upon the happening of the hazard or peril insured against whereby the party insured or his or her beneficiary suffers loss or injury.

The violation of law exclusion as interpreted by the majority would in effect make coverage dependent not on the "happening of the hazard or peril insured against," but on the discretionary decision of a prosecuting attorney. See, *Tower Ins. Co., Inc. v. Judge*, 840 F. Supp. 679 (D. Minn. 1993); *Safeco Ins. Co. of America, supra*. Under such exclusions, two identical "accidents" may or may not be covered under two identical policies, depending on how aggressively the prosecuting authority responds to the incident. This occurs notwithstanding the fact that each insured paid the same premium for the identical contract.

Accordingly, I reserve judgment on the enforceability of the violation of law exclusion contained in this policy. Such exclusions could exclude from coverage those occurrences for which people classically seek coverage, see *Tower Ins. Co., Inc., supra*, and render the insurance contract illusory. See *Safeco Ins. Co. of America, supra*.

GERRARD and MCCORMACK, JJ., join in this concurrence.

MICHAEL C. MORRISSEY, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

647 N.W.2d 644

Filed July 26, 2002. No. S-01-268.

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 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.
3. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Judgments: Appeal and Error.** An appellate court, in reviewing a district court'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 the 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. **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.
7. **Supreme Court: Administrative Law: Judicial Notice.** The Supreme Court will take judicial notice of general rules and regulations established and published by Nebraska state agencies under authority of law.
8. **Administrative Law.** To be valid, an action of an agency must conform to its rules which are in effect at the time the action is taken.
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.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded with directions.

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

R. Douglas Stave, of Stave, Dougherty & Stave, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

In this case, the Nebraska Department of Motor Vehicles (department) appeals from an order of the district court for Douglas County. After an administrative license revocation hearing, the department concluded that Michael C. Morrissey had refused to submit to a chemical test of his breath. In part on this basis, the department revoked Morrissey's driver's license. The district court reversed, relying on *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996). The court found that Morrissey submitted to a chemical test of his breath when he provided a sample of breath sufficient to register a digital result on a test record card. We reverse, and remand with directions.

BACKGROUND

On May 21, 2000, Officer Kenneth Randall of the Omaha Police Department was dispatched to the scene of a car accident on 60th Street near Interstate 80 in Omaha, Nebraska. At the scene, Randall discovered Morrissey behind the wheel of a vehicle situated on the median on 60th Street. Upon approaching the vehicle, Randall detected a strong odor of alcohol coming from Morrissey and the vehicle. Randall also observed that Morrissey had bloodshot eyes and appeared to be extremely intoxicated and sleepy. Randall attempted to administer a field sobriety test; however, Morrissey's condition prevented him from completing the test. Morrissey also failed a preliminary breath test at the scene.

Morrissey was arrested and transported to police headquarters. At the police station, Morrissey was read a postarrest chemical test advisement form and he agreed to submit to the chemical test. The chemical test was conducted by an analyst in the presence of two Omaha police officers, including Randall. Morrissey placed the mouthpiece of the Intoxilyzer 5000 in his mouth and blew a "small" sample into the machine. The test record card indicated that Morrissey had an alcohol content of 0.203 grams of alcohol per 210 liters of breath. However, the test record card

also indicated that the sample of breath obtained from Morrissey was deficient. Morrissey was told that he needed to repeat the test to produce a sufficient sample. Morrissey refused to submit to any further chemical test. Randall completed a "Notice/Sworn Report/Temporary License" (sworn report) and provided a copy to Morrissey. The sworn report indicates that Morrissey was requested to submit to a chemical test and that he "refused to submit to a chemical test or tests of breath, blood or urine."

Morrissey petitioned for a hearing to contest the revocation of his drivers' license. At the hearing, testimony was received from Randall and exhibits were received into evidence, including the sworn report. Also received into evidence was a copy of the test record card and the chemical test checklist. The checklist set forth the steps to be followed when administering a chemical test using an Intoxilyzer 5000. One of the steps stated: "SUBJECT DIGITAL READING: 0.____ of a gram of alcohol per 210 liters of breath." Handwritten in the blank space of that step was the number ".203."

Following the license revocation hearing, the department entered an order revoking Morrissey's driver's license for 1 year. As a basis for revocation, the department found in part that Morrissey had refused to submit to a chemical test. Morrissey appealed the order of revocation to the district court. The court reversed, finding that pursuant to *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996), Morrissey did not refuse to submit to a chemical test. The department appealed from the district court order, and we moved the case to our docket.

ASSIGNMENTS OF ERROR

The department assigns that the district court erred in (1) reversing the decision of the director of the department and reinstating Morrissey's driver's license and (2) finding that Morrissey had submitted to and completed a valid chemical test pursuant to Neb. Rev. Stat. § 60-6,205 (Reissue 1998).

STANDARD 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).

Reiter v. Wimes, 263 Neb. 277, 640 N.W.2d 19 (2002). See Neb. Rev. Stat. § 60-6,208 (Reissue 1998).

[2,3] A judgment or final order entered 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. *Davis v. Wimes*, 263 Neb. 504, 641 N.W.2d 37 (2002). 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.*

[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. *Reiter v. Wimes, supra.*

[5] Whether a decision conforms to the law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

[6] 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. *Davis v. Wimes, supra.*

ANALYSIS

The fundamental issue in this appeal is whether the evidence offered by the department established that Morrissey refused to provide a sufficient sample of breath. As a general rule, the offer by the department of the sworn report at the hearing establishes the department's prima facie case and the burden shifts to the driver to refute such evidence. *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). The rule presupposes a proper report, that is, a sworn report which comports with statutes and the relevant administrative rules and regulations. If the sworn report is not proper, the department may, nevertheless, establish its case by other means, such as by the testimony of a witness who observed the administration of the breath test. In this case, we conclude that the department carried its burden by means of live testimony.

[7] In its argument to this court, the department places considerable emphasis on the Nebraska Department of Health and Human Services Regulation and Licensure's rules and regulations, 177 Neb. Admin. Code, ch. 1 (1998), which we take judicial notice of. See *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002) (this court will take judicial notice of general rules and regulations established and published by Nebraska state agencies under authority of law). Among the rules and regulations relied upon by the department is 177 Neb. Admin. Code, ch. 1, § 002.01A (1998), which instructs that "[n]o digital result shall be reported on the checklist . . . if the test record card indicates an insufficient sample." The test record card in this case indicates that Morrissey provided an insufficient sample of breath during the chemical test. This insufficient sample produced a digital reading on the test record card of 0.203 grams of alcohol per 210 liters of breath. Yet, despite the clear command of § 002.01A, the analyst who conducted Morrissey's chemical test reported on the checklist that Morrissey's blood alcohol level was 0.203 grams of alcohol per 210 liters of breath.

[8] We deem this violation of § 002.01A to be significant. We have previously held that to be valid, an action of an agency must conform to its rules which are in effect at the time the action is taken. *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998). More importantly, any violation of the rules and regulations governing the administration of chemical tests calls into doubt the reliability of the results of such tests, especially in light of the evidentiary burdens the department is free from.

In *McPherrin v. Conrad, supra*, we held that the department makes a prima facie case for revocation once they establish the officer provided his or her sworn report containing the required recitations. The burden then shifts to the defendant to prove that one or more of the recitations in the sworn report are false. See, also, *Davis v. Wimes*, 263 Neb. 504, 641 N.W.2d 37 (2002); *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997); *McGuire v. Department of Motor Vehicles*, 253 Neb. 92, 568 N.W.2d 471 (1997); § 60-6,205(7). We adopted this rule aware that in some circumstances, the officer may not have personal

knowledge of every fact stated in the sworn report, such as the reliability or validity of the chemical test procedures. Despite this, we held that the recitations in the sworn report will be taken as true until proved false by the defendant.

The rule expressed in *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995), frees the department of independently investigating the circumstances of each arrest. The department is also free from establishing the foundational elements necessary for the admission of a breath test in a driving under the influence prosecution. See, e.g., *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). Thus, *McPherrin* conveys a substantial procedural benefit upon the department in an administrative license revocation proceeding. However, given this benefit, the department is expected to strictly comply with the applicable rules and regulations. Where, as in this case, the department violates one of those rules, we believe that concerns are properly raised about whether other aspects of the chemical testing conformed to the rules and regulations. Therefore, we conclude that when the applicable rules and regulations are not strictly complied with, the department cannot obtain the benefit of a presumption that all facts recited in the sworn report are true.

The sworn report received at Morrissey's license revocation hearing recited, inter alia, that Morrissey refused to submit to a chemical test of his breath, blood, or urine. While we determine that this fact may not be presumed to be true, the question now becomes whether the department offered sufficient evidence of Morrissey's refusal, independent of the sworn report.

At Morrissey's license revocation hearing, Randall testified that he transported Morrissey to police headquarters for chemical testing and was present during Morrissey's chemical test. Randall described the administration of the chemical test as follows:

> Q Did he — did Mr. Morrissey, did he take the mouth piece into his mouth?
>
> A Yes he did. He refused to blow an adequate sample.
>
> Q Did he offer some air into the instrument? I mean —
>
> A Yes, I believe he did some.
>
> Q Did he, at any point, verbally refuse?
>
> A Yes, he did.

> Q What — okay, what happened? Just explain to me what happened.
>
> A For the test, he sat down, Mr. Ingram explained the test, he did put the mouth piece to his mouth, then he got angry. He did — I believe he did blow a small amount at one point, and Mr. Ingram explained he needs to blow long and hard through the tube, and he verbalized that he wasn't going to do it, after a small period of time.
>
> Q And did, at any — after he said he was not going to do it, did he offer any air into the instrument after that point?
>
> A No, he didn't.

Morrissey argues that the district court correctly applied *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996), to the facts of this case to conclude that he submitted to a chemical test of his breath. In *Keys*, a motorist was arrested for driving under the influence of alcohol and was requested to submit to a chemical breath test. During the initial attempt to administer the chemical test, the motorist blew air around the mouthpiece of an Intoxilyzer Model 4011AS. The Intoxilyzer's indicator light did not light up, indicating that no air was entering the machine. The officer administering the test then requested that the motorist again offer a sample of breath into the machine. On this second attempt, the motorist provided a sample of air. The Intoxilyzer registered a digital reading of 0.110 grams of alcohol per 210 liters of breath. However, the sample of breath provided by the motorist was insufficient for the Intoxilyzer to print the result on a test record card. The motorist was cited for refusing to submit to a chemical breath test, and his driver's license was later revoked by the department after an administrative license revocation hearing.

On appeal, we were asked to decide if the motorist had submitted to a chemical breath test as required by Nebraska law under these facts. We noted that "[o]ur [driving under the influence] and administrative license revocation statutes are silent on whether the results of a chemical breath test must be shown on a test record card in order to be legally sufficient, or whether a digital Intoxilyzer reading will suffice." *Id.* at 968, 546 N.W.2d at 822. Because this issue was not addressed by statute

or case law, we looked to the applicable Nebraska Department of Health regulations for guidance. *Id*. After analyzing the applicable rules and regulations at 177 Neb. Admin. Code, ch. 1 (1993), we concluded that

> a motorist who provides a sufficient sample of breath to register a digital reading on an Intoxilyzer, but who does not provide enough breath to cause the machine to print the result on a test record card, has submitted to a breath test as required by Nebraska law in the absence of any statutory or regulatory requirement that the results be printed on a test record card . . . .

Keys v. Department of Motor Vehicles, 249 Neb. at 971, 546 N.W.2d at 824.

The department now argues that *Keys* is no longer controlling in light of revisions to 177 Neb. Admin. Code, ch. 1, promulgated subsequent to, and purportedly in response to, *Keys*. The department asserts that under these rules and regulations, Morrissey's failure to provide a sufficient sample of breath constituted a refusal to submit to a chemical test of his breath.

The Department of Health and Human Services Regulation and Licensure defines refusal as "*the failure to provide a sufficient sample of body fluid to complete a blood, breath, or urine test* or the refusal to submit to a chemical test of blood, breath, or urine." 177 Neb. Admin. Code, ch. 1, § 001.19 (1998). (Emphasis supplied.) Section 002.01A states in part: "[An] insufficient sample does not constitute a valid test." "Valid test" is defined as "an analysis performed according to methods approved by The Department of Health and Human Services Regulation and Licensure and by an individual possessing a valid permit." 177 Neb. Admin. Code, ch. 1, § 001.15 (1998).

[9,10] 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). 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*, 263 Neb. 141, 638 N.W.2d 839 (2002).

The Legislature has conferred power to the Department of Health and Human Services Regulation and Licensure to adopt methods for determining whether chemical tests may be considered valid. Neb. Rev. Stat. § 60-6,201(3) (Reissue 1998). The rules and regulations cited above indicate that a motorist who fails to provide a sufficient sample of breath, regardless of the digital reading produced by that insufficient sample, has refused to submit to a chemical test. Those rules and regulations also indicate that a valid test has not been conducted when an insufficient sample of breath has been provided. In this case, Randall testified that Morrissey offered a "small," but inadequate, sample of breath into the Intoxilyzer. Morrissey was then instructed to repeat the process in order to obtain an adequate sample of breath; however, Morrissey refused, and no adequate sample of breath was ever received from him. Under the above-cited rules and regulations, Morrissey is deemed to have refused to submit to a chemical test. To the extent that it conflicts with these rules and regulations, *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996), is no longer applicable.

CONCLUSION

Where the department fails to strictly comply with 177 Neb. Admin. Code, ch. 1, it cannot obtain the benefit of a presumption that all facts recited in a sworn report are true. Instead, the department must offer sufficient evidence, independent of the sworn report, to establish that a motorist's driver's license should be revoked. In this case, the department offered sufficient evidence, independent of the sworn report, to establish that Morrissey refused to submit to a chemical test of his breath under the Nebraska Department of Health and Human Services Regulation and Licensure's rules and regulations. These rules and regulations, which have the effect of statutory law, indicate that Morrissey's failure to provide a sufficient sample of breath during a chemical test constitutes a failure to submit to a chemical test. These rules and regulations supersede our decision in *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996), and control the disposition of this case. Thus, the district court erred in reversing the department's order

of revocation. We reverse, and remand with directions to vacate the order reinstating Morrissey's driver's license.

REVERSED AND REMANDED WITH DIRECTIONS.

CAROL A. BOWERS, FORMERLY KNOWN AS CAROL A. SCHERBRING, APPELLANT, V. GAIL LENS, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT J. SCHERBRING, DECEASED, APPELLEE.

648 N.W.2d 294

Filed July 26, 2002. No. S-01-447.

1. **Modification of Decree: Alimony: Appeal and Error.** An appellate court entrusts the modification of an alimony award to the discretion of the trial court and reviews the trial court's decision de novo on the record for abuse of discretion.
2. **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.
3. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
4. **Judgments.** A decree or judgment for the payment of money is one which is immediately due and collectible where its nonpayment is a breach of duty by the judgment debtor.
5. **Equity: Judgments: Interest.** A court of equity has discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right.
6. ____: ____: ____. The language of Neb. Rev. Stat. § 45-103.01 (Cum. Supp. 2000) is mandatory, and a court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money.
7. **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.
8. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
9. **Divorce: Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed as modified.

Michael B. Kratville for appellant.

Karen L. Vervaecke, on brief, for appellee.

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

GERRARD, J.

NATURE OF CASE

The appellant, Carol A. Bowers, appeals from the district court's award of alimony for $400 per month for 54 months, pursuant to this court's remand with directions to modify Bowers' award of alimony. See *Bowers v. Scherbring*, 259 Neb. 595, 611 N.W.2d 592 (2000). Bowers argues on appeal that the district court erred in failing to award her a larger amount of alimony for a longer time period, interest on the judgment, and attorney fees.

BACKGROUND

Bowers, formerly known as Carol A. Scherbring, and Robert J. Scherbring were married on May 30, 1969, and divorced pursuant to a dissolution decree entered on June 3, 1996. The decree awarded, inter alia, alimony of $1 per year to each party. Bowers filed a petition for modification on September 24, alleging a material change in circumstances because she unexpectedly lost her job as part of a reduction in force on August 15. Bowers requested an award of alimony on a temporary basis and modification of alimony on a permanent basis.

The district court held a hearing on Bowers' petition to modify. See *Bowers, supra*. Bowers, who had previously worked as a medical technologist for numerous years, had been dismissed from several jobs in her field since the entry of the dissolution decree and had not worked since March 1997. Bowers testified that because of cognitive impairments relating to her short-term memory, she was no longer able to work in the field of medical technology. Bowers presented medical testimony that she had suffered problems with memory retention and concentration since 1994. Dr. Thomas Grandy, a psychologist, testified that Bowers' deficiency in short-term memory prevented her from satisfactorily performing the daily duties required of a laboratory

medical technologist, and he recommended that she undergo vocational rehabilitation. The district court, in a May 15, 1998, order, concluded that there was no material change in circumstances after the entry of the decree and denied Bowers' petition for modification.

Bowers appealed the district court's order. The Nebraska Court of Appeals affirmed in an unpublished opinion, determining that Bowers failed to prove a change of circumstances since the time of the decree, as Bowers had suffered from memory problems since 1994 and had reported difficulties with thinking and remembering in 1995. *Bowers v. Scherbring*, 8 Neb. App. ci (No. A-98-564, June 29, 1999). Thus, the Court of Appeals determined that the record did not support a modification of alimony, and the district court did not abuse its discretion in denying Bowers' application to modify. *Id.*

This court granted Bowers' petition for further review. We determined that although Bowers' neurocognitive problems existed prior to the decree, neither party contemplated the extent to which Bowers' illness would prevent her from working as a medical technologist. *Bowers v. Scherbring*, 259 Neb. 595, 611 N.W.2d 592 (2000). Additionally, we concluded that the Court of Appeals erred in requiring Bowers to present evidence that she was unemployable in any position, rather than just as a medical technologist. Thus, we reversed the judgment of the Court of Appeals and remanded the cause to the district court with directions for further proceedings. *Id.*

On remand, the district court held a hearing to determine the appropriate amount of alimony. Bowers requested an increase in alimony retroactive to April 1997, because she had not worked since March 1997. Bowers had been employed as a medical technologist until March 1997, but her physician advised Bowers at that time to get out of the medical technology field and apply for Social Security disability benefits because of her ongoing cognitive problems. Bowers testified that she received neurocognitive therapy from May 1997 to August or September 1997, but discontinued treatment after her insurance company stopped paying for it.

Bowers entered a master's degree program in community counseling at the University of Nebraska-Omaha in August 1998,

and at the time of the hearing, she expected to finish her degree in May 2001. Bowers testified that she could seek a job in counseling after graduation, but she would not become a licensed mental health practitioner until she passed board examinations and completed 3,000 hours of work in her field.

Because she had not been employed since March or April 1997, Bowers used her savings and Social Security as income, and eventually liquidated assets totaling approximately $9,100 in the form of IRA's and mutual funds. Bowers received $2,631 in Social Security benefits for 1997. Bowers also received $17,000 in loans from her mother and student loans totaling approximately $36,000. For the spring 2001 semester, Bowers received an additional $4,200 in student loans.

The court admitted as an exhibit a list of Bowers' estimated monthly expenses, which included the type of monthly expenses Bowers incurred back to March or April 1997 when she first became unemployed. Bowers' monthly expenses, as estimated, totaled $1,838; she incurred approximately $5,000 in additional expenses since March 1997 for medical insurance, dental expenses, and eye care. Bowers testified that 6 months after her graduation, she will begin making payments of $400 per month on her student loans and will continue such payments for 10 years.

Scherbring indicated his income from the years 1997 to 2000 by submitting tax returns and W-2 forms as exhibits: $43,983.82 in 1997 (W-2 form); $43,048 in 1998; $47,775 in 1999; $50,533.42 in 2000 (W-2 form). Scherbring testified that his average net income was $2,771 per month and that his average monthly expenses were $2,923. Scherbring's cohabitant did not contribute to any of Scherbring's living expenses. Although Scherbring's monthly mortgage payment was approximately $800 to $850 at the time of the dissolution in 1996, that amount had increased to $1,193 because he refinanced his mortgage pursuant to a $22,000 property settlement in the dissolution decree. The district court received as an exhibit Bowers' attorney's affidavit and itemization of hours up to the time of the previous trial in this matter.

In a March 13, 2001 order, the district court awarded Bowers alimony retroactive to April 1, 1997, and ending on September

1, 2001, for a total of 54 payments at the rate of $400 per month, a purported total judgment of $21,200—54 multiplied by $400, however, actually totals $21,600. The district court ordered that Scherbring pay $500 per month starting on April 1, 2001, until the judgment is paid in full. The district court denied Bowers' request for attorney fees. Bowers appealed the judgment of the district court on April 10.

Scherbring died on October 12, 2001. Gail Lens, personal representative of Scherbring's estate, has been substituted as the appellee, and the judgment and instant appeal have been revived.

ASSIGNMENTS OF ERROR

Bowers assigns, restated, that the district court erred in (1) terminating Bowers' alimony in September 2001, (2) allowing Scherbring to pay off the judgments on a monthly basis instead of allowing Bowers to collect the judgment as may be deemed appropriate, (3) not allowing Bowers interest on the judgment, (4) awarding only $400 per month in alimony, and (5) failing to award Bowers attorney fees.

STANDARD OF REVIEW

[1] An appellate court entrusts the modification of an alimony award to the discretion of the trial court and reviews the trial court's decision de novo on the record for abuse of discretion. *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

[2] 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. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002).

ANALYSIS

Time Period of Alimony

Bowers assigns, first, that the district court erred in terminating alimony in September 2001. Due to Scherbring's death on October 12, 2001, we limit our consideration of this assignment of error to whether Bowers should receive 1 additional month of alimony for October 2001.

Bowers claims that because of her employment uncertainties, the district court should not have provided a termination date for

alimony, but instead hold another hearing to gauge Bowers' employment situation after she graduated from school. At the time of the March 2001 hearing, Bowers was scheduled to graduate in May 2001. The court's September 2001 end date of alimony allowed Bowers 4 months beyond graduation in which to secure gainful employment. Bowers testified that she will receive payment for working toward her 3,000-hour requirement for full certification.

[3] In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002). We have reviewed the district court's alimony determination de novo on the record for an abuse of discretion. Given the evidence submitted, it was reasonable for the district court to expect Bowers to begin supporting herself after September 2001; therefore, the court did not abuse its discretion in setting September 2001 as the termination date of Scherbring's alimony payments. Bowers' first assignment of error is without merit.

Paying Off Judgment on Monthly Basis

Next, Bowers argues that the district court erred in ordering Scherbring to pay off the judgment on a monthly basis. In its March 13, 2001, order, the district court awarded Bowers alimony of $400 per month retroactive from April 1997 through March 2001, plus an additional 6 months of alimony through September 2001, for a total of 54 payments. The court stated that the total amount awarded was $21,200 and ordered Scherbring to pay off the judgment in monthly installments of $500 starting April 1, 2001, and continuing until Scherbring paid the judgment in full.

[4] This court has long held that a decree or judgment for the payment of money is one which is immediately due and collectible where its nonpayment is a breach of duty by the judgment debtor. See *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). See, also, *Dryden v. Dryden*, 205 Neb. 666, 289 N.W.2d 525 (1980); *Cumming v. Cumming*, 193 Neb. 601, 228 N.W.2d 296 (1975). Installments of alimony ordinarily become vested as they accrue, and past-due installments become final judgments,

which courts have no authority to cancel or reduce. See, *Wolter v. Wolter*, 183 Neb. 160, 158 N.W.2d 616 (1968); *Sullivan v. Sullivan*, 141 Neb. 779, 4 N.W.2d 919 (1942). Although the instant case involves retroactive alimony rather than past-due alimony installments, the principle remains the same. Alimony payments ordinarily vest as they accrue; thus, we conclude that a judgment for retroactive alimony, i.e., alimony that should have vested and accrued in prior months, is one which is immediately due and collectible by the judgment creditor. This situation is, of course, distinguishable from an order in which a court may allow a contemnor to purge his or her contempt for past-due support on an installment basis. See, e.g., *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997); *Snodgrass v. Snodgrass*, 241 Neb. 43, 486 N.W.2d 215 (1992).

Applying the above principles to the present case, the district court's award of retroactive alimony from April 1997 through March 2001 became vested upon entry of the judgment—because the time for which it was due had passed, it had accrued and was immediately collectible. In addition, the alimony award from April 1, 2001, through September 2001 has also accrued, and it was immediately due and collectible at the time each installment vested on a monthly basis. The alimony awarded to Bowers became a lien on Scherbring's property at the time of the entry of the judgment. See Neb. Rev. Stat. § 42-371 (Cum. Supp. 2000).

We, therefore, conclude that the district court erred in limiting Bowers' ability to collect the alimony judgment from Scherbring to a periodic basis under these circumstances. We review a trial court's modification of an alimony award de novo on the record for abuse of discretion, and we are empowered to enter the order which should have been made as reflected by the record. We determine that the court abused its discretion in ordering Scherbring to pay off the judgment in $500 monthly increments starting on April 1, 2001; the order shall be modified to allow Bowers to collect the entire alimony judgment in such manner as allowed by law.

INTEREST

Bowers claims that the district court erred in failing to award her interest on the judgment retroactive to April 1997. Scherbring

argued that assessing interest back to 1997 would unreasonably penalize Scherbring for failing to comply with an order that, until March 13, 2001, did not exist.

[5,6] A court of equity has discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right. *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). Neb. Rev. Stat. § 45-103.01 (Cum. Supp. 2000) provides that interest shall accrue on decrees and judgments for the payment of money from the date of entry of judgment until the satisfaction of judgment. The language of § 45-103.01 is mandatory, and a court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money. *Gallner v. Gallner*, 257 Neb. 158, 595 N.W.2d 904 (1999); *Welch, supra*. In this case, the district court entered a judgment on March 13, 2001, for the payment of money from Scherbring to Bowers; thus, the district court does not have discretion to withhold interest from its judgment after March 13.

We must, however, consider when interest began accruing on the judgment and what effect that may have on the final satisfaction of the judgment. We determined above that when the district court entered its award of retroactive alimony to Bowers on March 13, 2001, Scherbring owed Bowers alimony from April 1997 to March 2001—$400 per month for 48 months, for a total of $19,200. We conclude that interest on this $19,200 began to accrue when the district court entered its judgment on March 13, because, as stated above, Scherbring owed the full $19,200 when the court entered its order. Prior to March 13, there was simply no judgment from which interest could accrue.

For the 6 months of alimony from April through September 2001, we determine, pursuant to § 45-103.01, that interest on each of those $400 payments began to accrue as each payment became due, as a final judgment, on the first day of each month.

Amount of Alimony

[7] Bowers next assigns that the district court erred in granting her only $400 per month in alimony. Bowers argues that the district court's award is unreasonable and untenable, considering that between 1997 and 2000, Bowers' average monthly income was approximately $3,000 less than Scherbring's average

monthly income. 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).

We determine, after reviewing the record de novo and considering the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 1998), that the district court did not abuse its discretion in awarding Bowers $400 per month alimony for the time period at issue. Bowers' fourth assignment of error is without merit.

Attorney Fees

[8,9] Bowers' final assignment of error alleges that the district court erred in failing to award her attorney fees. In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case. *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996).

Based on our de novo review of the record, and the general equities of the case, we find nothing to indicate an abuse of discretion on the part of the district court in its refusal to award attorney fees. Therefore, the district court did not err in refusing to grant Bowers attorney fees.

CONCLUSION

For the reasons stated above, we conclude that Bowers' assignments of error relating to the term of alimony, amount of alimony, and attorney fees are without merit, and we affirm the district court's order on those matters.

We determine, however, that the district court erred in (1) allowing Scherbring to pay off the $19,200 alimony judgment (i.e., retroactive alimony from April 1997 through March 2001)

and the alimony that accrued at a rate of $400 per month from April through September 2001, on a periodic basis—starting on April 1, 2001, until the judgment is paid in full; (2) failing to order interest, as set forth above, until the judgment is satisfied; and (3) calculating the total sum of the judgment as $21,200 rather than $21,600. We, therefore, modify the order of the district court to reflect (1) that 54 payments of $400 per month totals $21,600 and judgment in the sum of $21,600 shall be entered in favor of Bowers and against the appellee and (2) that judgment interest, pursuant to § 45-103.01, began to accrue on the sum of $19,200 when the district court entered its judgment on March 13, 2001, and on each of the $400 payments when they became due on the first day of each month from April through September 2001.

The judgment of the district court is thus affirmed as modified.

AFFIRMED AS MODIFIED.

STEPHAN, J., concurring.

For the sake of consistency, I note my dissent in the first appeal in this case, *Bowers v. Scherbring*, 259 Neb. 595, 611 N.W.2d 592 (2000), in which I expressed my opinion that the district court did not abuse its discretion in determining that there was no material change in circumstances which would justify modification of the original alimony award. Inasmuch as that view did not prevail and the adequacy of the factual grounds for modification is not before us in this appeal, I fully agree with the reasoning and disposition set forth in the majority opinion.

HENDRY, C.J., joins in this concurrence.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. LYLE J. KOENIG, RESPONDENT.

647 N.W.2d 653

Filed July 26, 2002. No. S-01-634.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

On June 15, 2001, amended formal charges were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, Lyle J. Koenig. Respondent's answer disputed the allegations. A referee was appointed and heard evidence. The referee filed a report on January 31, 2002. With respect to both counts I and II, the referee concluded that respondent's conduct had breached the disciplinary rules of the Code of Professional Responsibility and his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended that respondent be suspended from the practice of law for 90 days. Neither relator nor respondent filed exceptions to the referee's report.

FACTS

The substance of the referee's findings may be summarized as follows:

Respondent was admitted to the practice of law in the State of Nebraska on February 28, 1972. He practiced in Hebron from 1972 to 1994 when he moved to Lincoln.

Count I involves respondent's conduct with respect to the handling of the estate of Alice Nelsen and the sale of an estate asset, real property, to the city of Hebron, while respondent represented the estate and served as Hebron City Attorney. The detailed facts underlying count I as found by the referee are not disputed by the parties and are not repeated here. In sum, the facts show that respondent prepared the documentation to effect the sale of certain real property in which he misrepresented the status of the estate proceedings and the legal status of the real property, in violation of Canon 1, DR 1-102(A)(4); continued the multiple employment by the Nelsen estate and the city of Hebron when it involved different interests, in violation of Canon 5, DR 5-105(B); neglected the probate of the Nelsen estate in various respects, in violation of Canon 6, DR 6-101(A)(3); engaged in conduct that was prejudicial to the administration of justice, in violation of DR 1-102(A)(5) as a result of his continuing in multiple employment; and, accordingly, violated disciplinary rules, constituting a violation of DR 1-102(A)(1).

Count II involves respondent's conduct with respect to his representation of Ted Nelsen in Nelsen's federal lawsuit against Cargill, Inc., in which Nelsen claimed that Cargill, Inc., as lessee of a certain grain elevator owned by Ted Nelsen, had misused the elevator, resulting in damage to Ted Nelsen. The detailed facts underlying count II as found by the referee are not disputed by the parties and are not repeated here. In sum, the facts show that respondent neglected the federal lawsuit by, inter alia, failing to file a status report, resulting in the dismissal without prejudice of the case, in violation of DR 6-101(A)(3); engaged in conduct that was prejudicial to the administration of justice, due to the neglect of the federal lawsuit, in violation of DR 1-102(A)(5); and, accordingly, violated disciplinary rules, constituting a violation of DR 1-102(A)(1).

In his report, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary rules recited above and his oath as an attorney. With respect to the sanction which ought to be imposed for the foregoing violations, and considering the mitigating and aggravating factors the referee found present in the case, the referee recommended that respondent be suspended from the practice of law for 90 days.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion under Neb. Ct. R. of Discipline 10(L) (rev. 2001). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence.

A proceeding to discipline an attorney is a trial de novo on the record. *Apker, supra*. To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id*. Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id*.

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by

clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1), (4), and (5); DR 5-105(B); and DR 6-101(A)(3). We further conclude that respondent has violated the attorney's oath of office. See § 7-104.

We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.' " *Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Apker, supra*; *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Apker, supra*; *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

The evidence in the present case establishes, inter alia, that respondent's conduct with respect to these matters violated several disciplinary rules and his oath of office as an attorney. As mitigating factors, we note his cooperation during the disciplinary proceeding, his continuing commitment to the legal profession and the community, and the lack of evidence of any harm to the clients.

Factors weighing against respondent include his lack of willingness to take responsibility for his conduct, which he characterizes as merely "sloppy practice," and a prior reprimand.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court agrees with the referee's recommendation and finds that respondent should be suspended from the practice of law for 90 days.

CONCLUSION

The motion for judgment on the pleadings is granted. It is the judgment of this court that respondent should be suspended from the practice of law for a period of 90 days, and we therefore order him suspended from the practice of law for a period of 90 days effective immediately, after which period, respondent may apply for readmission to the bar. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. § 7-114 (Reissue 1997) and Neb. Ct. R. of Discipline 23 (rev. 2001).

JUDGMENT OF SUSPENSION.

CONNOLLY, J., not participating.

STATE OF NEBRASKA EX REL. SPECIAL COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. PETER R. BRINKER, RESPONDENT.

648 N.W.2d 302

Filed July 26, 2002. No. S-01-690.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

On June 19, 2001, formal charges were filed by the office of the Special Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, Peter R. Brinker. Amended formal charges were filed on January 8, 2002. Respondent's answer disputed the allegations. A referee was appointed and heard evidence. The referee filed a report on May 10, 2002. With respect to counts I and II of the amended formal charges, the referee concluded that respondent's conduct had breached disciplinary rules of the Code of Professional Responsibility and his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended disbarment. Neither relator nor respondent filed exceptions to the referee's report.

FACTS

The substance of the referee's findings may be summarized as follows:

Respondent was admitted to the practice of law in the State of Nebraska on December 24, 1980. He has practiced in Omaha.

Count I involves respondent's conduct in the handling of a client's settlement proceeds which had been set aside to satisfy a physician's lien, as well as respondent's conduct during the Counsel for Discipline's investigation into a grievance regarding the same funds. The detailed facts underlying count I as found by the referee are not disputed by the parties and are not repeated here. In sum, the facts show that respondent represented a client in a personal injury claim and in the course of such representation, executed a physician's lien with a chiropractor who had treated the client. When the personal injury claim was settled and a portion of the settlement proceeds were set aside to satisfy the lien, respondent deposited the funds into a bank account which was not his attorney trust account and failed and refused to satisfy the lien, despite repeated requests from the chiropractor's office and its bill collection agency. When the chiropractor's office filed a grievance against

respondent with the Counsel for Discipline's office, respondent denied representing the client and denied receipt of the settlement proceeds until he was confronted with information provided by another attorney, whose response detailed respondent's involvement. Respondent also failed to provide an accounting for the funds and failed to file a timely and appropriate response to the grievance. The referee found by clear and convincing evidence that as a result of respondent's conduct, respondent had violated Canon 1, DR 1-102(A)(1) (disciplinary rule violation), DR 1-102(A)(4) (dishonesty or deceit), and DR 1-102(A)(6) (conduct adversely reflecting on fitness to practice law); Canon 6, DR 6-101(A)(3) (neglect); Canon 9, DR 9-102(A) (handling client funds); Neb. Ct. R. of Discipline 9(E) (rev. 2001) (requiring response to grievance); and the attorney's oath of office.

Count II involves respondent's failure to deposit the settlement funds discussed above into an attorney trust account and respondent's failure to file the required affidavit regarding his attorney trust account. The detailed facts underlying count II as found by the referee are not disputed by the parties and are not repeated here. In sum, the facts show that in addition to respondent's failure to deposit the settlement funds into his attorney trust account, during the years 1993 through 1998, respondent did not file with the Nebraska State Bar Association affidavits identifying a trust account or accounts into which he deposited client funds or affidavits stating that he did not expect to receive client funds. The referee found by clear and convincing evidence that as a result of respondent's conduct, respondent had violated Neb. Ct. R. of Trust Accounts and Blanket Bonds 1 (rev. 2001) and 4 (rev. 2002) and the attorney's oath of office.

In his report, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary and trust account rules recited above and his oath of office as an attorney. With respect to the sanction which ought to be imposed for the foregoing violations, and considering the mitigating and aggravating factors the referee found present in the case, the referee recommended that respondent be disbarred from the practice of law.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion for judgment on the pleadings, under Neb. Ct. R. of Discipline 10(L) (rev. 2001). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence.

A proceeding to discipline an attorney is a trial de novo on the record. *Apker, supra*. To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id*. Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id*.

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1), (4), and (6); DR 6-101(A)(3); DR 9-102(A); Neb. Ct. R. of Discipline 9(E); and Neb. Ct. R. of Trust Accounts and Blanket Bonds 1 and 4. We further conclude that respondent has violated the attorney's oath of office. See § 7-104.

We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.' " *State ex rel. NSBA*

v. Frank, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Apker, supra*; *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Apker, supra*; *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

The evidence in the present case establishes, inter alia, that respondent's conduct with respect to these matters violated several disciplinary and trust account rules and his oath of office as an attorney. Factors weighing against respondent include his misrepresentation of the truth during the disciplinary proceeding, his failure to cooperate during the disciplinary proceeding, and his lack of remorse. The referee concluded there were no "mitigating circumstances" and recommended disbarment as a result of respondent's improper handling of client funds, numerous trust account rule violations, and misrepresentations to the Counsel for Discipline. We have previously disbarred an attorney who, like respondent, had violated trust account rules, mishandled client funds, and failed to cooperate with the Counsel for Discipline. *State ex rel. NSBA v. Howze,* 260 Neb. 547, 618 N.W.2d 663 (2000) (noting lack of mitigating circumstances).

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court agrees with the referee's recommendation and finds that respondent should be disbarred from the practice of law in the State of Nebraska.

CONCLUSION

The motion for the judgment on the pleadings is granted. It is the judgment of this court that respondent should be disbarred from the practice of law in the State of Nebraska, and we therefore order respondent disbarred, effective immediately. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. § 7-114 (Reissue 1997) and Neb. Ct. R. of Discipline 23 (rev. 2001).

JUDGMENT OF DISBARMENT.

LYLE D. LARSEN, APPELLEE, V. D B FEEDYARDS, INC., APPELLANT.

648 N.W.2d 306

Filed July 26, 2002. No. S-01-839.

1. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions 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. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Jurisdiction: Appeal and Error.** When an appellate court is without jurisdiction to act, the appeal must be dismissed.
5. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
6. **Workers' Compensation: Appeal and Error.** A workers' compensation case is a special proceeding for appellate purposes.
7. **Workers' Compensation: Claims.** An order of the compensation court which eliminates what would have been a complete defense to an employee's claim affects a substantial right of the employer.
8. **Workers' Compensation.** In keeping with the language of Neb. Rev. Stat. § 48-106(2) (Reissue 1998), excepting "employers" of farm and ranch laborers, it is the nature of the employer's business which determines the exception.

9. ____. One employer may engage in two separate businesses, one subject to the workers' compensation law and one excepted from that law.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Walter E. Zink II and Jenny L. Panko, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Clarence E. Mock and Denise E. Frost, of Johnson & Mock, and Brent M. Bloom for appellee.

Jacqueline M. Tessendorf, of Mattson, Ricketts, Davies, Stewart & Calkins, for amicus curiae Nebraska Cattlemen, Inc.

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

PER CURIAM.

Lyle D. Larsen was employed by D B Feedyards, Inc., on November 13, 1999, when he was injured while roping a steer owned by a customer of D B Feedyards. Larsen filed a petition against D B Feedyards in the Workers' Compensation Court seeking benefits for his injury. D B Feedyards answered by asserting that because it was an employer of farm or ranch laborers, it was excepted from the Nebraska Workers' Compensation Act under Neb. Rev. Stat. § 48-106(2) (Reissue 1998). The trial judge rejected D B Feedyards' defense and determined that Larsen was a covered employee. The review panel of the Nebraska Workers' Compensation Court affirmed. D B Feedyards appeals.

FACTS

This case was tried on stipulated facts. D B Feedyards is a Nebraska corporation with its principal place of business located slightly southeast of Craig, Nebraska. Daryl Bromm and his wife, Shirley Bromm, are the sole shareholders in the corporation. Daryl, Shirley, and their son Rodney Bromm are the only officers of the corporation. D B Feedyards was incorporated in 1973 and has remained incorporated since that time.

D B Feedyards began operation as a feedlot to feed livestock owned by Daryl and Rodney. Approximately 12 to 15 years ago, however, D B Feedyards began feeding cattle owned by other per-

sons or entities. D B Feedyards charges a fixed amount per head, per day for the cattle it feeds owned by others. D B Feedyards averages 5,000 head of cattle on feed. At any given time, one-half to three-fourths of the cattle on the feedlot are owned by persons or entities other than D B Feedyards. Although it does not do any formal advertising, D B Feedyards provides calendars and baseball caps bearing its name to its customers. D B Feedyards occasionally solicits customers to have their cattle fed at its feedlots. D B Feedyards receives separate income for its feeding operation and files a separate corporate income tax return each year. D B Feedyards' gross revenue for the period July 1, 1999, through July 1, 2000, was $5,122,186.

D B Feedyards owns 440 acres of farm ground in its own name, which it farms. The feedlot area, including the offices, scales, and Daryl and Shirley's residence, covers 160 acres. Crops raised on the farm are delivered to the feedlot for use as cattle feed, and manure from the feedlot is spread on the farmland. D B Feedyards owns farm equipment consisting of a combine, two payloaders, and several tractors, as well as two trucks used in its feeding operations.

At all relevant times, D B Feedyards employed three employees, including Larsen. Larsen is a professional roper who was hired to perform general labor, which included sorting and treating sick cattle. On November 13, 1999, Larsen injured his right thumb while roping a steer. The steer was owned by an entity other than D B Feedyards.

On March 8, 2000, Larsen filed a petition in the Workers' Compensation Court seeking benefits for the injury to his right thumb. In its answer, D B Feedyards asserted that Larsen was employed as a farm or ranch laborer under § 48-106(2) and therefore was not a covered employee under the provisions of the Nebraska Workers' Compensation Act. By joint stipulation of the parties, the case was bifurcated so that the trial judge could first determine whether D B Feedyards fit within the exception.

In an order filed January 22, 2001, the trial judge resolved this issue in favor of Larsen, concluding:

> The Court finds that the enterprise [D B Feedyards] was engaged in on November 13, 1999, while [Larsen] was roping a steer and was injured was a commercial business

> separate and distinct from farming and ranching. The sheer size of [D B Feedyards'] operation shows that it is more in the nature of a commercial enterprise rather than on [sic] old-fashioned farm and ranch operation. Employers operating businesses performing commercial services primarily for others, even though the task performed may commonly occur on a farm or a ranch, do not employ "farm or ranch laborers" within the meaning of Nebraska Revised Statute, Section 48-106.

This decision was affirmed without an opinion by a three-judge review panel of the Workers' Compensation Court. D B Feedyards perfected a timely appeal to the Nebraska Court of Appeals and filed a petition to bypass, which we granted.

ASSIGNMENTS OF ERROR

D B Feedyards assigns, restated, that the trial judge's decision as affirmed by the review panel erred as a matter of law in its determination as to Larsen's injury sustained on November 13, 1999, that D B Feedyards was not an excepted employer within the meaning of § 48-106(2) and therefore in its conclusion that Larsen was a covered employee subject to the provisions of the Nebraska Workers' Compensation Act.

STANDARD OF REVIEW

[1] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001); *Thornton v. Grand Island Contract Carriers*, 262 Neb. 740, 634 N.W.2d 794 (2001); *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

ANALYSIS

Jurisdiction.

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000); *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000); *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 612 N.W.2d 913 (2000). 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. *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000); *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999). When an appellate court is without jurisdiction to act, the appeal must be dismissed. *Thompson v. Kiewit Constr. Co., supra.*

Larsen argues that because the trial judge's order merely gave him the opportunity to proceed to the merits of his claim and did not resolve the issue of compensation, the order is not final and may not be appealed. We disagree.

[5-7] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. See, Neb. Rev. Stat. § 25-1902 (Reissue 1995); *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997); *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997); *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997). It is well settled that a workers' compensation case is a "special proceeding" for appellate purposes. See *Thompson v. Kiewit Constr. Co., supra*. The order of the trial judge as affirmed by the review panel eliminated what would have been a complete defense to the claim and thus affected a substantial right of D B Feedyards. See *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). Accordingly, we have jurisdiction of this appeal.

Larsen as Covered Employee.

D B Feedyards appeals the decision of the trial judge as affirmed by the review panel concluding that Larsen was covered under the Nebraska Workers' Compensation Act. D B Feedyards specifically claims that because it was engaged in the business of farming or ranching, it is an excepted employer under § 48-106(2) and that, therefore, its employee Larsen was not covered by the Nebraska Workers' Compensation Act. Larsen argues in response that D B Feedyards was primarily engaged in a commercial

enterprise, that D B Feedyards is not an excepted employer, and that the trial judge correctly concluded that Larsen was an employee covered by the Nebraska Workers' Compensation Act. In view of the statute, the case law, and the facts of this case, we agree with the conclusion of the trial judge as affirmed by the review panel that Larsen was a covered employee.

The Nebraska Workers' Compensation Act applies to employers described in § 48-106(1), but it does not apply to employers identified in § 48-106(2). The statutory language at issue in this case, § 48-106(2), provides in pertinent part, "The following are . . . not within the provisions of the Nebraska Workers' Compensation Act: . . . employers of farm or ranch laborers . . . ." We long ago observed that the agricultural exception statutes in other states generally focus on the characteristics of the laborer who is excluded from workers' compensation coverage, whereas under Nebraska's statutory language, the agricultural exception focuses on the employer of such laborer. In *Keefover v. Vasey*, 112 Neb. 424, 427, 199 N.W. 799, 800 (1924), we specifically stated, "It is worthy of note that in these other states the emphasis seems to be placed upon the exclusion of the laborer, while in this state it rests upon the exclusion of the employer of such labor." We have further noted that the classification of the exception as a function of the employer's status is a legislative prerogative. *Id.* See, also, *Leppert v. Parker*, 218 Neb. 63, 352 N.W.2d 180 (1984); *Otto v. Hahn*, 209 Neb. 114, 306 N.W.2d 587 (1981).

[8] In keeping with the language of § 48-106(2) excepting "employers" of farm and ranch laborers, our recent cases have emphasized that it is the nature of the employer's business which determines the exception. In *Leppert v. Parker*, we said, "It is clear from both the statute and the cases that it is the nature of the employer's business which determines the exemption, and not the work performed by the employee." 218 Neb. at 67, 352 N.W.2d at 182. See, also, *Bartunek v. Becker*, 222 Neb. 126, 382 N.W.2d 300 (1986). In *Leppert v. Parker*, we observed that although the emphasis is on the employer's operation in a § 48-106(2) analysis, the cases arising under § 48-106(2) nevertheless show that a case-by-case factual examination is required. In this regard, although the task the employee is performing at the time of the injury is relevant to the inquiry, see *Leppert v.*

Parker, supra, and *Campos v. Tomoi*, 175 Neb. 555, 122 N.W.2d 473 (1963), the fact that the injury occurred on the farm or ranch and the fact that the work itself could be characterized as farm or ranch labor does not control whether the employee is covered. *Campos v. Tomoi, supra*.

The farming exception under discussion was enacted in 1913, and the exception for ranching was added in 1945. 1913 Neb. Laws, ch. 198, § 6(2), p. 580; 1945 Neb. Laws, ch. 111, § 1, p. 356. More than 30 years ago, we acknowledged that

> old-fashioned farming and ranching contemplated by the Legislature at the time of the adoption of the [Nebraska Workers'] Compensation Act has been extensively affected by mechanization, specialization, and scientific advancement. The growth in the size of farms and the constantly accelerating changes in methods and machines, together with spiraling costs, have spawned a multitude of commercial businesses which provide equipment and specialized services for farmers and ranchers. These developments have, in some cases, created a type and kind of regular commercial business, separate and distinct from farming and ranching.

Hawthorne v. Hawthorne, 184 Neb. 372, 378, 167 N.W.2d 564, 567 (1969). It has been stated that "[s]ometimes intensive specialization, if carried too far, is enough to transform agriculture to commerce." 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 75.03[5] at 75-13 (2002).

[9] Given the realities of modern farming and ranching, we have observed that under the Nebraska Workers' Compensation Act, an employer may be engaged in several businesses. *Bartunek v. Becker, supra*. In *Brown v. Leavitt Lane Farm*, 215 Neb. 522, 527, 340 N.W.2d 4, 8 (1983), we held that "one employer may engage in two separate businesses, one subject to the workmen's compensation law and one exempt from that law." We also stated:

> "[T]he fact that an employer is engaged in farming does not remove from the coverage of the statute another business or occupation carried on by the employer which is otherwise within the coverage of the [workers' compensation] statute, nor does it subject the farming business to the statute."

Id. at 527, 340 N.W.2d at 8 (quoting 99 C.J.S. *Workmen's Compensation* § 33 (1958)).

D B Feedyards emphasizes on appeal that its operations are in the nature of farming and ranching and that the trial judge's determination that D B Feedyards was not excepted from the Nebraska Workers' Compensation Act for purposes of this case is in error. We do not agree. In the instant case, the parties stipulated to the facts, and the determinations made by the trial judge derived from the stipulation are supported by the record and the law.

The trial judge focused on the activities of the employer, as he should under § 48-106(2). See, *Bartunek v. Becker*, 222 Neb. 126, 382 N.W.2d 300 (1986); *Leppert v. Parker*, 218 Neb. 63, 352 N.W.2d 180 (1984). The record shows that D B Feedyards offers a specialized service to its customers, the feeding of cattle. See *Hawthorne v. Hawthorne, supra*. The trial judge found that in connection with Larsen's claim, D B Feedyards was set up as a commercial business on November 13, 1999, when and where Larsen was injured. The facts that D B Feedyards averages 5,000 head of cattle on feed, one-half to three-fourths of which are owned by customers of D B Feedyards, and that Larsen was injured while roping a steer which was owned by a customer of D B Feedyards support the trial judge's decision that Larsen was performing tasks for a commercial employer and thus not a farm or ranch laborer within the meaning of the workers' compensation law.

D B Feedyards appears to urge on appeal that because D B Feedyards is engaged in farming and ranching for its own account, it cannot also be a commercial enterprise for purposes of § 48-106(2). Contrary to D B Feedyards' assertion on appeal, the trial judge's determinations do not preclude the existence of two businesses being operated by D B Feedyards such that one is commercial and subject to the workers' compensation laws and the other is excepted from the workers' compensation laws under § 48-106(2). See, *Bartunek v. Becker, supra*; *Brown v. Leavitt Lane Farm, supra*. The tasks Larsen was performing when and where he was injured in this case were for the benefit of a separate commercial business conducted by D B Feedyards, which enterprise consists of feeding the cattle of the customers

of D B Feedyards. The trial judge's conclusion, as affirmed by the review panel, that D B Feedyards was not an employer excepted from the compensation laws under § 48-106(2) in this case was correct. The judgment is affirmed.

CONCLUSION

For the reasons discussed above, we conclude that the trial judge as affirmed by the review panel did not err in determining that D B Feedyards was not excepted from the Nebraska Workers' Compensation Act as an employer of farm or ranch laborers in this case. The judgment is affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

STEPHAN, J., dissenting.

I agree with the majority that under Nebraska law, it is the nature of the employer's business, and not the work performed by the employee, that determines whether the employer is exempt from the workers' compensation laws. See *Leppert v. Parker*, 218 Neb. 63, 352 N.W.2d 180 (1984). However, I cannot accept the majority's premise that D B Feedyards was engaged in two separate and distinct enterprises, one agricultural and one commercial, differentiated solely by the ownership of the cattle on feed. Nor can I accept the majority's decision to determine the applicability of the farm or ranch laborer exemption based upon the narrow and irrelevant question of whose steer was being roped at the time of the injury. In my view, all of the employer's operations fell within the farm or ranch laborer exemption codified at Neb. Rev. Stat. § 48-106(2) (Reissue 1998).

The facts in this case bear no semblance to those in prior cases in which we have recognized that an employer may be engaged in two separate enterprises, one agricultural and one commercial. For example, in *Bartunek v. Becker*, 222 Neb. 126, 129, 382 N.W.2d 300, 301 (1986), cited by the majority, we held that an employer who operated an automobile body shop on a farm which he and his father owned was engaged in "two businesses, one a farming operation which is exempt under [§ 48-106(2)] and the other an auto body shop which is not exempt." See, also, *Brown v. Leavitt Lane Farm*, 215 Neb. 522, 340 N.W.2d 4 (1983) (holding employer's general farming activities on his own land separate

and distinct business from his unrelated sale of nutrition products); *Campos v. Tomoi*, 175 Neb. 555, 122 N.W.2d 473 (1963) (indicating employers' general farming activities on own land separate and distinct business from employers' custom hay grinding services provided offsite). In all of our prior cases involving the operation of two businesses, there was a discernible separation of the two enterprises. Conversely, however, the record in this case demonstrates that D B Feedyards conducts a single, integrated operation in which its land is cultivated for the production of agricultural crops which are then used on D B Feedyards' premises to feed animals for livestock production, including animals owned by D B Feedyards and animals owned by others. Under these facts, it is impossible to draw a meaningful distinction between operations performed by D B Feedyards that are related exclusively to its own farming activities, and thus within the exemption, and those operations performed primarily for the benefit of a third-party consumer. To conclude that D B Feedyards is engaged in two separate businesses on these facts, one subject to the exemption and one not, "would tax our powers of distinction to the point of confusion." *Keefover v. Vasey*, 112 Neb. 424, 432, 199 N.W. 799, 802 (1924) (concluding question of whether grain thresher was farm laborer could not rest solely upon factual determination of whose grain was being threshed at time of injury). As briefed and argued by the parties, the precise issue presented is whether D B Feedyards was engaged in one business of farming or ranching, or in one commercial enterprise distinct from farming and ranching.

Addressing the issue as presented in this manner, I would conclude that D B Feedyards was engaged in one business of farming and ranching. This is not a case where intensive specialization has transformed an agricultural endeavor into a commercial venture. Our prior case law on this subject is factually distinguishable. In *Hawthorne v. Hawthorne*, 184 Neb. 372, 167 N.W.2d 564 (1969), we held that an employer engaged solely in custom combining for the public as a regular commercial business was not an employer of farm or ranch laborers within the meaning of § 48-106(2). Similarly, in *Campos v. Tomoi, supra*, we held that farmers who formed a partnership to perform custom hay grinding for cattle feeders did not fall within the statutory exemption when the

grinding services were unrelated to the farmers' day-to-day farming activities and were performed offsite. In both *Campos* and *Hawthorne*, the custom services were conducted away from the employers' premises and involved a single and independent aspect of crop and livestock production, i.e., harvesting grain in *Hawthorne* and grinding cattle feed in *Campos*. As noted, in the present case the record discloses a single integrated operation in which land was cultivated for the production of agricultural crops which were then used on D B Feedyards' premises to feed animals for livestock production, including animals owned by D B Feedyards and animals owned by others which D B Feedyards kept fed on its land. The same land, equipment, and labor are used regardless of who owns the cattle, and D B Feedyards' activities are not limited solely to the specialized feeding of animals owned by third parties. The essential nature and character of the enterprise operated by D B Feedyards is the same regardless of whether revenue is generated by the sale of its own fattened cattle or from the fees it receives for feeding cattle owned by others. Thus, D B Feedyards' entire operation constituted farming and ranching, albeit on a scale which was probably not envisioned by the Legislature when it enacted the farm laborer exemption in 1913 and added the ranch laborer exemption in 1945.

Based on the above, I would conclude that D B Feedyards was engaged in the business of farming and ranching and that it hired Larsen to perform tasks generally associated with that enterprise. Accordingly, it was an employer of farm or ranch laborers within the meaning of § 48-106(2) and not subject to the Nebraska Workers' Compensation Act.

Moreover, in my opinion, the fact-intensive nature of the present inquiry into the applicability of the farm or ranch laborer exemption benefits neither employers nor employees, and our prior case law on the subject has done little to clarify the parameters of the exemption. Although none of our prior case law has recognized it, since Initiative Measure No. 300 was adopted by the people of Nebraska in 1982, the Nebraska Constitution has defined "farming or ranching" in the context of what constitutes a family farm to mean "(i) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or

(ii) the ownership, keeping or feeding of animals for the production of livestock or livestock products." Neb. Const. art. XII, § 8. This constitutional definition provides a plain and workable test to apply to the language of the exemption in § 48-106(2). Based upon such test, I would hold as a matter of law that D B Feedyards' entire operation constituted farming or ranching and that it was therefore an exempt employer of farm or ranch laborers within the meaning of § 48-106(2).

For these reasons, I respectfully dissent.

GERRARD, J., joins in this dissent.

GERRARD, J., dissenting.

Under the lamentable state of our farm and ranch workers' compensation law, it appears that employer liability turns not on whose ox was gored, but on whose steer was roped. That such an otherwise insignificant distinction should be meaningful indicates to me that Neb. Rev. Stat. § 48-106(2) (Reissue 1998) needs serious reconsideration at the Legislature's earliest convenience.

Justice Stephan's analysis is on point, and given the language of § 48-106(2) and our prior jurisprudence, the facts of this case lead to the conclusion that D B Feedyards was an exempt employer of farm or ranch laborers. Thus, I join his dissent. The problem, of course, is that the lack of workers' compensation coverage for such an obviously hazardous activity goes against every intuitive bone in a judge's body—which is why I write separately.

Section 48-106(2) provides, in relevant part, that "employers of farm or ranch laborers" are "declared not to be hazardous occupations and not within the provisions of the Nebraska Workers' Compensation Act." Such a declaration is ludicrous given the nature of farm and ranch work. Nearly 20 years ago, we observed that

> the statement contained in § 48-106(2) to the effect that farm or ranch labor is not a hazardous occupation is patently silly, and while we would agree that subjecting someone to the likelihood of being kicked in the knee by a horse or being pulled into a combine is as hazardous as any office work covered by the act, nevertheless, the Legislature, which has absolute control in this matter, has made such a classification, and absent a determination by

> this court that the classification violates the Nebraska Constitution, we are compelled to apply the law as written.

Leppert v. Parker, 218 Neb. 63, 68, 352 N.W.2d 180, 183 (1984). That straightforward observation has drawn no amendment to the statute.

Equally troubling, the Legislature has not defined "employers of farm or ranch laborers" or, alternatively, attempted to distinguish laborers on the basis of the work they do, rather than the nature of their employers. Nonetheless, despite the defects of § 48-106(2), courts must still decide the cases presented, and in the absence of definitive guidance from the Legislature, we have resorted to "an examination on a case-by-case basis of the facts in each particular instance." *Leppert*, 218 Neb. at 67, 352 N.W.2d at 182. While it is a truism that each case is decided on its own unique facts, our piecemeal consideration of these cases has degenerated, as the present case demonstrates. Workers' compensation liability cannot possibly depend on whose steer the claimant was roping, yet that is precisely the circumstance that confronts the court today.

"A fundamental element of Anglo-American jurisprudence is the principle that the law should be stable, fostering both equality and predictability of treatment." *Metro Renovation v. State*, 249 Neb. 337, 349, 543 N.W.2d 715, 724 (1996) (Connolly, J., concurring in result). Our workers' compensation law, with respect to farm and ranch laborers, fosters neither; workers engaged in identical labors can be treated differently based on the business structure chosen by their employers, and workers' treatment turns on distinctions that are too subtle to be understood or anticipated.

In short, the Legislature needs to speak on this matter and provide statutory definitions that are clear and meaningful. The Legislature is the appropriate forum for the collective resolution of questions of public policy. See *Parnell v. Good Samaritan Health Sys.*, 260 Neb. 877, 620 N.W.2d 354 (2000). Should the Legislature determine, out of articulated and legitimate policy concerns, that some, or all, farm and ranch laborers should be exempt from the Nebraska Workers' Compensation Act, then the Legislature should so provide in a manner that clearly delineates the scope of the act. Employers and laborers may then govern

their affairs accordingly. Should the Legislature continue to ignore the matter, this court will have little alternative but to continue its semantic distinctions between "farm or ranch" cattle and "commercial" cattle, and similar oddities. In that case, to the purchasers of farm and ranch liability or workers' compensation insurance coverage—caveat emptor.

STEPHAN, J., joins in this dissent.

STATE OF NEBRASKA EX REL. SPECIAL COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ROBERT J. SIVICK, RESPONDENT.

648 N.W.2d 315

Filed July 26, 2002. No. S-01-901.

Original action. Judgment of pubic reprimand.

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

PER CURIAM.

INTRODUCTION

On August 9, 2001, formal charges were filed by the Special Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, Robert J. Sivick. Respondent disputed certain allegations. A referee was appointed and heard evidence. The referee filed a report on February 12, 2002. With respect to counts I, II, and III, the referee concluded that respondent's conduct breached disciplinary rules of the Code of Professional Responsibility and his oath as an attorney, see Neb. Rev. Stat. § 7-104 (Reissue 1997), and recommended specified discipline. Neither relator nor respondent filed exceptions to the referee's report.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 13, 1988. He has practiced law primarily in Douglas County.

The substance of the referee's findings may be summarized as follows:

Count I generally involves an incident which occurred on March 2, 2000, in which respondent engaged in an angry personal conversation in open court with a judge of the county court for Douglas County following the judge's public criticism of a fellow judge, the latter of whom is respondent's spouse. It is a matter of public record that the Nebraska Commission on Judicial Qualifications found that the judge's "insistence on making a heated private conversation public, and participation in an angry dispute in open court" was inappropriate. The judge was reprimanded. See *In re Complaint Against Prochaska*, No. S-35-010005 (Neb. Comm. on Jud. Qual. May 17, 2002). Among the comments included in this exchange, respondent questioned the impartiality of the judge's decision in a pending case. The referee found by clear and convincing evidence that respondent had admitted that he yelled at the judge, that he interrupted the judge, and that he was rude. The referee also found by clear and convincing evidence that respondent's "tirade" adversely reflects on respondent's fitness to practice law in violation of Canon 1, DR 1-102(A)(6); that by virtue of his remarks regarding the pending case, he engaged in undignified or discourteous conduct which is degrading to the tribunal while appearing in his professional capacity, in violation of Canon 7, DR 7-106(C)(6); and that the foregoing violations of disciplinary rules violated DR 1-102(A)(1).

Count II generally involves a letter respondent wrote to Chief Justice John V. Hendry on July 27, 2000, regarding both the March 2 incident referred to in count I and a subsequent appearance by respondent in front of the same judge on June 15. The referee found by clear and convincing evidence that the letter contained numerous false statements regarding various matters, including the judge's handling of the pending case referred to in count I without respondent's investigating the accuracy of his accusatory statements, and thus, that respondent had made false accusations against a judge, in violation of Canon 8, DR 8-102(B). The referee also found by clear and convincing evidence that respondent had engaged in conduct that adversely reflected on his fitness to practice law, in violation of DR 1-102(A)(6); engaged in conduct that was prejudicial to the administration of justice, in violation of DR 1-102(A)(5);

knowingly made false statements of law or fact in representation of a client, in violation of Canon 7, DR 7-102(A)(5); and violated DR 1-102(A)(1) through the foregoing violations of disciplinary rules.

Count III generally involves the course of this disciplinary proceeding. A letter of complaint was received by the office of the Counsel for Discipline on August 23, 2000, regarding respondent's conduct on March 2 and June 15 before the judge referred to in count I. The referee found by clear and convincing evidence that respondent failed to substantively respond to the office of the Counsel for Discipline's and the special counsel's inquiries regarding the matters raised in the letter of complaint without excuse and that such failures were prejudicial to the administration of justice, in violation of DR 1-102(A)(5), and that respondent violated a disciplinary rule, constituting a violation of DR 1-102(A)(1). The referee also found by clear and convincing evidence that respondent violated his oath of office as an attorney. See § 7-104.

As summarized above, in his report, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary rules recited above and his oath as an attorney. With respect to the discipline which ought to be imposed for the foregoing violations, and considering the mitigating and aggravating factors the referee found present in the case, the referee recommended respondent receive a public reprimand and probation for a period no less than 1 year.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion under Neb. Ct. R. of Discipline 10(L) (rev. 2001). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence.

A proceeding to discipline an attorney is a trial de novo on the record. *Apker, supra*. To sustain a charge in a disciplinary

proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id.*

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1), (5), and (6); DR 7-102(A)(5); DR 7-106(C)(6); and DR 8-102(B). We further conclude that respondent has violated the attorney's oath of office. See § 7-104.

We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.' " *State ex rel. NSBA v. Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness

to continue in the practice of law. *Apker, supra*; *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Apker, supra*; *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

The evidence in the present case established the misconduct charged. As mitigating factors, we note that respondent has not received prior discipline, there is evidence of his continuing commitment to the legal profession and the community, and respondent indicates regret with respect to the underlying events and the initial manner in which he approached this disciplinary proceeding.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. We find that the three counts in the formal charges stem from the single underlying event of March 2, 2000, during which the judge inappropriately insisted on making a personal and angry dispute with respondent public in open court. Upon due consideration, we find that respondent should be publicly reprimanded. We do not deem a term of probation to be appropriate discipline in this case.

CONCLUSION

The motion for the judgment on the pleadings is granted. It is the judgment of this court that respondent should be reprimanded. Respondent is hereby publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. § 7-114 (Reissue 1997) and Neb. Ct. R. of Discipline 23 (rev. 2001), including the total referee's fee of $5,144.87, previously approved by the court.

JUDGMENT OF PUBLIC REPRIMAND.

HENDRY, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JUDITH A. SPINDLER, RESPONDENT.

648 N.W.2d 319

Filed July 26, 2002. No. S-02-342.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

On March 29, 2002, formal charges were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, Judith A. Spindler. Respondent did not file an answer or any type of responsive pleading to the formal charges. On May 6, relator moved for judgment on the pleadings pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 2001).

FACTS

The substance of the formal charges may be summarized as follows:

Respondent was admitted to the practice of law in the State of Nebraska on September 8, 1982. She has practiced in Douglas County.

The formal charges are divided into six counts. Counts I through V involve respondent's conduct in the handling of five different clients' bankruptcy cases. The detailed facts underlying each of counts I through V are similar, and as respondent has not filed an answer or other responsive pleading disputing the same, are not repeated here. In summary, the formal charges allege that during the period from May to August 2000, respondent was contacted by five different clients, couples or individuals, to represent them in the filing of bankruptcy proceedings. Respondent met with each of the clients, was paid all or a portion of the agreed-upon attorney fee by the clients, promised to take certain action on behalf of the clients in the bankruptcy proceedings, and then failed to perform as promised. The clients each attempted numerous times, unsuccessfully, to contact respondent by telephone and

by mail. Thereafter, each of the clients filed a grievance with the Counsel for Discipline's office regarding respondent's conduct. Despite the filing of the grievances, respondent failed to refund all or even a portion of the fees advanced by the clients.

Based upon this conduct, the formal charges allege respondent had violated Canon 1, DR 1-102(A)(1) (disciplinary rule violation); Canon 2, DR 2-106(A) (excessive fee), DR 2-110(A)(2) (withdrawal from employment), and DR 2-110(A)(3) (refund of fees); Canon 6, DR 6-101(A)(3) (neglect); Canon 7, DR 7-101(A)(2) (failure to perform contract); and the attorney's oath of office.

Count VI involves respondent's failure to respond to written inquiries from the Counsel for Discipline's office regarding the grievances filed against respondent. Again, the detailed facts underlying count VI are not repeated here, as respondent has not filed an answer or other responsive pleading disputing the same. In summary, the formal charges allege that for each of the five grievances, respondent was sent a letter by the Counsel for Discipline's office, requesting an "appropriate written response within 15 working days." For each of the five grievances, respondent failed to submit a written response. Based upon this conduct, the formal charges allege respondent violated DR 1-102(A)(1) and (5) (engaging in conduct prejudicial to administration of justice); DR 6-101(A)(3) (neglect); Neb. Ct. R. of Discipline 3 and 9(E) (rev. 2001) (requiring response to grievance); and the attorney's oath of office.

ANALYSIS

Pursuant to rule 10(I) of the disciplinary rules, "[i]f no answer be filed [in response to formal charges] within the time limited therefor . . . the matter may be disposed of by the Court on its own motion or on a motion for judgment on the pleadings." We find that the requirements of rule 10(I) have been satisfied and see no reason why a judgment on the pleadings should not be granted. Based on the foregoing, this court finds by clear and convincing evidence that Spindler violated DR 1-102(A)(1) and (5), DR 2-106(A), DR 2-110(A)(2) and (3), DR 6-101(A)(3), DR 7-101(A)(2), disciplinary rules 3 and 9(E), and the attorney's oath of office. See Neb. Rev. Stat. § 7-104 (Reissue 1997).

We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.' " *Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002); *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Apker, supra*; *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

The evidence in the present case establishes, inter alia, that respondent's conduct with respect to these matters violated several disciplinary rules and the attorney's oath of office. No mitigating factors are apparent from the pleadings in this case.

Factors weighing against respondent include her retention of client funds in the absence of commensurate work and despite the initiation of disciplinary proceedings against her and her failure to respond to inquiries and requests for information from the Counsel for Discipline's office. We have stated that absent mitigating circumstances, the appropriate discipline for an attorney in cases of misappropriation and commingling of client funds is disbarment. *State ex rel. Counsel for Dis. v. Huston,* 262 Neb. 481, 631 N.W.2d 913 (2001). We have also stated that ignoring inquiries from the Counsel for Discipline's office is conduct we view "as a grave matter and as a threat to the credibility of attorney disciplinary proceedings." *Rothery*, 260 Neb. at 767, 619 N.W.2d at 593.

We have considered the formal charges, the allegations of which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court finds that respondent should be disbarred from the practice of law in the State of Nebraska.

CONCLUSION

The motion for the judgment on the pleadings is granted. It is the judgment of this court that respondent should be disbarred from the practice of law in the State of Nebraska, and we therefore order respondent disbarred effective immediately. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. § 7-114 (Reissue 1997) and Neb. Ct. R. of Discipline 23 (rev. 2001).

JUDGMENT OF DISBARMENT.

JONATHAN LUETHKE, APPELLEE, V. RONALD SUHR ET AL., APPELLANTS.

650 N.W.2d 220

Filed August 9, 2002. No. S-00-396.

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. **Attorney and Client: Compromise and Settlement.** The decision to settle a lawsuit belongs to the client; because the client bears the risk when settling or refusing to settle a dispute, it is the client, not the lawyer, who should assess whether the risk is acceptable.
3. ____: ____. The ordinary employment or retainer of a lawyer to represent a client with respect to litigation does not of itself give the lawyer the implied or apparent authority to bind the client by a settlement or compromise of the claim; and, in the absence of express authority, knowledge, or consent, the lawyer cannot do so.
4. ____: ____. A lawyer's execution of a settlement agreement without a client's knowledge or consent constitutes a breach of duty to the client.
5. ____: ____. Although lawyers retain apparent authority to make procedural and tactical decisions through the existence of the attorney-client relationship, a lawyer cannot settle a client's claim without express authority from the client.
6. ____: ____. Where there has been nothing beyond a mere employment or retainer of the lawyer to represent the client in a cause and the lawyer has acquired no other authority to enter into a settlement (such as acquiescence in open court), if the lawyer seeks to enter a settlement, the opposing party should ascertain whether the lawyer has received actual authority from the client to take such action.
7. **Attorney and Client: Compromise and Settlement: Appeal and Error.** Disputes over a lawyer's authority to settle a claim present factual questions for the trial court to decide, and a trial court's factual findings regarding settlement disputes will not be set aside unless such findings are clearly erroneous.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Affirmed, and cause remanded with directions.

Stephanie Frazier Stacy, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellants.

Michael A. Nelsen, of Hillman, Forman, Nelsen, Childers & McCormack, for appellee.

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

GERRARD, J.

NATURE OF CASE

Appellee, Jonathan Luethke, filed a personal injury lawsuit against the appellants, Ronald Suhr, Sandi Suhr, and Marci Kloppel, after an automobile injury accident involving Luethke and Kloppel. While trial was pending, the parties' counsel reached a settlement agreement; the settlement agreement was not reduced to writing, and subsequently, the appellants filed an amended answer and cross-petition to enforce the agreement. The district court bifurcated the proceedings between the settlement agreement enforcement claim and Luethke's personal injury cause of action. In a bench trial of the settlement enforcement claim, Luethke testified over the appellants' evidentiary objections that he did not give his attorney the authority to settle his claim. The district court concluded that because the attorney-client agency relationship regarding settlement agreements does not include apparent authority to settle, the appellants could not enforce the settlement agreement. The appellants appealed the judgment of the district court. The court has yet to try the personal injury claim.

FACTUAL BACKGROUND

On June 27, 1995, Luethke was injured in an automobile accident. Attorney Mary Wickenkamp filed suit on Luethke's behalf on July 14, 1997, alleging in the petition that Kloppel, driving a truck owned by Ronald Suhr and Sandi Suhr, negligently struck the rear of Luethke's vehicle while he waited to make a left-hand turn at the intersection of Nebraska Highway 15 and Waverly Road in Seward County. The appellants retained attorney Alan Plessman to represent them in the suit filed by Luethke.

On July 20, 1998, the day before a scheduled pretrial conference, Plessman faxed the following letter, in pertinent part, to Wickenkamp:

> I hereby offer to pay to you and your clients and any subrogees or lienholders we have notice of, that sum of $16,000.00, in exchange for a complete release of liability for our insureds and Continental Western Insurance Company; and a dismissal with prejudice of the pending suit, with all parties to bear their own costs and fees.

> [The insurance company] gave me that authority to be accepted by you before 5:00 p.m. today. Thereafter it is withdrawn. So, if this is a deal, fax me back a note to that effect.

Later that same day, Wickenkamp responded in a faxed letter, in pertinent part:

> I have not been able to make contact with my client by 5:00 to get positive authority to accept your offer of $16,000. I am willing to recommend your offer to my client, but I need to meet with Jon to discuss it. As we have discussed before, this young man has a developmental disability and I need to make certain his decision in this matter is informed.

That same day, Plessman responded to Wickenkamp and extended the offer until 9 a.m. the following morning.

On July 21, 1998, Wickenkamp accepted Plessman's offer via faxed letter: "My client will accept the offer. . . . Thanks for your cooperation in getting this done. I will assume that we are not meeting today with the Judge [for pretrial conference] and will call his office this morning." The district court judge's docket notes for July 21, 1998, read: " 'Case settled. Paperwork coming.' "

Plessman sent settlement documents to Wickenkamp on July 21, 1998, with a letter stating: "Enclosed are settlement papers, I need back after they're signed, along with directions on how to cut checks for payment of the $16,000.00. Once I know that, I can get the drafts in a day or so." In a letter dated July 29, 1998, Wickenkamp responded:

> Thank you for getting me the settlement documents so promptly. I've sent them on to my client. His uncle wants to review them with me and Jon as well. I'm on my way out of town and have a meeting with them set after I come back. Please understand it is not a problem. The uncle has been involved throughout this and just wants to make sure my client, who is somewhat disabled, understands everything. I do not anticipate any problem with the settlement, its just a matter of logistics. I will be in touch when I return.

The record provides no further correspondence between Plessman and Wickenkamp, and Plessman testified that the next

thing he received was Wickenkamp's motion to withdraw as counsel. Plessman never received executed settlement or dismissal documents.

On September 16, 1998, the district court judge filed a judge's note which asked: " 'Counsel: The paperwork, please?' " Wickenkamp's deposition, read into the record in part and accepted as a whole as exhibit 2, reveals that she withdrew as counsel in October 1998 after having her professional employment terminated by Luethke. On November 3, the district court judge filed another judge's note asking, " 'Mr. Plessman: What has become of the settlement we were told of back in July?' "

The district court granted the appellants leave to file an amended answer and cross-petition, which they subsequently filed, affirmatively stating that the parties had reached a settlement agreement and requesting that the court enforce that agreement. By this time, Luethke had retained his present counsel to replace Wickenkamp. The district court next granted the appellants' request to bifurcate the proceedings between Luethke's personal injury claim and the appellants' cross-petition to enforce the settlement agreement. The appellants hired substitute counsel for the settlement agreement bench trial because Plessman would testify at trial.

The appellants made a motion in limine prior to the start of the settlement enforcement hearing, seeking to prevent Luethke from testifying regarding the settlement agreement pursuant to Neb. Rev. Stat. § 7-107(2) (Reissue 1997). Section 7-107 states:

> 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 . . . .

The district court overruled the appellants' motion in limine.

Plessman testified regarding the correspondence between himself and Wickenkamp about the settlement agreement. The court received and admitted into evidence, without objection, Plessman's and Wickenkamp's correspondence and the settlement documents drafted by Plessman. Because Wickenkamp did not

appear to testify, the parties agreed to deem her unavailable and read parts of her deposition into the record. In her deposition, Wickenkamp verified that Luethke retained her as his attorney in this litigation, that she notified Plessman by letter that "My client will accept the offer," and that she withdrew as counsel in October 1998 after Luethke terminated her employment. Wickenkamp did not testify as to the content of her conversations with Luethke, invoking attorney-client privilege, but stated that she and Luethke had spoken during the timeframe of the letters between herself and Plessman regarding settlement negotiations.

The appellants moved for a directed verdict at the close of their evidence, arguing that the evidence demonstrated that a settlement agreement between the parties was reached and that the appellants were entitled to enforce that agreement. The district court overruled the motion. Over the appellants' objection, the court heard Luethke testify about his interactions with Wickenkamp regarding the settlement agreement. Luethke testified that although Wickenkamp originally anticipated receiving $84,000 or $64,000 for Luethke's case, she urged him to accept a settlement of $16,500 because they were not making headway with the other numbers. Luethke stated that the only time he authorized Wickenkamp to settle the case for him was when she presented him with a $64,000 offer; she, however, urged him to refuse the offer because she felt he could get more. Luethke testified that he never agreed to settle the case for $16,000—not during a meeting alone with Wickenkamp and not during a subsequent meeting at his mother's house with Wickenkamp, his mother, himself, and his uncle Norman Schmitt present.

The court received testimony from Schmitt, also over the appellants' objection, regarding the meeting with Wickenkamp and their settlement agreement discussions. Schmitt testified that at no time during Wickenkamp's representation of Luethke did Schmitt understand her to have the authority to settle Luethke's case for $16,000.

The district court's "Judgment on Defense of Settlement Agreement" concluded:

> Upon consideration, I find in favor of plaintiff [Luethke]. Were we dealing with settlement negotiations between two non-lawyers, with one participant acting as the agent of yet

> another non-lawyer, I would rule there was a binding settlement agreement.
>
> While I fully appreciate Mr. Plessman's good faith belief he had a settlement agreement and also appreciate that I am causing some difficulty in the practice of lawyers concluding they have a settlement before they have obtained their respective clients' express commitments, I believe the law of attorney/client relationships properly does not include apparent authority in counsel to settle claims in the absence of the client's express commitment to the settlement. Lawyer/client relationship law does not allow for operation of the same apparent authority doctrine that it does in matters other than settlements. I wish I could reach the opposite conclusion, but I believe the wiser public policy and the law requires the ruling I make in this particular instance.

The district court supplemented its original order, expressly determining and directing that pursuant to the terms of Neb. Rev. Stat. § 25-705(6) (Supp. 1999), recodified as Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000), there is no just reason for delay and that judgment should be entered as a final judgment on the appellants' claim seeking enforcement of the settlement agreement. See *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

The appellants then filed an appeal of 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

The appellants assign, consolidated and restated, that the district court erred in (1) failing to direct a verdict in the appellants' favor at the close of the appellants' evidence; (2) receiving into evidence, over objection, testimony pertaining to the settlement agreement; (3) misapplying, misinterpreting, and disregarding Nebraska agency law; and (4) concluding that attorneys do not have apparent authority to bind their clients to settlement agreements.

SCOPE 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. *In re Grand Jury of Douglas Cty.*, 263 Neb. 981, 644 N.W.2d 858 (2002).

ANALYSIS

This appeal requires us to consider when, and under what circumstances, a lawyer may bind his or her client to a settlement agreement entered into without express authority from the client. In order to answer this question, we must review a few well-settled principles unique to the practice of law and derived from the nature of the attorney-client relationship.

[2] Nebraska law is clear that the decision to settle a lawsuit belongs to the client; because the client bears the risk when settling or refusing to settle a dispute, it is the client, not the lawyer, who should assess whether the risk is acceptable. *Wood v. McGrath, North*, 256 Neb. 109, 589 N.W.2d 103 (1999). Additionally, the Code of Professional Responsibility, Canon 7, EC 7-7, dictates the boundaries of an attorney's authority to settle claims without the client's express authority as follows:

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his or her own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer. As typical examples in civil cases, it is for the client to decide whether to accept a settlement offer . . . .

We observed and noted these ethical considerations in *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985).

[3,4] Thus, as a general rule, in this state and in a vast majority of other jurisdictions, lawyers may enter settlement agreements only when the client expressly authorizes the lawyer to do so. The ordinary employment or retainer of a lawyer to represent a client with respect to litigation does not of itself give the lawyer the implied or apparent authority to bind the client by a settlement or compromise of the claim; and, in the absence of express authority, knowledge, or consent, the lawyer cannot do so. A lawyer's execution of a settlement agreement without a client's knowledge or consent constitutes a breach of duty to the client; and it may constitute a fraud upon the court. See 7A C.J.S.

Attorney & Client § 214 a. (1980). See, also, e.g., *Malave v. Carney Hosp.*, 170 F.3d 217 (1st Cir. 1999) (construing federal law); *Garabedian v. Allstates Engineering Co.*, 811 F.2d 802 (3d Cir. 1987) (apparently construing Pennsylvania law); *Blanton v. Womancare Inc.*, 38 Cal. 3d 396, 696 P.2d 645, 212 Cal. Rptr. 151 (1985); *Cross v. Dist. Court In & For 1st Jud. Dist.*, 643 P.2d 39 (Colo. 1982); *Dillon v. City of Davenport*, 366 N.W.2d 918 (Iowa 1985); *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996); *Hallock v. State*, 64 N.Y.2d 224, 474 N.E.2d 1178, 485 N.Y.S.2d 510 (1984); *Midwest Federal v. Dickinson Econo-Storage*, 450 N.W.2d 418 (N.D. 1990); *NEET v. Silver Street Partnership*, 148 Vt. 99, 528 A.2d 1117 (1987); *Hays v. Fischer*, 161 Ariz. 159, 777 P.2d 222 (Ariz. App. 1989); *Kazale v. Kar-Lee Flowers*, 185 Ill. App. 3d 224, 541 N.E.2d 219, 133 Ill. Dec. 382 (1989); *Townsend v. Square*, 643 So. 2d 787 (La. App. 1994); *Gojcaj v Moser*, 140 Mich. App. 828, 366 N.W.2d 54 (1985); *Schumann v. Northtown Ins. Agency, Inc.*, 452 N.W.2d 482 (Minn. App. 1990); *Southwestern Bell Yellow Pages v. Dye*, 875 S.W.2d 557 (Mo. App. 1994); *Amatuzzo v. Kozmiuk*, 305 N.J. Super. 469, 703 A.2d 9 (1997); *Royal v. Hartle*, 145 N.C. App. 181, 551 S.E.2d 168 (2001); Annot., 90 A.L.R.4th 326 (1991).

The appellants argue, however, that under Nebraska agency law, Wickenkamp can bind Luethke to a settlement because she acted with apparent authority in her correspondence with Plessman. The appellants cite Nebraska cases where a lawyer acted with apparent authority and, under agency law, bound the client to the lawyer's action. None of these cases, however, involved a lawyer's binding a client to a settlement agreement without that client's express authority. From the nature of the attorney-client relationship itself, a lawyer derives authority to manage the conduct of litigation on behalf of a client, including the authority to make certain procedural or tactical decisions. See, Code of Professional Responsibility, EC 7-7; *Brennan v. School Dist. No. 21*, 235 Neb. 948, 458 N.W.2d 227 (1990). That authority, however, is hardly absolute. Equally rooted in the law is the principle that without a grant of authority from the client, a lawyer cannot compromise or settle a claim (see Code of Professional Responsibility, EC 7-7), and settlements negotiated by lawyers without authority from their clients are generally not binding. A

narrow exception to this rule occurs when a lawyer settles a claim in excess of actual authority, but *in the presence of his or her client*, generally in open court, and the client remains silent regarding the terms of the settlement. See, e.g., *Hallock, supra*. See, also, *Navajo Tribe v. Hanosh Chevrolet-Buick*, 106 N.M. 705, 749 P.2d 90 (1988); *In re Gibson-Terry and Terry*, 325 Ill. App. 3d 317, 758 N.E.2d 459, 259 Ill. Dec. 336 (2001); *Nelson v Consumers Power Co*, 198 Mich. App. 82, 497 N.W.2d 205 (1993). No such circumstance is present in the instant case.

[5,6] We hold, therefore, that although lawyers retain apparent authority to make procedural and tactical decisions through the existence of the attorney-client relationship, a lawyer cannot settle a client's claim without express authority from the client. In other words, where there has been nothing beyond a mere employment or retainer of the lawyer to represent the client in a cause and the lawyer has acquired no other authority to enter into a settlement (such as acquiescence in open court), if the lawyer seeks to enter a settlement, the opposing party should ascertain whether the lawyer has received actual authority from the client to take such action. A party who enters a settlement agreement without verifying the opposing counsel's actual authority to settle does so at his or her peril.

The appellants argue that preventing lawyers from binding clients to settlement agreements without express authority would create problems in agency law and, in general, disrupt the practice of law. We have, however, already determined that lawyers have apparent authority to manage the conduct of litigation on behalf of a client, including the authority to make many procedural or tactical decisions, without express client consent. See *Brennan, supra*. Deciding that lawyers need express authority in the limited situation of *out-of-court* settlements will not, as the appellants argue, eviscerate the apparent authority of attorneys and agency law principles. In fact, several district courts already have rules which specifically require that in order to be recognized or considered by the court, agreements between parties to a suit, other than those made in open court or otherwise recorded by a court reporter, must be reduced to writing and signed by the parties. See, e.g., Rules of Dist. Ct. of First Jud. Dist. 1-2 (rev. 1995); Rules of Dist. Ct. of Second Jud. Dist. 2-3 (rev. 1995);

Rules of Dist. Ct. of Fifth Jud. Dist. 5-3B (rev. 2001); Rules of Dist. Ct. of Seventh Jud. Dist. 7-3 (rev. 1995).

[7] Jurisdictions that require express client authority for a lawyer to settle generally maintain that in the event of a dispute over the lawyer's authority to settle, it is a factual question for the trial court to determine and will not be disturbed absent an abuse of discretion. See *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996). See, also, *Kansas City Laborers Pension F. v. Paramount Indus.*, 829 F.2d 644 (8th Cir. 1987) (concluding that under federal law, district court abused discretion in failing to conduct hearing on whether attorney had actual authority to consent to settlement). We agree that disputes over a lawyer's authority to settle are factual issues to be resolved by the trial court; however, we will not set aside a trial court's factual findings regarding settlement disputes unless such findings are clearly erroneous.

After reviewing the record, we conclude that the district court did not clearly err in determining that Luethke did not grant express authority to Wickenkamp to compromise or settle his personal injury claim for the sum of $16,000. The record, in fact, would support a finding that Luethke did not authorize Wickenkamp to settle his personal injury claim for $16,000.

Having decided the primary issue in this appeal, we conclude that the appellants' remaining assignments of error are without merit. The appellants had argued that the district court erred in receiving evidence, over a § 7-107(2) objection, pertaining to the settlement agreement at issue. We note briefly that § 7-107(2) does not apply to the present case, because a lawyer's "proper duties and powers" do not include settling a lawsuit without a client's express authority. Moreover, Luethke testified regarding interactions and agreements between himself and Wickenkamp, not about the settlement agreement between Wickenkamp and Plessman. Thus, Luethke's testimony and Schmitt's testimony were properly admitted into evidence, and the court did not err in overruling the appellants' § 7-107(2) objection.

CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in determining that Wickenkamp could not enter into an out-of-court settlement agreement, and bind her client to the

agreement, without the express authority of Luethke, her client. The judgment of the district court is, therefore, affirmed, and this cause is remanded to the district court for a trial on the merits of the personal injury cause of action.

AFFIRMED, AND CAUSE REMANDED WITH DIRECTIONS.

McCORMACK, J., not participating.

CAPITOL CITY TELEPHONE, INC., A NEBRASKA CORPORATION, APPELLANT, V. NEBRASKA DEPARTMENT OF REVENUE, AN AGENCY OF THE STATE, AND MARY JANE EGR, TAX COMMISSIONER, APPELLEES.
ALIANT COMMUNICATIONS CO., DOING BUSINESS AS ALLTEL, A DELAWARE CORPORATION, AND ALIANT SYSTEMS, INC., DOING BUSINESS AS ALLTEL, A NEBRASKA CORPORATION, APPELLEES AND CROSS-APPELLANTS, V. NEBRASKA DEPARTMENT OF REVENUE, AN AGENCY OF THE STATE OF NEBRASKA, AND MARY JANE EGR, TAX COMMISSIONER, APPELLANTS AND CROSS-APPELLEES.

650 N.W.2d 467

Filed August 9, 2002. Nos. S-00-879, S-01-558.

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.** An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
4. **Administrative Law: Statutes: Appeal and Error.** To the extent the interpretation of statutes and regulations is 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, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent.

5. **Courts: Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
6. **Administrative Law.** Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law.
7. **Administrative Law: Statutes: Legislature.** Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction. This is particularly so when the Legislature has failed to take any action to change such an interpretation.
8. **Administrative Law: Statutes.** An administrative agency cannot use its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering.
9. **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. 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.
10. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
11. **Appeal and Error.** In appellate proceedings, the examination by the appellate court is confined to questions which have been determined by the trial court.
12. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
13. **Equity: Estoppel.** Six elements must be satisfied for the doctrine of equitable estoppel to apply: (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 will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.

Appeals from the District Court for Lancaster County: STEVEN D. BURNS and EARL J. WITTHOFF, Judges. Judgment in No. S-00-879 affirmed. Judgment in No. S-01-558 affirmed in part and in part reversed, and cause remanded for further proceedings.

Michael L. Schleich, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellant Capitol City Telephone, Inc., in No. S-00-879.

Don Stenberg, Attorney General, and L. Jay Bartel for appellees Nebraska Department of Revenue and Mary Jane Egr in No. S-00-879.

Don Stenberg, Attorney General, and L. Jay Bartel for appellants Nebraska Department of Revenue and Mary Jane Egr in No. S-01-558.

Paul M Schudel and Shannon L. Doering, of Woods & Aitken, L.L.P., for appellees Aliant Communications Co. and Aliant Systems, Inc., in No. S-01-558.

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

MCCORMACK, J.

NATURE OF CASE

These consolidated cases involve appeals from the Nebraska Department of Revenue (the Department). Capitol City Telephone, Inc. (Capitol); Aliant Communications Co. (Aliant); and Aliant Systems, Inc. (Systems), were each audited and issued deficiency assessments by the Department.

ALIANT AND SYSTEMS PROCEDURE

Aliant filed a petition for redetermination and paid the alleged deficiency. Systems paid the alleged deficiency and filed a claim of overpayment of sales and use tax. The cases of Aliant and Systems were consolidated. A hearing on that consolidated case was held before a hearing officer of the State Tax Commissioner (the Commissioner). The issues in the district court, according to Aliant's brief, were as follows: (1) whether gross receipts from charges by Aliant and Systems associated with installations, moves, additions, upgrades, or changes of inside wire, station connection, and terminal connections, performed within the premises of businesses or residences at locations commonly referred to as a "customer side" of the "demarcation point" (D mark), are subject to Nebraska sales tax pursuant to Neb. Rev. Stat. §§ 77-2703(1) and 77-2702.07(2) (Cum. Supp. 2000); (2) whether imposition of sales tax on charges by Aliant and Systems associated with installations, moves, additions, upgrades or

changes of inside wire, station connections, and terminal connections, when sales taxes assertedly not imposed on similar telephone equipment installed by others, constitutes an unreasonable classification in violation of the equal protection clause; and (3) whether the doctrine of equitable estoppel should be applied.

The hearing officer sustained the deficiency determination issued to Aliant and denied Systems' claim for overpayment of sales and use tax. Aliant and Systems then appealed to the district court for Lancaster County which set aside the orders of the Department and the Commissioner. The trial court found that Aliant and Systems are not subject to sales tax, interest, or penalties relating to the gross receipts from the installation and labor charges on the customer side of the D mark, but found that the elements of equitable estoppel had not been proved. The trial court did not address the second issue, the equal protection claim. From that, the Department appeals to this court.

Capitol Procedure

Capitol, after being issued a deficiency assessment by the Department, filed a petition for redetermination, and a hearing was held before a hearing officer of the Commissioner. The issue was whether the portion of the Department's assessment of sales tax on Capitol's gross receipts relating to trip and labor charges, installation charges, and programming charges for installing, connecting, and servicing new telephone systems and related equipment, and for moving, changing, and upgrading existing telephone equipment and features, was properly subject to sales tax in Nebraska. It should be noted that all of Capitol's charges were on the customer side of the D mark. The deficiency assessment was upheld. Capitol appealed to the district court for Lancaster County which affirmed the decision. The district court found that under § 77-2702.07(2), gross receipts shall also mean gross income received from the provision, installation, construction, servicing, or removal of property used in connection with the furnishing, installing, or connecting of telephone communication service. Because of the substantially similar questions involved in these cases, they have been consolidated for this court's review and determination.

BACKGROUND

Legal Background

On March 1, 1983, the Nebraska Public Service Commission issued an order directing that telephone customers would be responsible for the installation, repair, and maintenance of new inside station wiring and for the repair and maintenance of existing station wiring. Telephone customers were also allowed to purchase their own terminal equipment from sources other than the service provider.

The telephone company was to continue to own its facilities up to the D mark. The D mark is the point at which the facilities that are owned and maintained by the telephone company are connected to the inside station wiring owned by and dedicated to an individual customer's use. Commencing June 1, 1983, ownership of inside wire, station connections, and terminal equipment within the premises of businesses and residences on the customer's side of the D mark was transferred to the customers.

Prior to 1986, separately stated charges for labor and services rendered in installing or connecting tangible personal property were excluded from the definition of gross receipts and, therefore, were not subject to taxation. In 1986, the Nebraska Legislature extended the sales and use tax to the gross receipts of any person involved in connecting and installing telephone, telegraph, gas, electricity, sewer, water, and community antenna service. 1986 Neb. Laws, L.B. 1027. The following year, the Legislature removed the sales and use tax on the gross receipts of any person involved in installing and connecting sewer, water, gas, and electrical service. 1987 Neb. Laws, L.B. 523. The sales and use tax on the gross receipts of telephone, telegraph, and community antenna television service was retained.

Section 77-2703(1), which amendments have not substantively changed the applicable law in effect during Capitol's, Aliant's, and Systems' audit periods beginning in 1993, provides in relevant part:

> There is hereby imposed a tax at the rate provided in section 77-2701.02 upon the gross receipts from all sales of tangible personal property sold at retail in this state, the gross receipts of every person engaged as a public utility,

> as a community antenna television service operator or any person involved in the connecting and installing of the services defined in subdivision (2)(a), (b), or (d) of section 77-2702.07 . . . .

The current version of § 77-2702.07(2), which amendments also have not substantively changed the applicable law in effect during the audit periods beginning in 1993, defines "gross receipts" to include the following:

> Gross receipts of every person engaged as a public utility specified in this subsection or as a community antenna television service operator or any person involved in connecting and installing services defined in subdivision (2)(a), (b), or (d) of this section shall mean:
>
> (a) In the furnishing of telephone communication service, the gross income received from furnishing local exchange telephone service and intrastate message toll telephone service. Gross receipts shall not mean (i) the gross income, including division of revenue, settlements, or carrier access charges received on or after January 1, 1984, from the sale of a telephone communication service to a communication service provider for purposes of furnishing telephone communication service or (ii) the gross income attributable to services rendered using a prepaid telephone calling arrangement. For purposes of this subdivision, a prepaid telephone calling arrangement shall mean the right to exclusively purchase telecommunications services that are paid for in advance that enables the origination of calls using an access number or authorization code, whether manually or electronically dialed;
>
> (b) In the furnishing of telegraph service, the gross income received from the furnishing of intrastate telegraph services;
>
> . . . .
>
> (d) . . . .
>
> Gross receipts shall also mean gross income received from the provision, installation, construction, servicing, or removal of property used in conjunction with the furnishing, installing, or connecting of any public utility services specified in subdivision (2)(a) or (b) of this section or com-

> munity antenna television service specified in subdivision (2)(d) of this section. Gross receipts shall not mean gross income received from telephone directory advertising.

On September 22, 1986, Roger W. Hirsch, then the deputy Tax Commissioner, wrote a "Dear Telephone Company" letter. The letter stated that telephone companies would be taxed only on installation charges relating to the assembly and placement of components necessary to effect delivery of service from the company's general delivery system up to, but not beyond, the point where the service entered a customer's premises. The Commission has changed its position since this letter was sent, but the record does not reveal any specific documentation regarding this change.

In 1993, the Department's regulation regarding telephone and telegraph communication services, 316 Neb. Admin. Code, ch. 1, § 065.05 (1994), was formally amended in contravention of the Hirsch letter, and was enacted on May 14, 1994. That regulation provides: "Charges made by a telephone company to the customer for installations, service connections, move and change charges, service upgrades, optional features like call waiting or voice mail, and construction costs constitute gross receipts for telephone service and are taxable."

Capitol, Aliant, and Systems maintain that the sales tax is not applicable to the services they provide. They claim that the above-cited laws are limited only to those installations and services performed in the context of delivering a utility service, which is not the context of their installations and services at issue. The particular procedural background of each case is presented below.

CAPITOL

Capitol is a Nebraska corporation with its principal place of business in Nebraska. It purchases and services premanufactured telephone communications systems and equipment and resells the telephone systems to small- and medium-sized businesses. It also installs and maintains computer cabling networks and paging and intercom sound systems. Its systems and services consist of a group of products that are sold as complete communications systems with a variety of features and functions. The systems

vary in size and cost depending on the complexity of the features, functions, and telephones requested by the customer. The basic unit of the systems sold during the relevant time period was a key service unit (KSU) or a private branch exchange unit (PBX).

When Capitol sells a telephone system or equipment to a customer in Nebraska, the customer has several options. The customer can do his or her own installation, engage another party to perform the installation, or have Capitol install the telephone system. The installation process involves unpacking the various components of the system and mounting the KSU or PBX to a floor or wall. Parts of the PBX have to be connected. Wire or cable would then be run from the PBX to various locations throughout the building where the telephone jacks are located. Individual systems are then connected to the system by running a wire from the jacks to a plug in the telephone.

The telephones and the KSU or PBX are programmed to incorporate the features ordered by the customer. The system is physically linked with the local exchange telephone company's wire or cable via the D mark, thereby interconnecting the system with the local telephone facilities. This permits each telephone on the system the ability to access the local telephone exchange service. Capitol does not provide local exchange telephone service or intrastate message toll service in Nebraska. Capitol bills its customers for installing, connecting, and servicing telephone systems, and for moving, changing, and upgrading the related equipment and features at the customer's request.

The Department conducted an audit for sales and consumer's use tax of the books and records of Capitol for the period December 1, 1993, through October 31, 1997. As a result of said audit, the Department issued a notice of deficiency determination to Capitol on April 1, 1998. Capitol timely filed a petition for redetermination of its sales and use tax liability for the portion of the sales tax deficiency relating to trip and labor charges, installation charges, programming charges, and charges associated with moving, changing, and upgrading telephone systems and related equipment. On October 22, 1999, the Commissioner issued an order sustaining the deficiency determination and dismissing Capitol's petition for redetermination.

Capitol then appealed to the district court for Lancaster County. The district court held that Capitol's services are rendered in conjunction with the furnishing, installing, or connecting of local exchange and intrastate message toll service. Capitol has appealed to this court. The amount of tax being protested is $9,260, excluding interest and penalties.

Aliant and Systems

Aliant is a Delaware corporation domesticated under the laws of Nebraska with its principal offices and place of business in Lincoln, Nebraska. During the relevant time period (February 1, 1995, through March 31, 1998), Aliant operated as a diversified communications company.

Aliant also purchased telephones and resold them to its residential and business customers. It provided and installed voice mail and custom calling features such as call waiting and caller identification remotely from its central office. If requested by a customer, Aliant also installed materials such as inside wiring.

Systems is a Nebraska corporation with its principal offices and place of business also in Lincoln. During the relevant time period (July 1, 1995, through June 30, 1998), Systems provided intrastate message toll service through its division known as Lincoln Telephone Long Distance and later as Aliant Long Distance, provided sales and leases of telephone systems and other equipment, provided installation and training for the operation of telephone systems and other equipment, provided service agreements related to telephone systems and other equipment, and provided telephone answering service.

Systems also purchased premanufactured telephone systems and resold them to customers. Among the systems it sold were KSU, PBX, voice mail, call monitoring, facsimile machines, and intercoms.

The Department conducted an audit of Aliant for compliance with the sales and use tax laws of Nebraska for the period of February 1, 1995, through March 31, 1998. The Department issued a notice of deficiency determination to Aliant on or about February 16, 1999. On March 11, Aliant timely filed a petition for redetermination of such sales and use tax liability with the Department. Aliant requested a redetermination of the audit

findings, including, but not limited to, the application of sales tax to gross receipts that Aliant derived from installations, moves, equipment changes, and additions.

The Department also conducted an audit of Systems for compliance with the sales and use tax laws of Nebraska for the period July 1, 1995, through June 30, 1998. The Department issued a notice of deficiency determination on or about November 30, 1999. Systems made payment of amounts set forth in the notice. On or about January 26, 2000, Systems filed with the Department a claim for overpayment of sales and use tax, requesting a refund of amounts taxed, interest, and penalties paid as a result of the audit of Systems, and the subsequent deficiency assessment. The request for refund included sales tax on gross receipts that Systems derived from labor involved in the installation of telephone systems, equipment, and wiring.

The Department assessed sales tax on installation labor services provided by Aliant and Systems that were performed with regard to customer-owned facilities on the customer side of the D mark. As a result of a regulatory directive, these facilities were not a part of the public utility operations of either Aliant or Systems during the audit period. After consolidation of Aliant's petition for redetermination and Systems' claim for overpayment, on May 16 and 17, 2000, the Department conducted a hearing. On July 20, the Commissioner issued her order sustaining the deficiency determination against Aliant and denying Systems' claim for overpayment of sales and use tax.

Aliant and Systems then appealed to the district court for Lancaster County. The district court held that the weight of the evidence supports Aliant and Systems' argument that gross receipts from the labor services at issue do not relate to public utility functions, nor do such receipts relate to the connecting or installing of services. Thus, the trial court set aside the order of the Department and the Commissioner and stated that Aliant and Systems were not subject to sales tax, interest, or penalties relating to the gross receipts from the installation charges on the customer side of the D mark.

The Department has now appealed to this court. Again, the disputed items relate only to the various installation services performed by Aliant and Systems on the customer side of the

D mark, and the sales tax on those charges are $136,095 and $98,307, respectively.

ASSIGNMENTS OF ERROR

Capitol argues, rephrased, that its gross receipts from connecting and installing telephone communications systems are not subject to Nebraska sales tax pursuant to §§ 77-2703(1) and 77-2702.07(2) and that the trial court erred in finding that they were.

The Department argues just the opposite both in response to Capitol's assignment of error and in its own assignment of error against Aliant and Systems. The Department argues, rephrased, that the gross receipts of Aliant and Systems derived from charges for the provision, installation, or construction of property used in conjunction with the furnishing, installing, or connecting of telephone communication services are subject to Nebraska sales tax, pursuant to §§ 77-2703(1) and 77-2702.07(2), and that the trial court erred in finding they were not.

On cross-appeal, Aliant and Systems argue (1) that the trial court erred in failing to conclude that the Department's imposition of sales tax upon Aliant and Systems, while refusing to impose sales tax upon other providers of the same services, constitutes an unconstitutional denial of equal protection and (2) that the trial court erred in finding that Aliant and Systems failed to meet their burden to prove that the Department and the Commissioner are equitably estopped from assessing sales tax on the gross receipts at issue in this case.

STANDARD 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*, 263 Neb. 20, 637 N.W.2d 884 (2002); *Gottsch Feeding Corp. v. State*, 261 Neb. 19, 621 N.W.2d 109 (2001).

[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. *Young v. Neth, supra*; *Gottsch Feeding Corp. v. State, supra*.

[3] An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Gottsch Feeding Corp. v. State, supra*.

[4] To the extent the interpretation of statutes and regulations is 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, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Inner Harbour Hospitals v. State*, 251 Neb. 793, 559 N.W.2d 487 (1997).

[5] An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001).

ANALYSIS

Whether Gross Receipts at Issue are Taxable

Capitol, Aliant, and Systems argue that the gross receipts from the labor services at issue do not relate to a public utility function, nor were they received from the provision, installation, construction, servicing, or removal of property used in conjunction with the furnishing, installing, or connecting of a public utility service pursuant to §§ 77-2703(1) and 77-2702.07(2).

[6] Capitol specifically points to the 1986 "Dear Telephone Company" letter written by Hirsch to support its position that those charges are not taxable under §§ 77-2703(1) and 77-2702.07(2). The Department's regulation § 065.05 provides: "Charges made by a telephone company to the customer for installations, service connections, move and change charges, service upgrades, optional features like call waiting or voice mail, and construction costs constitute gross receipts for telephone service and are taxable." Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000).

The Aliant and Systems trial court concluded that neither § 77-2703(1) nor § 77-2702.07(2) provides a basis for assessing sales tax on the gross receipts from the labor services provided by Aliant or Systems. The trial court, in the Aliant and Systems' case, also held that the Department could not through adoption of § 065.05 enlarge its power to assess sales tax.

[7] The Department interprets §§ 77-2703(1) and 77-2702.07(2) as allowing for the gross receipts from the relevant labor services of Capitol, Aliant, and Systems to be subject to taxation. Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction. This is particularly so when the Legislature has failed to take any action to change such an interpretation. *Cox Cable of Omaha v. Nebraska Dept. of Revenue*, 254 Neb. 598, 578 N.W.2d 423 (1998).

Section 065.05 became effective May 14, 1994. Since Aliant's and Systems' tax deficiencies were from 1995 to 1998, the Hirsch letter had no effect as to Aliant or Systems. As to Capitol, however, its audit period was December 1, 1993, to October 31, 1997. Since § 065.05 became effective on May 14, 1994, the Hirsch letter was in existence with regard to Capitol from December 1, 1993, through May 14, 1994. The Hirsch letter, however, was not controlling and is not a rule or regulation. See *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997) (Department of Correctional Services' memorandum did not constitute rule or regulation), *disapproved on other grounds, Johnson v. Clarke*, 258 Neb 316, 603 N.W.2d 373 (1999).

[8] In *Perryman*, we were required to determine whether a memorandum by the director of the Department of Correctional Services was a rule or regulation. This memorandum was written in response to a letter containing a legal opinion from the Attorney General. The memorandum advised that, effective immediately, the application of good time toward mandatory minimum sentences imposed for certain drug offenses was to be discontinued. We held in *Perryman* that the memorandum did not constitute a rule or regulation. See, also, Neb. Rev. Stat. § 84-901(2) (Reissue 1999). We conclude that the Hirsch letter is akin to the Department of Correctional Services' director's memorandum in *Perryman*. The Hirsch letter is not a rule or regulation.

Even if the Hirsch letter was a rule or regulation, an administrative agency cannot use its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering. *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. 750, 566 N.W.2d 757 (1997); *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994).

[9] Additionally, 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 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).

[10] In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Burlington Northern & Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001).

We previously addressed a similar issue of statutory interpretation in *Cox Cable of Omaha v. Nebraska Dept. of Revenue*, 254 Neb. 598, 578 N.W.2d 423 (1998). In that case, Cox hired independent contractors to perform the installation of "house drops." These drops connect the distribution plant to a subscriber's residence, thereby enabling the subscriber to receive cable television. A use tax was assessed to Cox for the charges paid to the independent contractors for the installation of house drops. Cox maintained that the tax applied only to the franchise company when it performed the installation services because the independent contractors were not licensed cable providers.

This court, however, rejected that argument, stating:

> The tax imposed by § 77-2703(1) is on the gross receipts of cable television service operators "or any person involved in the connecting and installing" of regulated

> television services. Section 77-2703(1) clearly reflects an intent to tax not only the receipts of cable television service operators, but also the receipts of persons who are not franchised entities but perform services involving the connection and installation of regulated television services. Similarly, § 77-2702(4)(b)(iv) defines "gross receipts" to include not only gross income from furnishing regulated cable television service, but also gross income from the installation and construction of tangible personal property "used in conjunction with" the installation or connection of regulated cable television services.

254 Neb. at 604, 578 N.W.2d at 427.

We held in *Cox Cable of Omaha* that if the Legislature had intended to tax only the gross receipts attributable to connection and installation services performed by the holder of a franchise or permit, it could have so stated. However, the Legislature's use of broader language reflects that it intended the scope of the tax to extend beyond the receipts of the franchised entity to other persons or entities who derive revenue from performing services which involve the "installing" or "connecting" of regulated television services. Therefore, we held that the tax imposed by § 77-2703(1) extended to independent contractors' gross receipts derived from services which they performed in installing house drops pursuant to their contractual agreements with Cox. *Cox Cable of Omaha v. Nebraska Dept. of Revenue, supra.*

We conclude that §§ 77-2703(1) and 77-2702.07(2) allow for the charges at issue to be taxable. The definition of "gross receipts" in § 77-2702.07(2) encompasses every person engaged in furnishing telephone communication services or any person involved in connecting and installing telephone communication services. Subsection (2)(a) provides that gross receipts include the gross income from furnishing local exchange service and intrastate message toll telephone service. Additionally, the definition of "gross receipts" is broadened by subsection (2)(d) to include in the gross income revenue received from the provision, installation, construction, servicing, or removal of property used in conjunction with the furnishing, installing, or connecting of any public utility service, including telephone communication service.

The language of § 77-2703(1) ties in closely to the definition of "gross receipts" in § 77-2702.07(2). Section 77-2702.07(2) imposes a sales tax on the gross receipts of every person engaged as a public utility or any person involved in the connecting and installing of public utility service, including telephone communication service.

If the Legislature had intended only labor on the regulated side of the D mark to be taxable, it could have so stated in the statute. It did not, however, and instead stated that not only would the gross receipts of the public utility be taxed, but so would the gross receipts of "any person involved in the connecting and installing of the services defined in subdivision (2)(a), (b), or (d) of section 77-2702.07." § 77-2703(1).

We agree with the trial court in Capitol's case and find that the gross receipts of Capitol, Aliant, and Systems at issue are taxable. Regardless of who owns the inside wiring or terminal equipment, it is used in conjunction with the equipment of the telephone service carrier to provide the level of telecommunication service required by the customer. Capitol, Aliant, and Systems are engaged in installing and connecting telephones, wires, cables, consoles, and other property that form the telephone communication systems. Their telephone systems are connected or united with the local exchange network to carry telephone service into their customers' premises, and it is highly unlikely that their customers would pay for the systems if they would not have access to local telephone service. The services are, therefore, plainly rendered in conjunction with the furnishing, installing, or connecting of any local exchange service or intrastate message toll telephone service, even when performed on the customer side of the D mark.

We conclude that § 065.05 does not alter or enlarge the provisions of §§ 77-2703(1) and 77-2702.07(2) and, therefore, that the gross receipts of Capitol, Aliant, and Systems at issue are subject to Nebraska sales tax pursuant to §§ 77-2703(1) and 77-2702.07(2). We thus affirm the decision of the Capitol trial court and reverse the decision of the Aliant and Systems trial court on this issue.

Equal Protection

Equal protection is not raised as an issue in Capitol's case. In Aliant and Systems' cross-appeal, they argue that the Department's

selective imposition of sales tax upon them constitutes an unconstitutional denial of equal protection. They claim discriminatory treatment subjecting them to taxes not imposed upon others in the same class performing exactly the same services.

[11,12] The trial court, because it determined that the installations performed by Aliant and Systems were not subject to the sales tax under the relevant statutes, did not address the equal protection claim that Aliant and Systems presented. 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). An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001). This court has held that a constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. See *In re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002).

Therefore, we remand the equal protection issue raised by Aliant and Systems to the trial court for its consideration.

EQUITABLE ESTOPPEL

Aliant and Systems also argue on cross-appeal that the Department is equitably estopped from retracting, without appropriate notice, the position delineated in the Hirsch letter. They claim that in reliance upon the letter, Aliant's billing system was changed, and it is exactly what the Department intended to happen. Despite the Department's contentions that the letter was intended to be an interim statement, nowhere in the letter is that so stated, and the Department has never explicitly revoked or rescinded the letter.

[13] This court has set forth six elements that must be satisfied for the doctrine of equitable estoppel to apply: (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 will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of

knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel. See *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999).

The facts are that the Hirsch letter was dated September 22, 1986, and § 065.05 was issued in 1993, effective May 14, 1994. The regulation therefore superseded the Hirsch letter and was in full force and effect during the relevant time periods. Aliant and Systems are not being assessed taxes for periods before the issuance of § 065.05.

We agree with the trial court that the issuance of § 065.05 put Aliant and Systems on notice that they should no longer rely on the Hirsch letter. Agency regulations must be subject to a public hearing prior to their adoption, and § 065.05 has been a matter of public record since 1993. Additionally, Systems had notice from their customers that the Department changed its position with regard to installation charges. Had Aliant and Systems consulted the Department, they would have been further advised of the Department's position. Thus, under the facts of the case, it cannot be said that Aliant and Systems lacked the means to ascertain the correct interpretation and application of the law on the subject.

We therefore hold that the doctrine of equitable estoppel cannot be applied under the facts of this case.

CONCLUSION

We conclude that under §§ 77-2703(1) and 77-2702.07(2), the installation and labor charges at issue are subject to sales tax. The language of the statutes is broadly worded, and deference is to be given to the Department's interpretation. Additionally, the language in its common, ordinary sense provides for the taxing of these activities.

We remand to the trial court Aliant and Systems' equal protection claim as set forth in its cross-appeal, as the trial court did not pass on the issue.

Finally, we conclude that the trial court in the Aliant and Systems case was correct in holding that equitable estoppel is not applicable under the facts of this case.

We affirm the ruling of the trial court in the case of Capitol.

We reverse the decision of the trial court in the case of Aliant and Systems as to its holding that the installation and labor charges at issue were not taxable under §§ 77-2703(1) and 77-2702.07(2); affirm that court's holding as to Aliant and Systems' equitable estoppel claim; and remand Aliant and Systems' equal protection claim to the trial court for its consideration.

JUDGMENT IN NO. S-00-879 AFFIRMED.
JUDGMENT IN NO. S-01-558 AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GREEN TREE FINANCIAL SERVICING CORPORATION, APPELLEE, V. RANDY SUTTON AND RITA SUTTON, APPELLANTS, AND WILL ANDERS AND TONI ANDERS, APPELLEES.

650 N.W.2d 228

Filed August 9, 2002. No. S-00-1256.

1. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
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. **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. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
5. **Security Interests.** The filing of a financing statement is not necessary or effective to perfect a security interest in property subject to Neb. Rev. Stat. § 60-110 (Reissue 1998).
6. **Property: Appurtenances: Vendor and Vendee.** The characterization put upon articles as fixtures or nonfixtures by parties to a purchase contract should be upheld where the rights of third parties are not adversely affected, no statute suggests a contrary result, and the articles are not so completely merged with the realty as to prevent removal of the article without material injury to the realty.

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. **Motor Vehicles: Appurtenances.** Neb. Rev. Stat. §§ 60-102 to 60-117 (Reissue 1993) apply to all motor vehicles, commercial trailers, and semitrailers required to be registered under Neb. Rev. Stat. §§ 60-301 to 60-306 (Reissue 1993) and all cabin trailers defined in Neb. Rev. Stat. § 60-614 (Reissue 1993).
9. **Appurtenances: Words and Phrases.** According to Neb. Rev. Stat. § 71-4603 (Reissue 1996), a "manufactured home" is defined as a structure, transportable in one or more sections, which in the traveling mode, is 8 body feet or more in width or 40 body feet or more in length or, when erected on site, is 320 or more square feet and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities and includes the plumbing, heating, air-conditioning, and electrical systems contained in the structure.
10. **Actions: Pleadings.** Although a pleading should not leave uncertainty as to the theory of recovery on which the pleader wishes to proceed, in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader.

Appeal from the District Court for Morrill County: PAUL D. EMPSON, Judge. Affirmed in part, and in part reversed and remanded.

Gregory J. Beal, of Gregory J. Beal & Associates, P.C., for appellants.

Richard A. Drews, of Taylor, Kluver, Peters & Drews, for appellee Green Tree Financial Servicing Corporation.

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

MCCORMACK, J.

NATURE OF CASE

In this replevin action, Randy Sutton and Rita Sutton appeal the decision in favor of appellee Green Tree Financial Servicing Corporation, now known as Conseco Finance Servicing Corporation (Green Tree). Green Tree sought possession of a manufactured home situated on real estate purchased by the Suttons. The Suttons were not debtors, but were in possession of the manufactured home at the time the action was commenced. Prior to trial, Green Tree obtained an order allowing it to take possession of the manufactured home. At the time of trial, the

home was already in Green Tree's possession. The trial court directed a verdict in favor of Green Tree for possession of the manufactured home, but denied Green Tree's request for loss-of-use damages. No cross-appeal was taken by Green Tree. The trial court also directed a verdict against the Suttons on their claim for damages to their real property.

BACKGROUND

On or about March 25, 1997, Steven D. Beck and Lynda J. Beck made, executed, and delivered to Green Tree a manufactured home promissory note, security agreement, and disclosure statement (contract). Pursuant to the contract, the Becks were to make 360 monthly payments to Green Tree for the purchase of a manufactured home. Green Tree was to get a security interest in the home, which is noted on the certificate of title to the home.

The manufactured home was placed by the Becks on real property in Morrill County, which the Becks purchased from John Riggs. That transaction took place in December 1996. The Becks later filed for protection in the U.S. Bankruptcy Court for the District of Nebraska, but Green Tree obtained an order granting it relief from the automatic stay provisions.

On April 28, 1999, Green Tree filed a proof of claim with respect to its secured claim in the amount of $57,504.19. Under the contract for the sale of the manufactured home, the failure to make payments and the filing of bankruptcy were acts of default. This default entitled Green Tree to accelerate the full amount due under the contract and to repossess the home.

Sometime prior to July 16, 1999, the Becks abandoned the subject property. On June 15, 1999, the trustee executed a deed of reconveyance to "the person or persons entitled thereto." That same day, the trustee sold the real estate subject to the deed of trust to Timothy B. Riggs. On July 16, 1999, a warranty deed from Timothy Riggs and Kellye Riggs was given to Camp Clarke Ranch, L.L.C., conveying certain real estate, including the land on which the manufactured home was located. That same day, a warranty deed and attached plat from Camp Clarke Ranch, L.L.C., was given to the Suttons conveying the real estate at issue to the Suttons for $52,200.

At no time prior to the trustee's sale or the filing of the deed of reconveyance did Green Tree file or record a lien or claim of interest in the real estate. The Suttons checked for liens in the real estate records of Morrill County, but did not check the Morrill County clerk's records regarding a certificate of title to the manufactured home, or any liens thereon.

Randy Sutton testified that the value of the real property would have been only $700 per acre without the home. He assumed the home went with the land, and gave $52,200 for the property, which would have otherwise been farm ground. The Suttons claim that they were unaware of Green Tree's interest in the manufactured home until they learned otherwise on or about July 26, 1999.

The Suttons leased the manufactured home to Will Anders and Toni Anders, who occupied it until Green Tree commenced a replevin action. The Anderses moved out of the manufactured home and have no further interest in the proceeding.

Green Tree filed a replevin action to recover possession of the manufactured home. After a temporary possession hearing, the trial court entered an order granting immediate possession of the home to Green Tree. Green Tree posted an undertaking in replevin and a bond in the amount of $120,000. Green Tree hired a transfer company to remove the home and take it to a mobile home park in North Platte, Nebraska.

Under a writ of replevin, Morrill County Sheriff John Edens was ordered to deliver the manufactured home, a 1997 Guerdon Premier, 28- by 58-foot "mobile home," serial No. GDGENE0997158531/II. He oversaw the removal of the home, and met with the transfer company at approximately 9 a.m. on January 13, 2000. He observed the skirting around the manufactured home had been removed and jacks had been placed underneath the home to split the home into trailers. The only foundation observed by Edens was a flat cement surface. The home was sitting on cinder blocks, and attached underneath the trailers were axles and tongues.

Edens did not stay the entire day to observe the removal of the manufactured home, but checked in periodically until the home was removed around 4 p.m. He was not present when the home was actually driven off the property, but arrived soon after

the workers had left. He observed no damage to the trees or the real estate other than tire tracks on the grass where the trucks had driven. However, according to Randy Sutton, water lines were cut, left open, and exposed; septic system pipes were destroyed; a pump was removed from a well; and the real property was left in a state of utter destruction. The Suttons claim thousands of dollars in damages to their property by reason of the removal of the manufactured home.

During the testimony of Edens, the Suttons attempted to offer photographs of the property. Green Tree objected. An order was previously entered requiring all exhibits to be provided by September 13, 2000, unless good cause was shown. The photographs, marked as exhibits 39 to 47 were not produced by September 13, or prior to trial. Green Tree objected to the photographs on the basis that the pretrial order directed all exhibits to be provided by September 13, unless good cause was shown. The first time the attorney for Green Tree had seen any of these photographs was at the trial. The Suttons' attorney responded that the photographs were offered only as impeachment of Edens' testimony, since he testified that he did not see any damage to the real estate. The trial court sustained the objection, stating that Edens "didn't say there wasn't any damage. He said he didn't see any."

At the conclusion of the evidence, Green Tree moved for a directed verdict on all of the issues. The trial court sustained the motion as to whether Green Tree rightfully possessed the property, but denied the motion as to whether Green Tree was entitled to damages and as to whether the Suttons' counterclaim should be dismissed.

Before the jury was instructed, the trial court reconsidered its decision on Green Tree's motion to dismiss. Finding that the claim for damages incident to the removal of the manufactured home was insufficiently pled to be submitted to the jury, the trial court dismissed the Suttons' counterclaim with prejudice.

ASSIGNMENTS OF ERROR

According to the Suttons, the trial court erred (1) in directing a verdict in favor of Green Tree on the issue of whether it had the right to immediate possession of the manufactured home; (2)

in finding that it was not necessary for Green Tree to make a fixture filing in order to perfect a security interest in the manufactured home and ruling that Green Tree could treat the subject property as a motor vehicle or personal property rather than as property affixed to real estate; (3) in refusing to submit to the jury the issue of whether their real property had been damaged as a result of the removal of the manufactured home from said real property; and (4) in its rulings on evidence, the cumulative effect of which constitutes prejudicial error toward them.

STANDARD OF REVIEW

[1] A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001).

[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. *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002).

[3,4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *V.C. v. Casady*, 262 Neb. 714, 634 N.W.2d 798 (2001). A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000).

ANALYSIS

Green Tree's Right to Possession

The trial court directed a verdict in favor of Green Tree as to the issue of possession. The trial court necessarily found that

Green Tree had a valid lien on the manufactured home listed on the certificate of title, that it did not need to make a fixture filing in order to perfect its security interest, and that the manufactured home could be treated as a motor vehicle rather than as property affixed to real estate.

Neb. Rev. Stat. § 60-110 (Reissue 1998) provides:

> The provisions of article 9, Uniform Commercial Code, shall never be construed to apply to or to permit or require the deposit, filing, or other record whatsoever of a security agreement, conveyance intended to operate as a mortgage, trust receipt, conditional sales contract, or similar instrument or any copy of the same covering a motor vehicle. Any mortgage, conveyance intended to operate as a security agreement as provided by article 9, Uniform Commercial Code, trust receipt, conditional sales contract, or other similar instrument covering a motor vehicle . . . if a notation of the same has been made by the county clerk or the Department of Motor Vehicles on the face thereof, shall be valid as against the creditors of the debtor, whether armed with process or not, and subsequent purchasers, secured parties, and other lienholders or claimants but otherwise shall not be valid against them . . . .

[5] At the time that Green Tree filed its petition in replevin, Neb. U.C.C. § 9-302(3)(b) (Cum. Supp. 1996) stated that the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to § 60-110 (now found at Neb. U.C.C. § 9-311(a)(2)(i) (Reissue 2001)). Thus, a lien on a motor vehicle under § 60-110 is valid when noted on the certificate of title, and not through a fixture filing under article 9 of the Uniform Commercial Code.

[6] In *Metropolitan Life Ins. Co. v. Reeves*, 223 Neb. 299, 389 N.W.2d 295 (1986), we stated that the characterization put upon articles as fixtures or nonfixtures by parties to a purchase contract should be upheld where the rights of third parties are not adversely affected, no statute suggests a contrary result, and the articles are not so completely merged with the realty as to prevent removal of the article without material injury to the realty. The original contract between the Becks and Green Tree clearly demonstrate their intent for the manufactured home to remain

personal property and not become a fixture. Paragraph 9 of the contract between the Becks and Green Tree states:

> I agree that regardless of how my Manufactured Home is attached to the real property and regardless of how your security interest in my Manufactured Home is perfected and regardless of whether an affidavit of affixture (or other similar instrument identifying the property as a fixture) has been recorded, my Manufactured Home is and shall remain personal property and is not and shall not become a fixture or part of the real property unless you consent in writing and state law permits a contrary classification. I agree to pay any and all personal property taxes assessed against my Manufactured Home and agree that failure to pay such taxes shall constitute a default under paragraph 14 on page 3.

[7] To the extent the Suttons claim to be innocent third parties adversely affected by the intent of the original parties or that removal of the manufactured home would materially injure the real property upon which it is placed, the plain language of the Nebraska Revised Statutes dictates that Green Tree was entitled to immediate possession of the manufactured home and did not need to file a fixture filing. 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. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002); *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[8] Neb. Rev. Stat. § 60-102 (Reissue 1993) states, "Sections 60-102 to 60-117 shall apply to motor vehicles, commercial trailers, and semitrailers required to be registered under sections 60-301 to 60-306 and **all cabin trailers defined in section 60-614** . . . ." (Emphasis supplied.) Neb. Rev. Stat. § 60-614 (Reissue 1993) defines a cabin trailer as

> a trailer or semitrailer which is designed, constructed, and equipped as a dwelling place, living abode, or sleeping place, whether used for such purposes or instead permanently or temporarily for the advertising, sale, display, or promotion of merchandise or services or for any other commercial purpose . . . . Cabin trailer shall not mean a

> trailer or semitrailer which is permanently attached to real estate. There shall be three classes of cabin trailers:
>
> . . . .
>
> (2) Mobile home which shall include cabin trailers more than one hundred two inches in width or more than forty feet in length[.]

The issue is, therefore, whether a "manufactured home" is within the scope of § 60-110 as a "cabin trailer" or "mobile home."

According to the Suttons, none of the statutory definitions setting forth what a motor vehicle is suggest that a manufactured home is a motor vehicle. Therefore, the Suttons claim that Green Tree was required to make a fixture filing. They claim that absent a fixture filing, Riggs, as an innocent purchaser for value without notice, passed title to the manufactured home to the Suttons.

Green Tree, on the other hand, argues that it did all acts necessary under Nebraska law to obtain a perfected security interest in the manufactured home. Green Tree's lien was noted on the face of the certificate of title and was valid against the Suttons. Thus, Green Tree was entitled to immediate possession of the manufactured home.

[9] According to Neb. Rev. Stat. § 71-4603(1) (Reissue 1996), a "manufactured home" is defined as

> a structure, transportable in one or more sections, which in the traveling mode is eight body feet or more in width or forty body feet or more in length or when erected on site is three hundred twenty or more square feet and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities and includes the plumbing, heating, air conditioning, and electrical systems contained in the structure . . . .

The size of the manufactured home is 28 feet by 58 feet. The home was not attached to real estate when originally purchased. It is designed, constructed, and equipped as a dwelling place, living abode, or sleeping place, and was used as a permanent residence. It is designed to be moved, and is issued or delivered in two parcels or sections. Both Will Anders and Edens reported seeing axles attached to the bottom of the home.

Pursuant to Neb. Rev. Stat. §§ 71-4621(1), 76-1463, and 81-5,138 (Reissue 1996), the term "mobile home" includes "manufactured homes." While these statutes do not involve the certificates of title, they do provide insight as to how Nebraska law views manufactured homes. Nebraska law includes the term "manufactured home" within the definition of "mobile home."

Pursuant to Neb. Rev. Stat. § 60-113 (Reissue 1993), once the manufactured home was affixed to real property, the owner, in order to have the lien on a motor vehicle title canceled, would go to the county clerk's office to have the certificate of title surrendered. However, the lien noted on the certificate of title would still be valid if Green Tree did not consent to its being canceled. There appears to be nothing in the record which demonstrates that the Becks or the Suttons had the certificate of title surrendered or canceled. Thus, Green Tree would still have a valid lien on the manufactured home even if it was determined to be affixed to the Suttons' real property.

Other courts have come to similar decisions regarding the effect of noting a lien for a mobile home or manufactured home on a certificate of title. See, *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000) (security interest in mobile home is perfected when such interest is listed on certificate of title to mobile home); *ENT Fed. Cr. Un. v. Chrysler First Fin.*, 826 P.2d 430 (Colo. App. 1992) (noting lien on certificate of title was all that was required to create lien on manufactured home); *Beneficial Finance Co. v. Schroeder*, 12 Kan. App. 2d 150, 737 P.2d 52 (1987), *review denied* 241 Kan. 838, 737 P.2d 52 (bank properly perfected its security interest in mobile home by noting its interest on mobile home's certificate of title, and court noted that, as practical matter, if mobile homes were subject to fixture filing requirements, secured party with interest in mobile home could maintain priority only by making new fixture filing each time mobile home was moved). See, also, *Hiers v. Bank One*, 946 S.W.2d 196 (Ky. App. 1996); *Hughes v. Young*, 115 N.C. App. 325, 444 S.E.2d 248 (1994), *review denied* 337 N.C. 692, 448 S.E.2d 525; *Bank of Commerce v. Waddell*, 731 S.W.2d 61 (Tenn. App. 1986); *T & O Mobile Homes v. United California Bank*, 40 Cal. 3d 441, 709 P.2d 430, 220 Cal. Rptr. 627 (1985) (decided under statutory scheme applicable during relevant transactions).

Based on the above discussion, we conclude that the trial court did not err in granting Green Tree a directed verdict as to whether it had a right to immediate possession of the manufactured home. Green Tree noted its lien on the certificate of title to the manufactured home and did not need to make a fixture filing. It could thus treat the property as personal property rather than a fixture, since the certificate of title has not been surrendered with Green Tree's consent.

SUTTONS' DAMAGES

The Suttons also argue that the trial court erred in refusing to submit to the jury the issue of whether their real property had been damaged as a result of the removal of the manufactured home. The trial court held that the Suttons failed to sufficiently plead damages to their property caused by the manner of removing the home and that judgment on that issue was to be directed in favor of Green Tree.

We disagree with the trial court and find that the Suttons sufficiently pled damages to their real property caused by the manner in which the manufactured home was removed. On February 8, 2000, the Suttons filed an amended answer and counterclaim and claimed, inter alia, the following damages:

> 4. That the Defendants would be damaged in an amount in excess of $10,000.00, in any event, should the Court order that the Plaintiff in this case should be allowed to remove the residence from the property, and that the Plaintiff in any such case, should be ordered to pay the Defendants damages and restore the property to the same condition as it was prior to the construction of this house on the subject real estate, including replacement of trees and restoration of the landscape.
>
> That if Plaintiff has removed the residence from Defendant's real estate prior to trial, Plaintiff should be adjudged liable for replacement value of the residence plus any and all costs necessary to re-erect, construct or otherwise restore Defendant's property to substantially the same condition it was in before wrongful removal; that Defendant's [sic] should further be awarded damages for lost rental income and/or other revenues which Defendants

> otherwise would have received from the property removed, the beneficial use and enjoyment thereof.
>
> 5. That Defendants should be awarded any consequences damages sustained by Defendants resulting from Plaintiff's seizure and removal of the residence.

[10] Although a pleading should not leave uncertainty as to the theory of recovery on which the pleader wishes to proceed, we have held that in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader. *Becker v. Hobbs*, 256 Neb. 432, 590 N.W.2d 360 (1999).

Liberally construed, in light of the damages requested in paragraph 4, and when read in conjunction with paragraph 5, we conclude that the request in paragraph 5 for "consequences damages . . . resulting from Plaintiff's seizure and removal of the residence" did contemplate consequential damages. This paragraph was sufficient to notify Green Tree that the Suttons were requesting damages arising from the manner in which the manufactured home was removed from the real property.

Because we have found that the Suttons adequately pled damages to their real estate caused by the manner in which the manufactured home was removed, we find it unnecessary to address whether the trial court erred in failing to grant the Suttons leave to amend their pleading to conform to the evidence of the case.

We accordingly reverse the trial court's decision directing a verdict in favor of Green Tree on this issue, and we remand the cause to the trial court for a new trial on the issue of damages.

Rulings on Evidence

The Suttons argue that the trial court erred in excluding exhibits 39 to 47, which allegedly included photographs of the Suttons' real estate after the manufactured home was removed. The basis for the objection ruling was that the photographs were not produced in compliance with the pretrial order. This assigned error is not likely to occur in the new trial, and we decline to address the assignment of error.

CONCLUSION

For the aforementioned reasons, we find that the trial court did not err in granting a directed verdict in favor of Green Tree as to whether it had the right to immediate possession of the

manufactured home and as to whether a fixture filing was necessary for Green Tree to perfect a security interest in the manufactured home. However, we find that the trial court did err in directing a verdict in favor of Green Tree on the issue of the Suttons' damages.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

RONALD D. MEYER, SPECIAL ADMINISTRATOR OF THE ESTATE OF RAMONA C. MEYER, DECEASED, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

650 N.W.2d 459

Filed August 9, 2002. No. S-01-303.

1. **Tort Claims Act: Appeal and Error.** A district court's findings of fact in a proceeding under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996 & Cum. Supp. 2000), will not be set aside unless such findings are clearly erroneous.
2. **Proximate Cause: Evidence.** The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause (1) that produces a result in a natural and continuous sequence and (2) without which the result would not have occurred.
5. **Negligence: Proximate Cause.** A proximate cause need not be the immediate cause of an injury; it may be enough that the acts complained of set in motion a series of events through which damage results.
6. ____: ____. A cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster.
7. **Trial: Presumptions: Appeal and Error.** In reviewing the findings of the trial court, an appellate court presumes that the court resolved any controverted facts in favor of the successful party and considers the evidence and permissible inferences therefrom most favorably to that party.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Reversed and remanded for a new trial on the issue of damages.

Denise E. Frost and Clarence E. Mock, of Johnson & Mock, for appellant.

Douglas L. Kluender and Jay L. Welch, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellee.

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

PER CURIAM.

NATURE OF CASE

Ramona C. Meyer (Meyer) was killed as a result of a three-vehicle accident. At the time, Donald C. Poston (Poston), the driver of the van which struck Meyer's car, was being pursued by a Nebraska State Patrol trooper. Meyer's husband, as special administrator of her estate, filed this action against the State of Nebraska. The district court for Cuming County entered judgment for the State, and the estate appeals.

STANDARD OF REVIEW

[1] A district court's findings of fact in a proceeding under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996 & Cum. Supp. 2000), will not be set aside unless such findings are clearly erroneous. *Goodenow v. State*, 259 Neb. 375, 610 N.W.2d 19 (2000).

[2] The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong. *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993), *disapproved in part on other grounds, Henery v. City of Omaha*, 263 Neb. 700, 641 N.W.2d 644 (2002).

FACTS

On August 5, 1995, Poston, his wife Julie, and his sister-in-law drove from Springfield, Nebraska, to Norfolk, Nebraska, to visit the Postons' daughter, who was a patient at the Norfolk Regional Center. As a pretense, Julie suggested that Poston take their daughter to pick up supplies while Julie remained at the center. Julie actually wanted to discuss with staff of the center a recent deterioration in Poston's behavior.

Poston was to return to the center to pick up Julie, and the family planned to see a movie.

Poston left the center with his daughter and sister-in-law as passengers in his van. Rather than driving to pick up supplies, he left Norfolk on U.S. Highway 275, heading toward Springfield. Traveling east at a high rate of speed, he met a westbound patrol car driven by Sgt. Gerald Sieck of the Nebraska State Patrol. Using radar, Sieck determined that Poston was traveling at 94 miles per hour. Sieck turned his car around and, with his car's siren and overhead lights activated, pursued Poston approximately 27 miles through Wisner and Beemer and into West Point.

Poston slowed as he passed through Wisner, but outside town, he increased his speed to more than 100 miles per hour. On two occasions, Sieck was able to get close enough to the van to read its license plate.

At Sieck's request, Sgt. Lonnie Schultz of the West Point Police Department set up a roadblock on the north side of the town. Poston passed through the roadblock and then accelerated, continuing into West Point at a speed estimated at between 70 and more than 100 miles per hour. At the intersection of Highway 275 and Grant Street, Poston's van collided with two vehicles.

One of the cars was driven by Meyer, who was killed. Her estate filed a wrongful death action and sought damages for pain and suffering and medical and funeral expenses. The other car was driven by Muriel A. Bacus, who was injured along with her sons. It is undisputed that Meyer was killed during a vehicular pursuit involving a law enforcement officer employed by the State.

The district court found that on the day of the accident, Poston was suffering a psychotic episode which continued after the collision and that Poston was undeterred in his obsession to return home to Springfield at a high rate of speed. The court found that although Sieck's actions "were obviously a factor," the evidence did not show that Poston would have driven other than as he did in the absence of a pursuit. The court concluded that the pursuit was not a concurring proximate cause of the accident, and it dismissed the estate's claim against the State. Additional facts will be set forth in the analysis as necessary.

ASSIGNMENTS OF ERROR

The estate asserts that the district court erred in its interpretation and application of the proximate cause element of § 81-8,215.01 (Reissue 1994) (which was in effect at the time of the accident) and in finding that the estate failed to prove that the pursuit proximately caused the accident, thus incorrectly dismissing the estate's claim against the State. The estate also asserts that the court abused its discretion in admitting and adopting the opinion of a physician about the state of mind and actions of Poston, including whether his van would have collided with the Meyer and Bacus vehicles absent the pursuit by Sieck.

ANALYSIS

The district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly erroneous. *Goodenow v. State*, 259 Neb. 375, 610 N.W.2d 19 (2000). The question presented is whether Sieck's pursuit of Poston was a proximate cause of Meyer's death. The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong. *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993).

At the time of the accident, § 81-8,215.01 provided:

> 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 the state during vehicular pursuit, damages shall be paid to such third party by the state.
>
> For purposes of this section, vehicular pursuit shall mean 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 *Adams v. State*, 261 Neb. 680, 625 N.W.2d 190 (2001), we stated that the conduct of the officer must be examined to

determine whether such conduct proximately caused the plaintiff's injuries. If an officer's actions during a vehicular pursuit proximately cause damage to an innocent third party, the State is strictly liable for those damages. *Id.*

In *Stewart*, we construed Neb. Rev. Stat. § 13-911 (Reissue 1991), which addressed vehicular pursuits conducted by officers of political subdivisions. We held that § 13-911

> created strict liability on the part of a political subdivision when (1) a claimant suffers death, injury, or property damage; (2) such death, injury, or property damage is proximately caused by the actions of a pursuing law enforcement officer employed by the political subdivision; and (3) the claimant is an innocent third party.

Stewart, 242 Neb. at 244, 494 N.W.2d at 133.

The district court found that Poston was suffering from a psychotic episode during his travel from Norfolk to West Point and that this psychotic state continued after the collision. The court concluded that as a result of his psychotic state, Poston was undeterred in his obsession to return home at a high rate of speed. The court found that Poston was aware that Sieck was pursuing him, but it concluded that the evidence did not show that the accident was caused by Sieck's actions. It concluded that Sieck's actions were not a concurring proximate cause because Poston's high-speed driving had taken place for several miles prior to the time Sieck observed Poston. The court found that the estate failed to establish that the pursuit by Sieck was a proximate cause of the accident, and it dismissed the action.

The estate argues that the district court erroneously interpreted the proximate cause element of § 81-8,215.01 to require that the vehicular pursuit be the sole proximate cause of the accident, rather than merely a proximate cause of the accident. It relies upon the court's finding that while Sieck's actions "were obviously a factor," they were not the proximate cause of the accident.

[3] We therefore consider whether the language of § 81-8,215.01 requires that the vehicular pursuit be the sole proximate cause. 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.*, 263 Neb. 544, 641 N.W.2d 55 (2002).

[4] We conclude that the plain language of § 81-8,215.01 requires that the actions of a law enforcement officer during a vehicular pursuit be merely a proximate cause of the damage, and not the sole proximate cause. A proximate cause is a cause (1) that produces a result in a natural and continuous sequence and (2) without which the result would not have occurred. *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001).

[5,6] In *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994), we approved a jury instruction stating that a proximate cause need not be the immediate cause of an injury; it may be enough that the acts complained of set in motion a series of events through which damage results. See, also, *Rose v. Buffalo Air Service*, 170 Neb. 806, 104 N.W.2d 431 (1960). A cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999).

[7] We therefore must address whether the district court was clearly wrong in finding that the pursuit was not a proximate cause of the accident. In reviewing the findings of the trial court, an appellate court presumes that the court resolved any controverted facts in favor of the successful party and considers the evidence and permissible inferences therefrom most favorably to that party. *Vilas v. Steavenson*, 242 Neb. 801, 496 N.W.2d 543 (1993).

The following evidence is significant in our determination. Poston was driving his van at a high rate of speed, which was clocked at 94 miles per hour. Sieck gave chase and turned on his car's siren and overhead lights. The siren and lights remained in operation through Wisner, Beemer, and West Point, a distance of approximately 27 miles. During the pursuit, Poston's van passed any vehicle it approached, and vehicles pulled over for Sieck.

Poston slowed to approximately 70 miles per hour as he passed through Wisner and then sped up. Sieck increased his speed to more than 100 miles per hour to catch up to Poston. On two occasions between Wisner and Beemer, Sieck closed to

within 100 feet of the van. With Sieck close behind, Poston went through Beemer in excess of 100 miles per hour. Sieck then radioed the Cuming County Sheriff and requested a roadblock north of West Point. In the 8 miles between Beemer and West Point, Sieck clocked Poston at 107.3 miles per hour.

According to Sieck's testimony, he believed during the pursuit that Poston was resisting apprehension by attempting to elude him. Sieck noted, however, that Poston did not try to turn off onto a county road to lose him, a common action taken by those who are evading police. Sieck said there was a time during the pursuit when he perceived that no matter what he did, including terminating the pursuit, Poston would continue to flee.

Sieck requested that the roadblock be set up at the junction of Highways 275 and 9, which is about 1 mile from the West Point city limits. The roadblock was set up in one lane by Sergeant Schultz of the West Point Police Department.

Schultz said he was notified by the county sheriff's office dispatch that Sieck was involved in a pursuit from the north into West Point. The one-lane roadblock allowed an escape path and followed department policy. Southbound traffic was directed onto the shoulder of the road. After Schultz parked his patrol car, he turned on the emergency lights and took a shotgun with him in case the speeding vehicle headed toward him.

When Schultz first saw the van, Sieck's vehicle was approximately one-eighth to one-half mile behind it. Schultz stated that Poston was obviously aware of the roadblock because the van went around three vehicles on the shoulder, cut sharply between the patrol car and another car, cut back within a few feet in front of the patrol car, and continued southbound. Schultz could hear the van accelerate as it continued into West Point. As Sieck approached the roadblock, he slowed down. He then accelerated after passing through the roadblock and continued the pursuit.

Sieck followed Poston into West Point at a distance described variously as one-half mile, several blocks, or just a few seconds. Within the city limits of West Point, Highway 275 is known as Lincoln Street, which extends a distance of 1.8 miles. Sieck was at the top of a hill about .63 of a mile from the intersection of Lincoln and Grant Streets when the accident occurred.

The Meyer vehicle was facing east on Grant Street and was apparently preparing to turn north onto Highway 275. Poston passed another vehicle about two blocks before the intersection with Grant Street. The Poston and Meyer vehicles collided head on, and Poston's van then crossed the centerline and collided head on with the Bacus station wagon, which was northbound on Highway 275.

Gaylon Kuchel, who teaches courses in law enforcement pursuit and helped design the pursuit policy for the Omaha Police Department, stated that the Nebraska State Patrol pursuit policy met the criteria established in the curricula of law enforcement academies, the Nebraska State Crime Commission, and state law, which requires law enforcement agencies to adopt vehicular pursuit policies. Police officers are taught that the continuation of a high-speed pursuit over a protracted distance very frequently results in an accident. Kuchel said that roadblocks are not used often because they are dangerous and that after a fleeing suspect has passed a roadblock, there can be an "excitation about that situation" and the vehicle increases its speed as it leaves the roadblock.

On August 7, 1995, Poston was interviewed by Investigator David Spiegel. Poston said he remembered meeting Sieck outside Norfolk. Poston said he knew if he stopped, he would be killed. Poston stated that the "voice" told him to "go, go, go" and that he would be protected. Poston told Spiegel that he saw the red lights and heard the siren behind him. He recognized the roadblock at West Point and went around it.

Dr. Terry Davis, a psychiatrist practicing in Omaha, testified that Poston's behavior was consistent with a psychotic episode. Psychosis impairs one's ability to interpret reality. Davis said that Poston did not appear to understand the consequences of his actions. Davis stated that a person in a psychotic state may perceive voices when no one is present. Davis stated that Poston believed a "voice" directed him to leave Norfolk.

Dr. William Spaulding, a clinical psychologist who treated Poston at the Lincoln Regional Center, said Poston had a chronic psychiatric disorder punctuated by periods of acute psychosis, which were characterized by confusion, emotional arousal, delusional beliefs, and a propensity to act on those

beliefs. On the date of the accident, Poston was suffering from a severe psychiatric disorder-either schizophrenia or schizoaffective disorder, Spaulding said. Poston's behavior was driven by his delusional beliefs and extreme emotional arousal, and he was not able to understand the basic concepts of right and wrong on that day.

Spaulding said he saw no reason why Poston would have changed his behavior if the patrol vehicle had not been following him. Spaulding said it is highly unlikely that any action by Sieck would have disrupted the general nature of Poston's behavior that day. "He was on a psychotic mission, and whatever events may have transpired I very much doubt that it would have diverted him from his psychotic mission."

All the injured were taken to the hospital in West Point, where Douglas Kelley, a Nebraska State Patrol officer, said he heard Poston tell his daughter: " 'I knew we had to outrun that police officer because he was going to kill us.' " She responded, " 'No, Dad, we were stupid,' " and Poston stated, " 'No, we weren't. If I hadn't wrecked we'd be dead.' "

In its written opinion, the district court stated:

> Although the Trooper's actions were obviously a factor, the evidence does not show that in the absence of a pursuit Poston would have driven other than as he did. . . .
>
> . . . [T]he evidence shows that Poston left Norfolk and drove at a high rate of speed to the point of the accident [which] was as likely caused by the "voice" in his head directing him to drive fast as by Trooper Sieck's pursuit.
>
> This Court cannot find that Trooper Sieck's actions were a concurring proximate cause for the reason that Poston's high speed driving had been taking place for several miles prior to Sieck's observations. Although the chase may have been a factor, the evidence does not show that his pursuit combined with Poston's psychotic behavior to cause the accident.

The definition of vehicular pursuit is especially relevant to our decision.

> [V]ehicular pursuit shall mean 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.

§ 81-8,215.01.

The accident occurred when Poston's vehicle arrived at the intersection of Highway 275 and Grant Street in West Point at the same time the Meyer and Bacus vehicles arrived. For the pursuit to have been a proximate cause of the accident, the pursuit must have caused Poston to resist apprehension by maintaining or increasing his speed or must have caused Poston to attempt to elude Sieck while driving at speeds in excess of those reasonable under the conditions. If the actions of law enforcement caused Poston to increase his speed or attempt to elude Sieck by driving at an excessive speed, then those actions can be found to have been a proximate cause of the accident.

The district court found that the pursuit was not a proximate cause because Poston would have taken the same actions regardless of any action by law enforcement personnel who were in pursuit of Poston. We disagree and conclude that the court was clearly wrong.

A cause of injury may be a proximate cause, notwithstanding that it acted through a series of events, if the events were combined in one continuous chain to produce the accident. See *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). The test of causation is not that the particular injury could be anticipated but whether after the occurrence, the injury appears to be the reasonable and probable consequence of the acts or omissions. *Id.*

Whether Poston could have been diverted from his psychotic mission and whether the pursuit had anything to do with how Poston drove the van while on his mission are two separate issues. If the pursuit caused Poston to drive the van in an attempt to elude apprehension, then the pursuit is a proximate cause of the accident.

Poston was aware that he was being pursued by law enforcement. When he was first observed by Sieck, he was traveling at 94 miles per hour. The pursuit lasted for 27 miles, during

which time Poston's speed varied from 70 to 107 miles per hour. At several times, Poston increased his speed during the pursuit.

Because of Poston's psychotic condition, the district court discredited what he said about the pursuit, but it is not disputed that Poston knew he was being pursued and that some of his actions while driving were for the purpose of eluding his pursuer. He swerved around the roadblock and accelerated after passing the roadblock. Immediately following the accident, Poston stated, " 'I knew we had to outrun that police officer because he was going to kill us.' " Poston's reasons for evading the pursuer, whether real or imagined, are not relevant to our determination. What is important is the fact that at certain times, Poston's actions were a result of his attempts to evade his pursuer.

It was not disputed that Poston was trying to resist apprehension. Sieck stated that Poston was attempting to elude him. Schultz stated that Poston was obviously aware of the roadblock and that the van accelerated as it passed the roadblock. After passing the roadblock, Poston accelerated and continued into West Point. Sieck continued to pursue Poston through the roadblock and into West Point.

The roadblock was a factor in the pursuit. It was initiated at the specific request of Sieck in an attempt to apprehend Poston. Poston attempted to elude law enforcement when he encountered the roadblock. As Poston approached the roadblock, he altered his speed, swerved to avoid the cars, and then accelerated. Poston's actions were the result of Sieck's attempt to apprehend Poston. The pursuit and the roadblock were factors contributing to Poston's arrival at the intersection of Highway 275 and Grant Street at a time which resulted in the accident.

Section 81-8,215.01 creates strict liability on the part of the State when a claimant suffers death or injury which is proximately caused by the actions of a pursuing law enforcement officer and the claimant is an innocent third party. See *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993). Meyer was an innocent third party who died as a result of the accident. The pursuit of Poston, which included the use of a roadblock, was, at a minimum, a proximate cause of the accident. Sieck's

actions set in motion a series of events through which the accident occurred. These events were combined in one continuous chain which ultimately resulted in the accident.

The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong. *Stewart v. City of Omaha, supra*. We find that the district court was clearly wrong in determining that the pursuit was not a proximate cause of the accident.

The estate also objects to the district court's admission and adoption of Davis' opinion that the pursuit was an extraneous factor that did not affect Poston's actions. Because we find that the court erred in entering judgment for the State, the cause must be remanded for a determination of damages only. Davis' opinion relates to the issue of liability, and it is therefore unnecessary to address this assignment of error.

CONCLUSION

The district court was clearly wrong in finding that the pursuit was not a proximate cause of the accident which resulted in Meyer's death. Therefore, the judgment is reversed, and the cause is remanded for a new trial on the issue of damages.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

WRIGHT, J., participating on briefs.

MURIEL A. BACUS, APPELLANT, V.
STATE OF NEBRASKA, APPELLEE.
KYLE BACUS, A MINOR, BY MURIEL A. BACUS, HIS NEXT FRIEND AND CONSERVATOR, APPELLANT, V.
STATE OF NEBRASKA, APPELLEE.
RICHARD J. BACUS, A MINOR, BY MURIEL A. BACUS, HIS NEXT FRIEND AND CONSERVATOR, APPELLANT, V.
STATE OF NEBRASKA, APPELLEE.

650 N.W.2d 241

Filed August 9, 2002. Nos. S-01-277 through S-01-279.

Appeals from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Reversed and remanded for a new trial on the issue of damages.

Jeff C. Miller and Malcolm D. Young, of Young & White, for appellants.

Douglas L. Kluender and Jay L. Welch, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellee.

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

PER CURIAM.

Muriel A. Bacus (Bacus) and her two sons, Kyle Bacus and Richard J. Bacus, sustained injuries as a result of a three-vehicle accident. The driver of one of the other vehicles, Ramona C. Meyer, was killed. At the time of the accident, Donald C. Poston, the driver of the van which struck the other two vehicles, was being pursued by a Nebraska State Patrol trooper. Bacus, on behalf of herself and her sons, filed these actions against the State of Nebraska. The district court for Cuming County entered judgment for the State, and Bacus appeals.

The issues raised in these appeals are identical to those raised in *Meyer v. State, ante* p. 545, 650 N.W.2d 459 (2002). It is therefore unnecessary to restate the facts and analysis. In *Meyer*, we concluded that the plain language of Neb. Rev. Stat. § 81-8,215.01 (Reissue 1994) (which was in effect at the time of the accident) requires that the actions of a law enforcement officer during a vehicular pursuit be merely a proximate cause of

the damage, and not the sole proximate cause. We held that the district court was clearly wrong in finding that the vehicular pursuit was not a proximate cause of the accident which resulted in the injuries to the Bacuses.

Therefore, the judgment of the district court is reversed, and the cause is remanded for a new trial on the issue of damages.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

WRIGHT, J., participating on briefs.

ROSIE RODRIGUEZ, APPELLANT, V. JESS C. NIELSEN, DOING BUSINESS AS NIELSEN & BIRCH, APPELLEE.

650 N.W.2d 237

Filed August 9, 2002. No. S-01-612.

1. **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.
2. **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.
3. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In civil legal malpractice actions, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client.
4. **Criminal Law: Malpractice: Attorney and Client: Claims: Proof.** In cases involving alleged malpractice in the defense of a criminal matter, a convicted criminal who files a legal malpractice claim against his or her defense counsel must also allege and prove that he or she is innocent of the underlying crime.
5. **Actions: Pleadings.** A petition need not state a cause of action or defense in any particular form as long as the petition states in a logical and legal manner the facts which constitute the cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute.
6. ____: ____. It is the facts well pled, not the theory of recovery or legal conclusions, which state a cause of action.
7. **Self-Defense.** Justification of the use of force in self-defense is a statutorily defined affirmative defense in Nebraska.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Lori L. Phillips, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Stephen W. Kay and Harold W. Kay, of Kay and Kay, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Rosie Rodriguez brought this malpractice action against her former attorney, Jess C. Nielsen, alleging that his representation of her in a misdemeanor criminal action was negligent. The district court sustained Nielsen's demurrer to Rodriguez' fourth amended petition and gave her 20 days to amend. She did not further amend, and the case was dismissed. Rodriguez appeals.

SCOPE OF REVIEW

[1] 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. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

FACTS

In November 1996, Rodriguez filed suit against Nielsen. The district court sustained Nielsen's demurrer, and Rodriguez filed an amended petition alleging, among other things, that Nielsen owed her a duty of care to represent her in a competent manner, that Nielsen was negligent in the performance of such duty, and that Nielsen's negligence was the proximate cause of Rodriguez' damages. Part of Nielsen's answer alleged that Rodriguez' amended petition failed to state a cause of action.

Nielsen then filed a motion for summary judgment, alleging there was no genuine issue as to any material fact and that he was entitled to judgment as a matter of law. The district court sustained the summary judgment motion, and Rodriguez appealed. We reversed the judgment and remanded the cause

with directions, concluding that Rodriguez should have been given the opportunity to amend her petition. *Rodriguez v. Nielsen*, 259 Neb. 264, 609 N.W.2d 368 (2000).

On remand, the district court sustained Nielsen's demurrer to Rodriguez' fourth amended petition. When Rodriguez did not further amend, the court dismissed her petition. Rodriguez timely appealed.

ASSIGNMENT OF ERROR

Rodriguez claims the district court erred in finding that she failed to allege sufficient facts to support her allegation of innocence.

ANALYSIS

This matter is before us following the dismissal of Rodriguez' fourth amended petition. The relevant portions of the petition alleged:

> 14. That the Plaintiff was not guilty of the charges for which she was convicted for the following reasons:
>
> A. That on the date the alleged assault took place Michelle Mora, the alleged victim, was present with her mother at the mall in North Platte, yelling obscenities at the Plaintiff and her daughter and threatening the Plaintiff and her daughter with statements such as "I'm going to kick your ass."
>
> B. That the Plaintiff and her daughter attempted to leave the mall in order to avoid a confrontation with the alleged victim and her mother when Michelle Mora grabbed the Plaintiff by the arms and prevented her from leaving the mall.
>
> C. That the Plaintiff made numerous requests for Michelle Mora to let her go, and that Michelle Mora's response was to squeeze the Plaintiff's arms so hard her fingernails broke the skin on her left arm.
>
> D. That in order to free herself from Michelle Mora's grasp and to protect herself from Michelle Mora the Plaintiff had to use force to repel the alleged victim.

[2] 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. *Tilt-Up Concrete v. State City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001). We therefore review Rodriguez' fourth amended petition to determine whether the district court erred in sustaining Nielsen's demurrer. The question is whether Rodriguez has alleged facts that support her allegation of innocence. This is a question of law; therefore, we will reach a conclusion independent of that of the district court. See *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[3,4] Generally, in civil legal malpractice actions, a plaintiff alleging attorney negligence must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss (damages) to the client. *Rodriguez v. Nielsen*, 259 Neb. 264, 609 N.W.2d 368 (2000); *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991). However, in cases involving alleged malpractice in the defense of a criminal matter, a convicted criminal who files a legal malpractice claim against his or her defense counsel must also allege and prove that he or she is innocent of the underlying crime. See *Rodriguez, supra.* In *Rodriguez*, we set forth the allegations required to state a cause of action for legal malpractice by a convicted criminal against his or her defense lawyer. The convicted criminal must, in addition to the usual requirements of employment, duty, breach, proximate cause, and damage, allege facts supporting an allegation of innocence. See *id.* Therefore, to properly state a cause of action, Rodriguez must allege facts to demonstrate innocence of the underlying crime of which she was convicted.

[5,6] A petition need not state a cause of action or defense in any particular form as long as the petition states in a logical and legal manner the facts which constitute the cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute. *Nuss v. Alexander*, 257 Neb. 36, 595 N.W.2d 263 (1999). It is the facts well pled, not the theory of recovery or legal conclusions, which state a cause of

action. *Id.*, quoting *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993).

In *Rodriguez*, 259 Neb. at 271, 609 N.W.2d at 373-74, we stated:

> Unless a plaintiff can establish his or her innocence of the underlying criminal charges, the law views the criminal conduct as the legal cause of damages, and not the attorney's malpractice. . . . Thus, public policy prohibits a convicted criminal from bringing a malpractice action against his or her attorney because allowing such a claim would provide the criminal with an opportunity to profit either directly or indirectly from his or her criminal conduct.

(Citations omitted.)

[7] In considering the demurrer, we are required to give Rodriguez the benefit of all reasonable inferences from the facts alleged in her fourth amended petition. Rodriguez does not allege actual innocence or set forth any facts that would establish her actual innocence. Instead, she alleges that she acted in self-defense. Justification of the use of force in self-defense is a statutorily defined affirmative defense in Nebraska. *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999). Neb. Rev. Stat. § 28-1409(1) (Reissue 1995) provides that "the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."

Rodriguez has not denied that she committed the acts but has implied that the acts were the result of a reasonable and good faith belief in the necessity of using force and that the force used was immediately necessary and justified under the circumstances. See *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). Giving Rodriguez the benefit of all reasonable inferences from the facts alleged, she has not alleged and cannot prove actual innocence.

Rodriguez did not allege that she was absent at the time of the incident or that she did not commit the acts which occurred. Instead, Rodriguez alleged she committed the acts but that the acts were in self-defense. In the context of this civil malpractice action, these allegations of fact do not demonstrate actual

innocence. Therefore, Rodriguez' allegations do not establish that she is innocent of the crime of which she was convicted.

CONCLUSION

The district court did not err in sustaining the demurrer and dismissing Rodriguez' petition when she failed to amend. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
DWIGHT L. ROSSBACH, APPELLEE.

650 N.W.2d 242

Filed August 16, 2002. No. S-00-1313.

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. **Constitutional Law: Criminal Law: Preliminary Hearings.** A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of the Nebraska Constitution.
3. **Criminal Law: Preliminary Hearings: Probable Cause.** A preliminary hearing is not a trial of the person charged in regard to his or her guilt or innocence; rather, the purpose of a preliminary hearing is to ascertain whether or not a crime has been committed and whether there is probable cause to believe the accused committed it.
4. **Probable Cause: Evidence: Verdicts.** Evidence that would justify a committing magistrate in finding that probable cause existed for the detention of a defendant need not necessarily be sufficient to sustain a verdict of guilty when he or she is placed on trial.
5. **Preliminary Hearings: Proof.** The rule that an accused is entitled to the benefit of a reasonable doubt does not apply in preliminary examinations.
6. **Criminal Law: Preliminary Hearings: Probable Cause: Evidence.** The test at a preliminary hearing is not whether guilt is established beyond a reasonable doubt, but, rather, whether evidence is adduced that shows a crime was committed and that there is probable cause to believe that the accused committed the crime.
7. **Sexual Assault.** The victim's lack of consent is not an element of the crime of sexual assault when the victim is incapable of resisting or appraising the nature of his or her conduct.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Exception sustained, and cause remanded for further proceedings.

Kay E. Tracy, of the Hall County Attorney's Office, for appellant.

Kirk E. Naylor, Jr., for appellee.

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

GERRARD, J.

The State filed a complaint in the district court charging the appellee, Dwight L. Rossbach, with two counts of first degree sexual assault pursuant to Neb. Rev. Stat. § 28-319(1)(b) (Reissue 1995). A preliminary hearing was held in the district court, and the court refused to bind Rossbach over for trial and dismissed the charges against him. The State initiated error proceedings, arguing that there was sufficient evidence adduced to bind Rossbach over for trial in the district court. We agree, and remand this cause to the district court for further proceedings in accordance with Neb. Rev. Stat. § 29-2316 (Reissue 1995).

FACTUAL BACKGROUND

The State initially filed a complaint in the county court for Hall County, alleging that Rossbach committed first degree sexual assault against A.H. and L.N., pursuant to § 28-319(1)(b). Section 28-319(1) states that "[a]ny person who subjects another person to sexual penetration . . . (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct . . . is guilty of sexual assault in the first degree." The county court conducted a preliminary hearing and dismissed the initial complaint after finding that the evidence indicated that a crime had not been committed by the accused.

The State refiled an identical complaint directly in the district court, and the parties stipulated that a preliminary hearing could be conducted in the district court based upon the record of the proceedings held in the county court. At the district court preliminary hearing, the court received 12 exhibits, including transcribed testimony from six witnesses, including A.H. and L.N., previously offered at the county court hearing. Additionally, the parties stipulated regarding testimony that would be

given by a chemist employed by the Nebraska Department of Motor Vehicles.

The State alleges that on February 10, 2000, Rossbach sexually assaulted A.H. and L.N. at his home. At that time, A.H. and L.N. were 17 and 16 years old, respectively, and attended a small central Nebraska high school. Rossbach, at that time, was a 44-year-old Spanish language teacher at the same high school. Rossbach had L.N. as a student in a class during the 1999-2000 school year; A.H. was not then a student of Rossbach, but had been in the past. The testimony and the evidence from the preliminary hearing reveal the following: In December 1999, A.H. began e-mailing Rossbach after she and L.N. found his e-mail address in another teacher's classroom. A.H. testified that she and her friends composed an e-mail to Rossbach during lunchtime, and A.H. sent it to Rossbach on a dare from her friends. At some point prior to February 10, 2000, A.H. and L.N. showed Rossbach identical tattoos that they each had near the pelvis—a four-leaf clover with the saying "lucky you." The high school principal testified that prior to February 10, he received a warning from another high school teacher that A.H. had mentioned an attraction to both Rossbach and the principal, and A.H. expressed a desire to have sex with them.

The evidence also showed that A.H. had been hospitalized for alcohol poisoning in October 1999 and that she had spoken with Rossbach about it. Upon hearing this, Rossbach, according to A.H., told her that she "shouldn't drink so much." A.H. also testified that she has been taking Zoloft, an antidepressant medication, for approximately 2 years and had been on antidepressants since she was in fifth grade. A.H. mentioned her antidepressant medication to L.N. while at Rossbach's home on February 10, 2000, and A.H. thought that Rossbach probably heard the exchange.

In an e-mail to Rossbach dated February 9, 2000, A.H. wrote, "I know that you could lose your job . . . . But I know I want to do this. . . . I can hardly get my mind off of you, I undress you with my eyes just walking pass [sic] you in the hallway." A.H. testified that she wrote this e-mail in response to prior conversations with Rossbach in which he expressed a desire to have sex with A.H., but said he could lose his job if anyone found out. A.H. testified that although her flirtation with Rossbach might

have made it seem like she reciprocated his desire, she never actually told him that she wanted to have sex with him. Rossbach invited A.H. to his home during the week of February 10, e-mailed her directions to his home, and mentioned specifically that his wife would be out of town.

The evidence revealed that on the evening of February 10, 2000, A.H. and L.N. attended a party in Grand Island, Nebraska, where they each consumed alcoholic beverages. A.H. testified that she drank four bottles of "Two Dogs," an alcoholic beverage, and a "Reserves" wine cooler at the party and that before 9 p.m., was "buzzing" and "had a light head." L.N. testified that before they left the party at 8:30 p.m., she drank a "Reserves" wine cooler and two bottles of "Two Dogs" alcoholic beverage and felt "too drunk to drive." L.N. testified that she and A.H. had not previously agreed to go to Rossbach's home, but decided to go once they were in the car after the party. A.H. had brought the written directions to Rossbach's home and had left them in L.N.'s car. A.H. drove L.N.'s car to Rossbach's home, approximately 20 miles away from the party in Grand Island.

Upon arriving at Rossbach's home, A.H. and L.N. entered without knocking. A.H. and L.N. found Rossbach in his kitchen, where he gave them tequila and beer. L.N. stated that Rossbach was not drinking alcohol, but "some kind of pop." Rossbach knew that A.H. and L.N. had been drinking, as A.H. brought a bottle of "Reserves" with her into Rossbach's home and he tasted it. A.H., when asked how she physically felt while at Rossbach's home, testified that she felt dizzy, had trouble walking, talked fast, slurred her speech, and laughed a lot. L.N. testified that she felt sick but was laughing and did not feel like she was going to pass out.

Rossbach told the high school principal that after talking with A.H. and L.N., he went into the bathroom adjacent to his bedroom. Upon exiting the bathroom, Rossbach found A.H. and L.N. in his bed. L.N. stated that Rossbach had removed some of her clothing before he entered the bathroom; while he was in the bathroom, A.H. suggested that L.N. should remove the rest of her clothes. L.N. testified that she removed her shirt at A.H.'s suggestion, although she did not want to. A.H. and L.N. both testified that though they did not intend to have sex with Rossbach when

going to his home, Rossbach sexually penetrated both of them. A.H. and L.N. remembered having sex with Rossbach. L.N. testified that she does not remember driving herself back from Rossbach's home, because she was feeling "spaced out."

A.H. testified that she had sex with Rossbach willingly and e-mailed him again after February 10, 2000. On February 14, A.H. e-mailed Rossbach:

> I dont know Senor, I havent been able to stop thinking about you and everything else. Every time I turn around there you are . . . I have a feeling that I'm gonna fall and that I'm gonna fall hard. I have all these wierd [sic] feelings and thoughts and I just dont know what to do. I get jealous when I see other women in school talking to you. Its stupid, I know, but I do. I want it all, but its all so hard. I just dont know. What do you think?? So when am I gonna get to play again??
>
> Your little "TOY"
>
> me

In an e-mail to Rossbach dated February 16, 2000, A.H. wrote:

> [W]hen ever [sic] you want to have a little fun, you know how to get ahold of me. And like we discussed, it will only be the two of us. . . . But like I said, dont worry about [L.N.] She just wishes that she never would of done it and shes starting to forget about it. I'm the one whos waiting for more of it.

Again, A.H. signed the e-mail "Your little Toy."

At the preliminary hearing, the State also offered the testimony of Dr. Susan Howard, an expert qualified in adolescent medicine and psychiatry. Howard opined that A.H. and L.N. were mentally or physically incapable of resisting or appraising the nature of their conduct when they had sex with Rossbach. She based this opinion on a reading of the police records, her knowledge of child development, psychiatric issues, and her medical knowledge of the effects of alcohol on judgment and decisionmaking ability. It was Howard's opinion that A.H. and L.N. were incapable of resisting or appraising the nature of their conduct because of (1) A.H.'s and L.N.'s relative ages and stages of development, (2) their level of alcohol consumption, and (3) the imbalance of authority inherent in the student-teacher relationship.

The parties also stipulated at the preliminary hearing that were the State's chemist called to testify, he would opine that A.H.'s blood alcohol content ranged from .310 to .370 at 9 p.m. on February 10, 2000, and that her blood alcohol content increased to a range of .317 to .430, and possibly as high as .500 (depending on the alcohol consumed) at the time of the alleged assault around midnight. Though the stipulation is not specific on the basis of the measurement, it appears from the record that the court and the parties understood the measurement of the alcohol content to be grams of alcohol per 100 milliliters of blood, or its equivalent. The chemist, if called, would have also testified that L.N.'s blood alcohol content ranged from .126 to .186 at 9 p.m. on February 10 and that the range increased up to .202, "with an average" of .149 or .170 (depending on the alcohol consumed) at the time of the alleged assault around midnight. The chemist formed these opinions from a hypothetical based on A.H.'s and L.N.'s self-reporting with respect to the amount of alcohol consumed and the time of consumption, and their respective body weights. Rossbach did not stipulate that the amounts of consumption utilized by the chemist in answering the hypothetical question were, in fact, the amounts consumed by A.H. and L.N. The court accepted the parties' stipulation regarding the offer of testimony by the State's chemist.

The district court determined in its order of dismissal that the State did not show that a crime, as defined by § 28-319(1)(b), had been committed. The court stated in its order that "[t]hese alleged victims . . . were capable of resisting arranging [sic] this sexual encounter and were capable of appraising the nature of their conduct . . . ." Further, the district court, without assessing the culpability of Rossbach, reasoned that

> the alleged victims consumed the vast majority of the alcohol voluntarily and had the capacity to make a decision to travel in a car in excess of 20 miles, engage in the sexual relationship, discuss the ramifications of the relationship, and . . . the capacity to continue to try to foster the relationship.

Thus, the court, at the preliminary hearing stage, dismissed the two counts of first degree sexual assault against Rossbach. The State takes exception to the judgment of the district court

pursuant to the error proceedings set forth in Neb. Rev. Stat. § 29-2315.01 (Reissue 1995).

ASSIGNMENT OF ERROR

The State assigns that the district court erred in dismissing the charges at the preliminary hearing rather than binding Rossbach over to stand trial on two counts of first degree sexual assault, pursuant to § 28-319(1)(b).

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. Haltom*, 263 Neb. 767, 642 N.W.2d 807 (2002).

ANALYSIS

[2] We have long recognized that a preliminary hearing did not exist at common law. A preliminary hearing is a creature of statute, and its functional purpose is stated in Neb. Rev. Stat. § 29-506 (Reissue 1995). A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of the Nebraska Constitution. *Delay v. Brainard*, 182 Neb. 509, 156 N.W.2d 14 (1968). See *State v. O'Kelly*, 175 Neb. 798, 124 N.W.2d 211 (1963).

[3] A preliminary hearing is not a trial of the person charged in regard to his or her guilt or innocence. See, *Delay, supra*; *State v. Sheldon*, 179 Neb. 377, 138 N.W.2d 428 (1965). Instead, the purpose of a preliminary hearing is to ascertain whether or not a crime has been committed and whether there is probable cause to believe the accused committed it. See, *State v. Wilkinson*, 219 Neb. 685, 365 N.W.2d 478 (1985); *State v. Ruzicka*, 218 Neb. 594, 357 N.W.2d 457 (1984); *State v. Howard*, 184 Neb. 274, 167 N.W.2d 80 (1969); *Delay, supra*; *Fugate v. Ronin*, 167 Neb. 70, 91 N.W.2d 240 (1958). The effect of the foregoing, if found to exist, is to hold the accused for trial in district court, which has jurisdiction to try the accused. *Delay, supra.* See *Fugate, supra*.

[4] Thus, the question before us is not whether the State proved the accused guilty beyond a reasonable doubt, but, rather, whether the State had adduced enough evidence, if believed by a trier of fact, that would show that a first degree sexual assault had been

perpetrated and that there is probable cause to believe the accused committed the act(s). Evidence that would justify a committing magistrate in finding that probable cause existed for the detention of a defendant need not necessarily be sufficient to sustain a verdict of guilty when he or she is placed on trial. See, *Delay, supra*; *Neudeck v. Buettow*, 166 Neb. 649, 90 N.W.2d 254 (1958).

[5,6] The rule that the accused is entitled to the benefit of a reasonable doubt does not apply in *preliminary* examinations. *Delay, supra.* The test is not whether guilt is established beyond a reasonable doubt, but, rather, whether evidence is adduced that shows a crime was committed and that there is probable cause to believe that the accused committed the crime. See, *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000); *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982). Any alteration to this rule, when we require prompt preliminary hearings, would tend to make the preliminary hearing a trial and could seriously impede the flow of criminal prosecutions. See *Delay, supra*.

The issue on appeal, therefore, is whether the State had adduced sufficient evidence at the preliminary hearing to bind Rossbach over for trial on two counts of first degree sexual assault. In other words, assuming the evidence to be true, see *Delay, supra*, is there evidence worthy of consideration that would tend to show that the crime of first degree sexual assault was committed in the present case? There was no dispute at the preliminary hearing stage that Rossbach was the individual who engaged in the charged conduct.

The real issue that troubled the district court, and that we now confront, is whether alleged victims of sexual assault can voluntarily intoxicate themselves so as to render themselves "physically incapable of resisting or appraising the nature of [their] conduct" under § 28-319(1)(b). Nebraska's sexual assault statutory scheme provides the answer.

There are three distinct ways in which a perpetrator can commit the offense of first degree sexual assault under § 28-319(1). In addition to compelled or coerced sexual penetration pursuant to § 28-319(1)(a), a perpetrator 19 years or older may commit first degree sexual assault by subjecting a victim that is less than 16 years of age to sexual penetration. See § 28-319(1)(c). Furthermore, Nebraska's first degree sexual assault law prohibits,

without qualification, a perpetrator from sexually penetrating a victim that the attacker knows or should have known is "mentally or physically incapable of resisting or appraising the nature of his or her conduct." § 28-319(1)(b). Nothing in the plain language or legislative history of § 28-319(1)(b) limits or qualifies the "incapable of resisting or appraising the nature of his or her conduct" phrase—a fact significant to our analysis.

Common-law authorities treated intercourse with an unconscious woman as rape and occasionally expanded this rule to cases where the female was not technically unconscious but was so incapacitated by alcohol or drugs as to be in a condition of utter insensibility or stupefaction. See, e.g., *Hirdes v. Ottawa Circuit Judge*, 180 Mich. 321, 146 N.W. 646 (1914); *Commonwealth v. Burke*, 105 Mass. 376 (1870); *State v. Stoyell*, 54 Me. 24 (1866); A.L.I., Model Penal Code and Commentaries § 213.1, comment 1 (1980). Most current statutes, however, differentiate unconsciousness from lesser impairment and require in the latter case that the drug or intoxicant be administered by or with the privity of the defendant in order to constitute the highest degree of forcible rape. See, e.g., Cal. Penal Code § 261(a)(3) (West 1999); Idaho Code § 18-6101(4) (Michie Cum. Supp. 2002); La. Rev. Stat. Ann. § 14:43A(1) (West 1997); N.H. Rev. Stat. Ann. § 632-A:2I(f) (Cum. Supp. 2001); N.D. Cent. Code § 12.1-20-03(1)b (1997); Ohio Rev. Code Ann. § 2907.02(A)(1)(a) (Anderson 1999); A.L.I., Model Penal Code and Commentaries, *supra*, comment 5.

The principal modern deviation from this view is the New York statute, under which the incapacitating substance must be administered without the consent of the victim, and the defendant has an affirmative defense if he did not know of the facts or conditions giving rise to the victim's incapacity to consent. N.Y. Penal Law § 130.10 (McKinney 1998). If the defendant did have such knowledge, however, New York declares him guilty of a lesser offense of rape without requiring that the defendant act with the purpose of preventing resistance or even that he administer the substance in question. *Id.*; N.Y. Penal Law §§ 130.00(6) and 130.25(1) (McKinney 1998). Many states require that the intoxicant be given without the victim's consent. See, e.g., Ala. Code § 13A-6-60(6) (1994); Colo. Rev. Stat. Ann. § 18-3-402(1)(d) (West 1999); Ky. Rev. Stat. Ann. § 510.010(5) (Michie 1999).

Nebraska, however, is among a handful of states that substantially codifies the common-law view. In these states, the statute requires that the victim be under the influence of an intoxicant or be mentally or physically incapacitated, but does not require that the defendant administer the intoxicant or that the victim be given the intoxicant without consent. See § 28-319(1)(b). See, also, Ariz. Rev. Stat. Ann. § 13-1401(5)(b) (West 2001); Iowa Code Ann. § 709.1(1) (West Cum. Supp. 2002); Kan. Stat. Ann. § 21-3502(a)(1)(C) (Cum. Supp. 2001); Mont. Code Ann. § 45-2-101(40) (1999). Nebraska and these other states grade the offense at the same level as forcible rape.

[7] No qualification or lesser offense exists with regard to voluntary intoxication in Nebraska. Plain and simple, any person who subjects another person to sexual penetration, who knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct, is guilty of first degree sexual assault. § 28-319(1)(b). The victim's lack of consent is not an element of the crime of sexual assault when the victim is incapable of resisting or appraising the nature of his or her conduct. See, *State v. Collins*, 7 Neb. App. 187, 583 N.W.2d 341 (1998); *In re Interest of J.M.*, 223 Neb. 609, 391 N.W.2d 146 (1986). Under § 28-319(1)(b), the two-part analysis requires a significant abnormality, such as severe intoxication or other substantial mental or physical impairment, on the part of the alleged victim, and knowledge of the abnormality on the part of the alleged attacker. See *Collins, supra.*

With that in mind, we apply the plain language of § 28-319(1)(b) to the present facts to determine whether there was sufficient evidence (assuming the evidence to be true) that would tend to show that a crime had been committed such as to bind Rossbach over for trial in the district court. As noted earlier, § 28-319(1) provides that "[a]ny person who subjects another person to sexual penetration . . . (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct . . . is guilty of sexual assault in the first degree."

As we view the record for purposes of a preliminary hearing, the State has adduced sufficient evidence, if proved beyond a reasonable doubt at trial and believed by a trier of fact, of acts

that would constitute the crime of first degree sexual assault as defined by § 28-319(1)(b). Without repeating in detail the facts set forth earlier in the opinion, we note that the evidence revealed, at a minimum, significant mental or physical abnormality on the part of both A.H. and L.N. in the hour(s) prior to the alleged sexual assault. A.H. had a blood alcohol content that potentially ranged from .370 at 9 p.m. on February 10, 2000, to .430, or higher, at or around the time of the alleged sexual assault. L.N. had a blood alcohol content that potentially ranged from .186 at 9 p.m. on February 10 up to .202, at or around the time of the alleged sexual assault. Howard testified, inter alia, that because of both women's ages and stages of development, along with the high level of alcohol consumption, A.H. and L.N. were incapable of resisting Rossbach or appraising the nature of their conduct.

Further, evidence was adduced indicating that Rossbach knew or should have known of the significant mental or physical abnormalities of both women on the evening of February 10, 2000. In addition to the high blood alcohol contents of both women, the evidence showed that the women felt dizzy, had trouble walking, and slurred their speech. Rossbach gave A.H. and L.N. more alcohol after they arrived at his home, prior to the alleged assaults. The fact that A.H. and L.N. had voluntarily consumed substantial amounts of alcohol earlier in the evening does not lessen the culpability of Rossbach. There was no dispute at the preliminary hearing that Rossbach subjected both A.H. and L.N. to sexual penetration during the evening of February 10.

Given the facts presented at the preliminary hearing, including the expert testimony of Howard and the State's chemist (which may be contested at trial but was undisputed at the preliminary hearing), we conclude that the State has adduced enough evidence at this stage of the proceedings to show that the crime(s) were committed and probable cause to believe that Rossbach committed the crime(s). We determine as a matter of law that the State has adduced enough evidence at the preliminary hearing to bind Rossbach over to stand trial on two counts of first degree sexual assault in the district court. Ultimately, of course, under our statutory and constitutional system, it will be a trier of fact

that will determine whether the State has proved beyond a reasonable doubt that Rossbach subjected A.H. and L.N. to sexual penetration at a time when they were mentally or physically incapable of resisting or appraising the nature of their conduct.

CONCLUSION

For the foregoing reasons, we sustain the exception taken by the State, pursuant to § 29-2315.01. Because jeopardy did not attach at the preliminary hearing, we remand the cause to the district court for further proceedings consistent with this opinion and in accordance with § 29-2316.

EXCEPTION SUSTAINED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., participating on briefs.

HENDRY, C.J., not participating.

AMERICAN BUSINESS INFORMATION, INC., ET AL., APPELLEES, V. MARY JANE EGR, STATE TAX COMMISSIONER, AND NEBRASKA DEPARTMENT OF REVENUE, APPELLANTS.

650 N.W.2d 251

Filed August 16, 2002. No. S-01-470.

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. ____: ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
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. **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.

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

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

Richard P. Jeffries, of Kutak Rock, L.L.P., for appellees.

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

MCCORMACK, J.

NATURE OF CASE

The Nebraska Department of Revenue and State Tax Commissioner Mary Jane Egr appeal from an order of the district court for Lancaster County. At issue is whether sales of certain products by American Business Information, Inc., now known as infoUSA Inc. (ABI), are "sales of tangible personal property" under Neb. Rev. Stat. § 77-2734.14 (Reissue 1990).

BACKGROUND

ABI provides comprehensive business data and products to other businesses to help those businesses find new customers. The data and products are derived from ABI's database, which contains entries from over 10 million businesses in the United States and Canada. The database is compiled using yellow page directories and other sources of public information. ABI also conducts telephone verification of its database to ensure that the database is accurate and up to date.

Using this database, ABI markets a number of customized and noncustomized products. Customized products include only businesses meeting criteria specified by the customer and are produced in the type of medium requested by the customer. Generally, customized products are priced on a per-name basis. Pricing varies according to the number of names supplied, the type of data delivered, and the medium on which the data is delivered. ABI distributes its products under agreements that grant customers a license to use ABI's products in the ordinary course of their businesses and prohibit the unauthorized reproduction of

ABI's products. The types of products marketed by ABI, and which are the subjects of this appeal, are described below.

The most basic product marketed by ABI is the prospect list. Prospect lists, which are customized products, are printed on 8½- by 11-inch paper and contain entries on individual businesses. The data reported include a business' name, address, telephone number, fax number, type of business, number of employees, sales volume, and other information. Prospect lists are typically three-hole-punched for use in a notebook binder. Prospect lists have a variety of marketing applications, including direct sales.

ABI also markets 3- by 5-inch index cards to its customers. Index cards are also customized products and contain the same data as prospect lists. On the back of each card, space is provided where comments may be written. Index cards are often used for telemarketing purposes because of the convenience of distributing them to numerous sales associates. Index cards were developed by ABI in response to customers' comments about the limitations of prospect lists.

ABI also provides business data via computer diskettes and magnetic tapes. Each of these media is a customized product. Each allows the customer to obtain the data the customer desires from ABI and then to format that data in the manner the customer chooses to produce its own reports, labels, cards, et cetera. The only difference between computer diskettes and magnetic tapes is that magnetic tapes are suitable for use on large mainframe computers.

CD-ROM's are noncustomized products. Each CD-ROM contains the entire ABI database, enabling customers to access and format the data they need. CD-ROM's are "metered" so that customers have access to only the number of records paid for by the customer.

ABI also delivers online data from its database by computer communications over telephone lines. Customers purchasing online data use computer equipment capable of receiving, interpreting, and storing an electronic signal transmitted by ABI. Customers are able to conduct their own search query and download data directly from ABI's database.

Two other products not at issue in this appeal, mailing labels and business directories, are also marketed by ABI. Business directories are bound volumes and are noncustomized products. Mailing labels are customized products and can be directly attached to brochures for direct mail use. ABI and the department have stipulated that sales of business directories and mailing labels are "[s]ales of tangible personal property" under § 77-2734.14(2).

During 1990 and 1991, ABI and its shareholders filed income tax returns which reflected their opinion that the sales of the aforementioned products were "[s]ales of tangible personal property" under § 77-2734.14(2). The department audited ABI for the 1990 and 1991 tax years and determined that ABI's sales were "other than sales of tangible personal property" under § 77-2734.14(3). Based on that determination, the department assessed deficiency notices to ABI for corporate income tax. During 1990 and 1991, ABI was organized as a subchapter S corporation, meaning that ABI's income was passed on to its shareholders on a proportional basis for taxation purposes. Thus, the department also assessed deficiency notices to ABI's shareholders for individual income taxes. ABI and its shareholders (hereinafter collectively referred to as "ABI") protested the department's deficiency assessments, which assessments the commissioner later sustained. ABI appealed the commissioner's decision to the district court for Lancaster County.

The district court reversed the commissioner's decision for two reasons. First, the district court concluded that it was not logical to conclude that the business directories and mailing labels were tangible personal property, as stipulated by the parties, while finding that ABI's remaining products were not. Second, the district court felt compelled to reverse the decision based on the language of *May Broadcasting Co. v. Boehm*, 241 Neb. 660, 490 N.W.2d 203 (1992). In *May Broadcasting Co.*, we stated, "The mere fact that [electronic] signals may be received and stored shows that a tangible thing is in issue. The concept of physically storing an intangible thing is beyond comprehension." 241 Neb. at 666, 490 N.W.2d at 207. The department and commissioner now appeal, and we moved the case to our docket

pursuant to our authority to regulate the docket of this court and the Nebraska Court of Appeals.

ASSIGNMENT OF ERROR

The department and commissioner assign, rephrased, that the district court erred in finding that ABI's sales of business data products were "[s]ales of tangible personal property" under § 77-2734.14(2) rather than "[s]ales, other than sales of tangible personal property" under § 77-2734.14(3).

STANDARD 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. *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000). 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.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

[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. *Id.*

[5] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

ANALYSIS

The income derived from the sales of ABI's products is apportioned to Nebraska pursuant to § 77-2734.14. That section provides in relevant part:

> (1) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales everywhere during the tax period.

> (2) Sales of tangible personal property are in this state if: . . . .
>
> (3) Sales, other than sales of tangible personal property, are in this state if . . . .

Thus, the statute distinguishes between sales of tangible personal property and sales of other than tangible personal property when apportioning income to Nebraska. Because of other stipulated facts unimportant to our decision, the apportionment of ABI's income hinges on whether the sales of the prospect lists, 3- by 5-inch index cards, computer diskettes, magnetic tapes, CD-ROM's, and online information are sales of tangible personal property under § 77-2734.14(2), or whether they are sales of other than tangible personal property under § 77-2734.14(3).

In support of their argument that the sales of ABI's products are sales of other than tangible personal property, the department and commissioner cite a number of cases from other states. See, e.g., *Fingerhut Products Co. v. Commissioner of Revenue*, 258 N.W.2d 606 (Minn. 1977); *Spencer Gifts, Inc. v. Taxation Div. Director*, 182 N.J. Super. 179, 440 A.2d 104 (1981); *Dun & Bradstreet, Inc. v. City of New York*, 276 N.Y. 198, 11 N.E.2d 728 (1937); *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405 (Tenn. 1976); *Bullock v. Statistical Tabulating Corp.*, 549 S.W.2d 166 (Tex. 1977); *Janesville Data Center v. Dept. of Revenue*, 84 Wis. 2d 341, 267 N.W.2d 656 (1978). The courts in each of these cases concluded that under the law of the respective state, sales of products similar to the products sold by ABI were not sales of "tangible personal property." Instead, the courts concluded that the object or essence of the sale was the sale of intangible information and that the physical medium which conveyed that information was merely incidental or inconsequential to the transaction.

Upon review of these cases, we conclude that the department and commissioner's emphasis on them is misplaced. In each of these cases, the respective state courts inquired into the meaning of the term "tangible personal property" and interpreted that term under state law. However, in the present case, we are required to interpret that term consistent with the meaning given to it under federal law. In addition, we conclude that *May Broadcasting Co. v. Boehm*, 241 Neb. 660, 490 N.W.2d 203

(1992), which the district court relied on in this case, is not directly applicable because in *May Broadcasting Co.*, we were not required to interpret the relevant provisions of Nebraska use tax under federal law, unlike the present case. However, as discussed below, we find the reasoning of *May Broadcasting Co.* to be applicable to our analysis.

The Legislature has directed that the term "tangible personal property," as used in § 77-2734.14,

> shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required. Any reference to the laws of the United States shall mean the provisions of the Internal Revenue Code of 1986 . . . .

Neb. Rev. Stat. § 77-2714 (Reissue 1996). Thus, we consider the meaning of the term "tangible personal property" under the Internal Revenue Code of 1986.

In *Norwest Corp. & Subs. v. Commissioner*, 108 T.C. 358 (1997), the U.S. Tax Court considered whether computer software was tangible personal property or intangible personal property for purposes of federal investment tax credits. In that case, the taxpayer purchased computer software written on magnetic disks and tapes. The taxpayer's purchase entitled it to use the software on a nonexclusive, nontransferable basis for an indefinite or perpetual term. The taxpayer did not purchase any intellectual property rights in the software, nor did the taxpayer purchase the right to reproduce the software outside of its affiliated corporations.

The Tax Court held that the software was tangible personal property. Relying primarily on legislative history to reach this conclusion, the Tax Court stated that the "explicit legislative intent to define broadly the term 'tangible personal property' suggests that the term may encompass all personal property that is not intangible property in the narrow, traditional sense; i.e., rights and obligations created by law." *Id.* at 374-75.

> Intangible intellectual property rights and the tangible or physical manifestations or embodiments of those rights are distinct property interests. . . . A purchaser of a particular tangible manifestation or embodiment of intellectual property acquires only property rights in that manifestation

> or embodiment and does not acquire any rights to the underlying intellectual property.

(Citation omitted.) *Id.* at 375.

This distinction between the acquisition of intellectual property rights and the acquisition of a license to use the physical embodiment of intellectual property leads us to conclude that the products sold by ABI constitute tangible personal property. ABI distributes its products under agreements that grant customers a license to use ABI's products in the ordinary course of their businesses. Those agreements also contain terms and conditions prohibiting the unauthorized reproduction of ABI's products. ABI's customers acquired no intangible intellectual property rights when purchasing ABI's products.

In *Norwest Corp. & Subs.*, it was important to the Tax Court's reasoning that the magnetic disks and tapes at issue in that case had a tangible, physical manifestation or embodiment. However, an online data product similar to that in the present case was not at issue in *Norwest Corp. & Subs*. In the present case, it is clear that the prospect lists, the 3- by 5-inch index cards, the computer diskettes, the magnetic tapes, and the CD-ROM's sold by ABI have a tangible, physical manifestation or embodiment. Less clear is whether the online data sold by ABI has a tangible, physical manifestation or embodiment. However, in *May Broadcasting Co. v. Boehm*, 241 Neb. 660, 490 N.W.2d 203 (1992), this court considered whether syndicated programming purchased by a broadcaster and transmitted to the broadcaster via electronic signals was tangible personal property subject to use tax. This court concluded that it was and, in the process, stated: "A transmission by satellite is the transmission of a tangible thing—an electronic signal. The mere fact that the signals may be received and stored shows that a tangible thing is in issue. The concept of physically storing an intangible thing is beyond comprehension." *Id.* at 666, 490 N.W.2d at 207. By the same reasoning employed in *May Broadcasting Co.*, we conclude that ABI's delivery of online data electronically over telephone lines "is the transmission of a tangible thing." We therefore conclude that the sale of each of the business products at issue in the present case is a sale of "tangible personal property" under § 77-2734.14(2).

CONCLUSION

The sales of business data products by ABI are "[s]ales of tangible personal property" under § 77-2734.14(2). Thus, the decision of the district court is affirmed.

AFFIRMED.

HAROLD D. EYL, AN INDIVIDUAL, AND CITY OF WISNER, A POLITICAL SUBDIVISION, APPELLEES, V. CIBA-GEIGY CORPORATION, A NEW YORK CORPORATION, AND NORTHEAST COOPERATIVE, A COOPERATIVE ASSOCIATION, APPELLANTS.

650 N.W.2d 744

Filed September 6, 2002. No. S-00-219.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
2. **Judgments: Verdicts.** In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
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. **Constitutional Law: Statutes.** Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state laws that conflict with federal law are invalid.
6. **Constitutional Law: States: Words and Phrases.** There are three varieties of preemption: express, implied, and conflict preemption.
7. ____: ____: ____. Express preemption arises when Congress has explicitly declared federal legislation to have a preemptive effect. It can also arise when a federal agency, acting within the scope of authority conferred upon it by Congress, has expressly declared an intent to preempt state law.
8. **Federal Acts: Products Liability: Claims.** The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (1994), preempts state common-law failure-to-warn claims.
9. **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.
10. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.

11. **Federal Acts: Products Liability: Claims.** Claims brought against a manufacturer and distributor alleging liability for failure to place flags or other notices warning others that an herbicide had been applied are labeling claims that are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (1994).
12. ____: ____: ____. A failure-to-warn claim is preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (1994), against both the manufacturer and the distributor of the product.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Reversed and remanded with directions to dismiss.

William J. Brennan and Gerald L. Friedrichsen, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellants.

Susan E. Fieber, of Nolan, Olson, Hansen, Fieber, Lautenbaugh & Geren, for appellee City of Wisner.

David E. Copple and Jim K. McGough, of Copple, Rockey & McGough, P.C., for appellee Harold D. Eyl.

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

CONNOLLY, J.

A jury awarded appellee Harold D. Eyl a $2,146,000 verdict for injuries he sustained after he was exposed to the herbicide "Pramitol 5PS" while working for appellee City of Wisner. Pramitol is manufactured by appellant Ciba-Geigy Corporation, and the City of Wisner purchased the product from appellant Northeast Cooperative, a distributor. We granted the appellants' motion to bypass.

On appeal, the appellants argue that Eyl's claims are labeling based and preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq. (1994). Eyl contends that FIFRA does not preempt his claims and asks us to overrule our decision in *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255. In the alternative, Eyl argues that because he was a bystander who should have been warned that a substance had been applied, his claims are not labeling based and that FIFRA does not apply. We determine that FIFRA applies to preempt

Eyl's failure-to-warn claims and decline to overrule *Ackles*. Accordingly, we reverse, and remand with directions to dismiss.

I. BACKGROUND

On April 9, 1993, Eyl was assigned to work at River Park in Wisner, Nebraska, where employees were setting posts and laying pea rock around playground equipment. On that morning, Donald H. Bode, an employee of the City of Wisner, applied Pramitol to prevent weeds in the playground area, which would then be covered by the pea rock. Pramitol requires water to activate it, and Bode testified that he usually wore rubber boots if it was wet.

Neither Ciba-Geigy nor Northeast Cooperative provided flags or signs that could be displayed to warn others that Pramitol had been applied in the area. A representative for Ciba-Geigy admitted that in addition to product labels, the company does send out additional pamphlets, brochures, leaflets, and news articles to suppliers or communities, but that the information must be consistent with the label.

Richard Brahmer, the general manager of Northeast Cooperative, testified that on some occasions, he would give customers information about a product that was not on the label. Brahmer stated that he was probably aware that people from the community would come in contact with Pramitol, but did not warn customers purchasing it to protect the application area. He testified that Northeast Cooperative sometimes prepared warning flags for customers of other products, because in 1996, a law was passed that required applicators to post warnings.

The label for Pramitol states, "DANGER":

> Corrosive — causes eye and skin damage. Do not get in eyes, on skin or clothing. Wash clothing after handling. Wear goggles or face shield and rubber gloves when handling. Harmful if swallowed, inhaled or absorbed through the skin. . . .
>
> If on skin: Remove contaminated clothing and immediately wash affected areas thoroughly with soap and water.

The material safety data sheet for Pramitol in effect on April 9, 1993, states that if skin contact occurs, the person should wash with soap and water and should remove contaminated clothing

and wash before reuse. The data sheet advises users to wear rubber gloves, waterproof boots, a long-sleeved shirt, long pants, and a hat. The data sheet also states that Pramitol can cause chemical burns to the skin and lists it as being "extremely irritating" to the skin. A later data sheet, issued in 1994, lists the same precautions, but omits the reference to chemical burns and states that Pramitol is "non-irritating" to the skin.

Eyl was present when the Pramitol was applied. Eyl did not read the label or the data sheet for the product because he did not use the product. The data sheet was available at a city warehouse where the employees worked, and boots were available for them to wear if needed. Eyl spent the day hauling pea rock to the playground area in a wheelbarrow, which required that he walk through grass and over the playground area. He testified that there was heavy fog and that the grass was wet. Puddles of water were also in the playground area.

Eyl was wearing steel-toe leather boots with oil-resistant soles. He testified that the boots became wet and stayed wet all morning. When he got home that evening, his boots, socks, and pant legs were wet. He wore the boots again for about 5 hours the next day. After April 10, 1993, the boots turned whitish in color and became stiff and brittle.

On April 11, 1993, Eyl's feet were red and sore. Eyl first saw his physician on April 13, and at that time, Eyl's feet and ankles were swollen, red, and hot. Eyl's feet later developed ulcers and remained painful. His condition did not improve, and Eyl was later seen by a dermatologist and was referred to the Mayo Clinic in Rochester, Minnesota. Because of the condition of his feet, Eyl is permanently disabled.

After Eyl presented his case, the appellants moved for a directed verdict, arguing that labeling-based state common-law failure-to-warn claims were preempted by FIFRA. The court stated that it did not view the case as a labeling-based claim that was preempted by FIFRA and denied the motion. The appellants then adduced evidence and renewed their motion for a directed verdict. The motion was overruled.

During the jury instruction conference, the court refused an instruction on design defects and stated that the case was a failure-to-warn case. The court submitted Eyl's claims to the

jury on negligent failure to warn against both appellants. The court submitted to the jury Eyl's strict liability claim for a warning defect against only Ciba-Geigy. The only claims submitted to the jury were claims based on a theory of failure to warn. The jury found for Eyl on all claims and awarded damages. The appellants moved for judgment notwithstanding the verdict. Among the issues raised, the appellants argued that Eyl's claims were preempted by FIFRA. The motions were overruled, and judgment was entered against the appellants.

II. ASSIGNMENTS OF ERROR

The appellants assign, rephrased, that the district court erred in (1) failing to find that Eyl's failure-to-warn claims are preempted by FIFRA, (2) failing to grant their motion for a directed verdict because Eyl failed to present a prima facie case, (3) failing to find that Eyl was negligent as a matter of law in a manner that entitled them to a directed verdict, (4) allowing medical experts to testify regarding causation when the experts did not know the level and extent of Eyl's exposure to Pramitol, (5) failing to grant their motions for a mistrial, (6) allowing prejudicial evidence, (7) failing to instruct the jury on the allocation of damages, (8) instructing the jury on future medical expenses, (9) instructing the jury regarding the label approved by the Environmental Protection Agency (EPA), (10) instructing the jury about Eyl's factual claims, and (11) overruling their motions for judgment notwithstanding the verdict because the verdict was excessive.

III. STANDARD OF REVIEW

[1] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Bowley v. W.S.A., Inc., ante* p. 6, 645 N.W.2d 512 (2002).

[2] In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

[3,4] Statutory interpretation presents a question of law. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (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. *In re Grand Jury of Douglas Cty.*, 263 Neb. 981, 644 N.W.2d 858 (2002).

IV. ANALYSIS

1. Preemption

The appellants contend that FIFRA preempts Eyl's failure-to-warn claims because this court, and a large majority of other courts, have held that FIFRA preempts labeling-based common-law causes of action. See *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255 (holding that FIFRA preempts labeling-based common-law claims and citing cases from other jurisdictions).

Eyl, however, asserts that the claims are not preempted because after our decision in *Ackles*, the EPA, in an amicus brief filed in *Etcheverry v. Tri-Ag*, 22 Cal. 4th 316, 993 P.2d 366, 93 Cal. Rptr. 2d 36 (2000), expressed the opinion that FIFRA does not preempt common-law claims. The Montana Supreme Court then adopted the EPA's position that FIFRA does not preempt common-law claims. *Sleath v. West Mont Home Health Services*, 304 Mont. 1, 16 P.3d 1042 (2000), *cert. denied sub nom. Dow AgroSciences LLC et al. v. Sleath et al.*, 534 U.S. 814, 122 S. Ct. 40, 151 L. Ed. 2d 13 (2001). Eyl further argues that even if FIFRA preempts failure-to-warn claims, it does so only for labeling-based claims in which there is a failure to warn the user of the product. Eyl argues that because he was a bystander, not a user, his claims are not labeling based.

(a) Federal Preemption: General Background

[5,6] Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state laws that conflict with federal law are invalid. U.S. Const. art. VI, cl. 2. See Scott A. Smith and Duana Grage, *Federal Preemption of State Products Liability Actions*, 27 Wm. Mitchell L. Rev. 391 (2000) (citing sources). There are three varieties of preemption: express, implied, and conflict preemption. See *id.*

[7] Express preemption arises when Congress has explicitly declared federal legislation to have a preemptive effect. It can

also arise when a federal agency, acting within the scope of authority conferred upon it by Congress, has expressly declared an intent to preempt state law. *Id*. This case involves issues of express preemption.

(b) FIFRA

Originally enacted in 1947, FIFRA establishes a comprehensive regulatory scheme for the packaging of chemicals such as pesticides and herbicides. See *Ackles, supra*. The EPA is the administrative agency in charge of setting appropriate regulations. Before an herbicide may be sold, it must be registered and its labeling approved by the EPA. *Id*.; § 136a(a). The review procedure requires that an applicant submit a proposed label to the EPA for approval. The label must address various concerns, including ingredients, directions for use, and adverse effects of the product. *Ackles, supra*; § 136a(c). " 'The objectives and purposes of FIFRA include the strengthening of federal standards, increasing EPA authority for their enforcement, and providing a comprehensive and uniform regulation of the labeling, sale, and use of pesticides.' " *Welchert v. American Cyanamid, Inc*., 59 F.3d 69, 71 (8th Cir. 1995).

FIFRA, at 7 U.S.C. § 136(p), defines label and labeling as follows:

> **(1) Label**
>
> The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.
>
> **(2) Labeling**
>
> The term "labeling" means all labels and all other written, printed, or graphic matter—
>
> (A) accompanying the pesticide or device at any time; or
>
> (B) to which reference is made on the label or in literature accompanying the pesticide or device . . . .

FIFRA contains specific preemption language for labeling-based claims, yet it also allows the states to regulate the use of a product. Section 136v provides in part:

> **(a) In general**
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to

the extent the regulation does not permit any sale or use prohibited by [FIFRA].

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].

(c) *Cipollone*, *Medtronic, Inc.*, and *Ackles*

The U.S. Supreme Court has never addressed the issue whether FIFRA preempts common-law causes of action. The Court, however, decided two cases involving other statutes that courts rely on when deciding issues regarding preemption under FIFRA.

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), the Court addressed the issue whether the Federal Cigarette Labeling and Advertising Act (1965 Act), as amended by the Public Health Cigarette Smoking Act of 1969 (1969 Act), preempted common-law claims—including design defect and failure-to-warn claims. The 1965 Act provided that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provision of this chapter." 15 U.S.C. § 1334(b) (Supp. V 1965-69). The 1969 Act's preemption clause provides: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b) (2000).

Concerning the 1965 Act, the Court stated that Congress spoke precisely and narrowly by using the term "statement." Thus, the Court determined that on its face, the preemption section of the 1965 Act prohibited only rulemaking bodies from mandating particular cautionary statements on cigarette labels. In determining the preemptive effect of the 1969 Act—a plurality of the Court held that unlike the 1965 Act—the 1969 Act preempted state common-law failure-to-warn claims that were based on advertising. The plurality's focus was on the terms "requirement or prohibition" in the 1969 Act. The plurality stated:

Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is

> much broader. First, the later Act bars not simply "statement[s]" but rather "requirement[s] or prohibition[s] . . . imposed under State law." Second, the later Act reaches beyond statements "in the advertising" to obligations "with respect to the advertising or promotion" of cigarettes.

Cipollone, 505 U.S. at 520.

The plurality rejected an argument that common-law damages actions do not impose "requirement[s] or prohibition[s]," stating that this argument was at odds with the plain language of the 1969 Act and the general understanding of common-law damages actions. The Court reasoned:

> The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

505 U.S. at 521, citing *San Diego Unions v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959).

The plurality also rejected an argument that the phrase "imposed under State law" excluded common-law actions, stating that it previously recognized that "State law" included common-law rules of liability. The Court noted that the preemption clause did not preempt all common law, but only those actions predicated on a theory that necessarily interferes with the 1969 Act. The Court determined that the plaintiff's failure-to-warn claim was preempted because it was specifically at odds with the labeling requirement of the 1969 Act.

After the decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), every federal court of appeals to address the issue has held that common-law labeling-based failure-to-warn claims brought against manufacturers of pesticides or herbicides are preempted by FIFRA. See, *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255 (citing *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995);

Taylor AG Industries v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995); *Lowe v. Sporicidin Intern.*, 47 F.3d 124 (4th Cir. 1995); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887 (8th Cir. 1994); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *King v. E.I. Dupont De Nemours and Co.*, 996 F.2d 1346 (1st Cir. 1993), *cert. dismissed* 510 U.S. 985, 114 S. Ct. 490, 126 L. Ed. 2d 440; *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), *cert. denied* 510 U.S. 913, 114 S. Ct. 300, 126 L. Ed. 2d 248; *Arkansas-Platte & Gulf v. Van Waters & Rogers*, 981 F.2d 1177 (10th Cir. 1993), *cert. denied* 510 U.S. 813, 114 S. Ct. 60, 126 L. Ed. 2d 30).

In addition, numerous state appellate courts hold that FIFRA preempts labeling-based common-law causes of action. See, e.g., *Ackles, supra*; *Schuver v. E.I. Du Pont de Nemours & Co.*, 546 N.W.2d 610 (Iowa 1996), *cert. denied* 519 U.S. 910, 117 S. Ct. 274, 136 L. Ed. 2d 197; *Hochberg v. Zoecon Corp.*, 421 Mass. 456, 657 N.E.2d 1263 (1995); *Quest Chemical Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995); *All-Pure Chemical Co. v. White*, 127 Wash. 2d 1, 896 P.2d 697 (1995); *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 886 P.2d 869 (1994), *cert. denied* 516 U.S. 820, 116 S. Ct. 80, 133 L. Ed. 2d 38 (1995).

After the decisions of these courts, the U.S. Supreme Court, in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996), revisited its decision in *Cipollone*. In *Medtronic, Inc.*, the plaintiff, who was injured when her pacemaker failed, sought to recover damages under Florida common law. The manufacturer contended that the claims were preempted under the Medical Device Amendments of 1976 (MDA).

Under the MDA, the Food and Drug Administration (FDA) prohibits marketing certain classes of medical devices, including pacemakers, without assurances that the devices are safe and effective. This requirement subjects a company to a rigorous premarket approval process. *Medtronic, Inc., supra*. See 21 U.S.C. § 360e (1994). But the MDA provided a grandfather clause that allowed existing devices to remain on the market during the approval process. The MDA also allowed devices that were substantially equivalent to preexisting devices to avoid the rigorous approval process by filing a notice and completing a relatively

simple approval process referred to as a " '§ 510(k) process.' " *Medtronic, Inc.*, 518 U.S. at 478. See 21 U.S.C. § 360(b). The pacemaker at issue in *Medtronic, Inc.* was approved under this "§ 510(k) process."

The MDA provides in part:

> [N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—
>
> (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
>
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k(a) (2000). The Court's plurality held that the MDA generally does not preempt common-law damages claims.

The Court focused on the term "requirement" in the MDA. The plurality reasoned that

> if Congress intended to preclude all common-law causes of action, it chose a singularly odd word with which to do it. The statute would have achieved an identical result, for instance, if it had precluded any "remedy" under state law relating to medical devices. "Requirement" appears to presume that the State is imposing a specific duty upon the manufacturer, and although we have on prior occasions concluded that a statute pre-empting certain state "requirements" could also pre-empt common-law damages claims, see *Cipollone*, 505 U.S., at 521-522 (opinion of STEVENS, J.), that statute did not sweep nearly as broadly as Medtronic would have us believe that this statute does.

Medtronic, Inc., 518 U.S. at 487-88.

The plurality noted that the act at issue in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), prohibited state requirements that were "based on smoking and health" and that common-law claims not based on smoking and health were not preempted. Concerning the MDA in *Medtronic, Inc.*, however, the plurality determined that an examination of the entire MDA makes it apparent that the term " 'requirements,' " as used throughout, "is linked with language suggesting that its focus is device-specific enactments of positive

law by legislative or administrative bodies, not the application of general rules of common law by judges and juries." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 489, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). See, also, *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255 (discussing *Medtronic, Inc.*).

In *Ackles*, this court held that FIFRA preempted common-law failure-to-warn claims. The plaintiff, a mail carrier, was delivering mail when he became exposed to an insecticide that was being sprayed on an adjacent cornfield. He then sought damages under theories of negligence and strict liability based on a failure of the manufacturer to warn him of the danger.

We addressed both *Cipollone* and *Medtronic, Inc.* and stated: "[W]hile at first blush *Medtronic, Inc*. appears to retreat from the preemption analysis put forth in *Cipollone*, it was the separate and distinct statutes that were involved in each case that were the determining factor." *Ackles*, 252 Neb. at 281, 561 N.W.2d at 578. We then noted other courts which held that the preemption language employed in FIFRA was more similar to the statutory language in *Cipollone* than the statutory language in *Medtronic, Inc*. *Ackles, supra* (citing *Lewis v. American Cyanamid Co.*, 294 N.J. Super. 53, 682 A.2d 724 (1996), *aff'd as modified* 155 N.J. 544, 715 A.2d 967 (1998), and *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996)). See, also, S. Douglas Fish, Note, *In Defense of FIFRA Preemption of Failure to Warn Claims*, 12 J. Nat. Resources & Env. Law 123 (1996-97) (discussing *Medtronic, Inc.*). In particular, we relied on the following reasoning from a New Jersey case:

> "[L]ike the preemption clause at issue in *Cipollone* and unlike that in *Medtronic*, the preemption provision of FIFRA is precise and explicit; *i.e.*, a State 'shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.' Furthermore, FIFRA, like the *Cipollone* statutes, leaves unconstrained all state common law causes of action for defective products except those based on inadequate labels. Finally, FIFRA has no escape clauses like the 'grandfathering' and 'substantially equivalent' provisions of MDA. The statute and regulations provide that

> substantially all pesticides are subject to extensive review by the EPA, and the EPA prescribes precise content for pesticide labels . . . ."

Ackles, 252 Neb. at 281-82, 561 N.W.2d at 578, quoting *Lewis v. American Cyanamid Co., supra*.

(d) Decisions Since *Ackles*

Since our decision in *Ackles*, a majority of courts continue to hold that FIFRA preempts labeling-based failure-to-warn claims. See, e.g., *Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir. 2002) (rehearing and rehearing en banc denied); *Grenier, supra*; *Arnold v. Dow Chemical Co.*, 91 Cal. App. 4th 698, 110 Cal. Rptr. 2d 722 (2001); *Etcheverry v. Tri-Ag*, 22 Cal. 4th 316, 993 P.2d 366, 93 Cal. Rptr. 2d 36 (2000); *Ackerman v. American Cyanamid Co.*, 586 N.W.2d 208 (Iowa 1998); *Didier v. Drexel Chem. Co.*, 86 Wash. App. 795, 938 P.2d 364 (1997); *Lewis, supra.*

Since *Ackles*, two courts have held that failure-to-warn claims are not preempted by FIFRA. *Sleath v. West Mont Home Health Services*, 304 Mont. 1, 16 P.3d 1042 (2000), *cert. denied sub nom. Dow AgroSciences LLC et al. v. Sleath et al.*, 534 U.S. 814, 122 S. Ct. 40, 151 L. Ed. 2d 13 (2001); *Brown v. Chas. H. Lilly Co.*, 161 Or. App. 402, 985 P.2d 846 (1999), *review denied* 330 Or. 138, 6 P.3d 1098 (2000).

2. Eyl's Arguments

(a) Preemption

Eyl asks this court to reverse our decision in *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255, and determine that FIFRA does not preempt common-law failure-to-warn claims because of the reasoning of *Sleath, supra*. He argues that under *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996), FIFRA does not preempt failure-to-warn claims and asks this court to adopt the position of the EPA that was set forth in an amicus brief filed in *Etcheverry, supra*.

In *Sleath, supra*, the Montana Supreme Court overruled a previous case in which it held that common-law failure-to-warn claims were preempted by FIFRA. *Sleath, supra*) (overruling *McAlpine v. Rhône-Poulenc Ag. Co.*, 285 Mont. 224, 947 P.2d

474 (1997)). In reaching this determination, the court considered the amicus brief filed by the EPA in *Etcheverry, supra*, in which the EPA argued that FIFRA did not preempt state law claims. The court determined that it should consider the government's position on the issue and gave it deference. The court also discussed *Medtronic, Inc.*, which it had not previously considered, and concluded that in the light of that case, FIFRA did not preempt state law claims for damages.

We decline to adopt the position taken by the Montana Supreme Court. First, we have already considered the effect of *Medtronic, Inc.* on the issue of FIFRA preemption in *Ackles* and determined that FIFRA preempts failure-to-warn claims.

Second, we give no deference to the EPA's position in the amicus brief filed in *Etcheverry*. The *Etcheverry* brief was written for that specific case. The EPA did not file an amicus brief with this court in this case. Nor have we found—outside of *Etcheverry*—a similar brief filed by the EPA in any of the numerous other cases which have discussed FIFRA preemption. In addition, the record is silent whether the view expressed in the *Etcheverry* brief was an EPA official policy statement for all cases and if the EPA still adheres to that view. Further, we note that in *Etcheverry*, the California Supreme Court did not adopt the EPA's arguments. See *Etcheverry, supra*. Under these circumstances, we give no deference to the position taken in the *Etcheverry* brief.

Finally, the Eighth Circuit Court of Appeals recently considered and rejected the same arguments asserted by Eyl. *Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir. 2002) (rehearing and rehearing en banc denied). In *Netland*, the appellant requested the Eighth Circuit to overrule precedent holding that FIFRA preempts state common-law failure-to-warn claims based on *Medtronic, Inc., supra*, *Sleath, supra*, and *Brown, supra*, and on the EPA's brief in *Etcheverry, supra*. The Eighth Circuit panel stated that it would not overrule a prior decision unless it did so en banc. The plaintiff in *Netland* then sought rehearing en banc, which was denied. The continuing position of the Eighth Circuit is that state common-law failure-to-warn claims are preempted by FIFRA.

[8] The overwhelming majority of jurisdictions hold that FIFRA preempts state common-law failure-to-warn claims. We agreed with this position in *Ackles, supra*. We decline to now

overrule *Ackles*. We hold that Eyl's failure-to-warn claims are preempted by FIFRA.

(b) Argument That Eyl's Claims Are Not Labeling Based

Eyl contends that Ciba-Geigy should have provided notice of the dangers of Pramitol to the general public through "signs, flags, newspaper notices, etc." Reply brief for appellee Eyl at 14. He argues that FIFRA applies to preempt only claims that are labeling based and directed to the actual user of a product. He argues that his claim was not labeling based because he was a bystander and was seeking damages for failure to warn that a chemical had been applied instead of basing his claim on the existing Pramitol label. For purposes of this opinion, we assume, without deciding, that Eyl, as an employee of the applicator, was a bystander.

[9,10] Whether a particular form of warning comes within the definitions of "label" and "labeling" set forth in 7 U.S.C. § 136(p) is a matter of statutory interpretation. 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. *In re Application No. C-1889, ante* p. 167, 647 N.W.2d 45 (2002). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Gracey v. Zwonechek*, 263 Neb. 796, 643 N.W.2d 381 (2002). The question is whether warning flags, posters, or signs supplied by the manufacturer and aimed at warning that a pesticide has been applied or of its dangers are part of the label or labeling under FIFRA. We conclude that they are.

In cases where the plaintiff claims that the lack of point-of-sale signs or consumer notices are not related to labeling and packaging, the overwhelming majority of courts hold that FIFRA preempts the claims. *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), *cert. denied* 510 U.S. 913, 114 S. Ct. 300, 126 L. Ed. 2d 248; *Dow Chemical Co. v. Ebling*, 723 N.E.2d 881 (Ind. App. 2000) (*Ebling I*), *vacated in part on other grounds* 753 N.E.2d 633 (Ind. 2001); *Jenkins v. Amchem Products, Inc.*, 256 Kan.

602, 886 P.2d 869 (1994), *cert. denied* 516 U.S. 820, 116 S. Ct. 80, 133 L. Ed. 2d 38 (1995); *Hopkins v. American Cyanamid Co.*, 666 So. 2d 615 (La. 1996); *Wadlington v. Miles, Inc.*, 922 S.W.2d 520 (Tenn. App. 1995); *Goodwin v. Bacon*, 127 Wash. 2d 50, 896 P.2d 673 (1995). See, *Kuiper v. American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S. Ct. 1839, 140 L. Ed. 2d 1090 (1998) (alleged misrepresentation in advertising separate from label is labeling based when it reiterates information on label); *Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999) (agreeing with *Kuiper, supra*).

In *Papas, supra*, a worker at a humane society suffered injuries after applying a pesticide to dogs at his workplace. See *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *vacated and remanded on other grounds* 505 U.S. 1215, 112 S. Ct. 3020, 120 L. Ed. 2d 892 (1992). After remand from the U.S. Supreme Court to consider the case in the light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), the Eleventh Circuit held that point-of-sale signs, consumer notices, or other informational materials were labeling based. In addressing the issue, the court stated:

> Appellants urge us to hold that their warning claims "unrelated to labeling and packaging" are not pre-empted by section 136v. They contend that because the language of 136v refers only to "labeling or packaging," the section does not pre-empt failure to warn claims based on point-of-sale signs, consumer notices, or other informational materials that are "unrelated" to labeling and packaging. But any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff[s] necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging. If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends. Plaintiffs may not interfere with the FIFRA scheme by bringing a common law action alleging the inadequacy of, for example, point-of-sale signs. Because claims challenging the adequacy of warnings on materials other than the label or package of a product necessarily imply that the labeling

> and packaging failed to warn the user, we conclude that these claims are also pre-empted by FIFRA.

Papas, 985 F.2d at 519. See, also, *Taylor AG Industries, supra*; *Ebling I*; *Hopkins, supra*; *Wadlington, supra*; *Goodwin, supra*.

Shortly after *Papas* was decided by the 11th Circuit, the 4th Circuit agreed, stating:

> To allow the [plaintiffs] to argue that the warning language which appears on point-of-sale or other promotional material is inadequate when that language is identical to that approved by the EPA would in effect allow the establishment of an additional or different state law requirement concerning adequate warning language.

Worm, 5 F.3d at 748. See, also, *Jenkins, supra* (agreeing with *Papas, supra*, and *Worm, supra*).

Agreeing with the view taken in *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), *cert. denied* 510 U.S. 913, 114 S. Ct. 300, 126 L. Ed. 2d 248, and similar cases about point-of-sale signs and similar devices, the Court of Appeals of Indiana further addressed the plain language of § 136(p). *Ebling I*. In *Ebling I*, an applicator sprayed an apartment with a pesticide before, and possibly for a short time after, the plaintiffs, a family, moved in. The plaintiffs were not provided with labeling information regarding the pesticide before they were exposed. The children later developed seizure disorders, and the plaintiffs filed suit against the applicator and the manufacturer.

On appeal, the plaintiffs argued that the defendants owed a common-law duty to distribute additional materials warning of the product to people whose homes were being sprayed. The Indiana Court of Appeals rejected this argument because of the definitions of "label" and "labeling" contained in § 136(p). The court noted that FIFRA has a broad definition of labeling that does not require the labeling materials to be affixed to the pesticide. Applying the language of § 136(p), the court stated:

> Thus, any written information that a pesticide registrant disseminates with a pesticide is considered "labeling" under FIFRA, and any obligation placed upon a registrant in this regard is necessarily a labeling requirement. From this language, it is clear that Congress intended to preempt state common law actions that would impose requirements

> on a registrant to disseminate additional written matter with its product, regardless of whether this matter was identical to the EPA-approved labeling information.

Ebling I, 723 N.E.2d at 897. The court then stated its agreement with *Papas, supra*, and similar cases. The court held that FIFRA preempted claims against both the manufacturer and the applicator. On further review, the Supreme Court of Indiana reversed the decision regarding the applicator, but summarily affirmed the decision regarding the manufacturer. *Dow Chemical Co. v. Ebling*, 753 N.E.2d 633 (Ind. 2001) (*Ebling II*).

Eyl's argument that Ciba-Geigy should have provided notice of the dangers of Pramitol to the general public through "signs, flags, newspaper notices, etc." is off the mark. As previously noted, the overwhelming majority of jurisdictions hold that these types of warnings are labeling based. Under § 136(p), labeling means all labels and all other written, printed, or graphic matter accompanying the pesticide or device at any time. A warning flag or sign in this case consists of some form of written or graphic material provided by the manufacturer that will accompany the product at some time. This alone meets the plain language of "labeling" under § 136(p). The definition of "label" is also met, because additional warning materials or devices that a manufacturer provides would need to be "attached to, the pesticide or device or any of its containers or wrappers." § 136(p)(1). In addition, Eyl argues that the public should have been warned of Pramitol's dangers. This, however, would require some type of printed information. In that case, the warning would then have to incorporate language from the direct product label and information about the warning system would need to be incorporated into the directions for use on the label—information that also falls under the statutory definition of "label" and "labeling."

Further, considerations such as (1) whether warning devices such as flags are needed, (2) what they should look like, (3) what printed material they should contain, and (4) how they should be used and for how long are all factors that would affect the types of warnings provided from the manufacturer and are properly part of the EPA review process. The purpose of FIFRA preemption is to create a uniform system of labeling across the

country. Requiring manufacturers to provide additional warning devices to some states and not to others frustrates the goal of FIFRA preemption.

But Eyl argues that flags and other such warning devices are not labeling based and thus not preempted. He relies on cases dealing with ordinances affecting applicators. He argues that if an applicator can be required to provide warning flags, then a manufacturer should also be required to provide that type of warning.

Eyl's reasoning ignores the reason why a warning provided by an applicator—as opposed to a manufacturer—is not labeling based. Although FIFRA prevents states from implementing additional or different labeling requirements on manufacturers under § 136v(b), it specifically allows states to regulate the "use" of pesticides by applicators under § 136v(a). In applicator cases, it is the applicator, not the manufacturer, who is responsible for providing the warning. The manufacturer is not required to take any action whatsoever in providing the warning devices. Nor is the manufacturer required to alter the labeling. As a result, when an applicator is required to provide label information, the labeling approved by the EPA and provided by the manufacturer is unaffected and the regulation is simply a regulation on the use of the product under § 136v(a). But if a *manufacturer* is required to provide items such as warning flags, then the labeling of the product is involved, which labeling requirement is preempted by FIFRA. The applicator cases make this point clear.

In *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991), an applicator case, the U.S. Supreme Court determined that an ordinance that required applicators to obtain a permit before application of certain pesticides and to place placards containing notice of the pesticide and label information was not preempted by FIFRA. In reaching this conclusion, the Court relied specifically on the language in § 136v(a). Section 136v(a) provides that states may regulate the sale or use of pesticides so long as the state regulation does not permit a sale or use prohibited by FIFRA. The Court specifically noted that FIFRA does not expressly supersede local regulation of pesticide use. The Court did not base its reasoning on a definition of "labeling." Instead, the Court recognized that the ability to regulate use

does not give states any greater power over their ability to regulate labeling. The Court stated:

> The specific grant of authority in § 136v(a) consequently does not serve to hand back to the States powers that the statute had impliedly usurped. Rather, it acts to ensure that the States could continue to regulate use and sales even where, such as with regard to the banning of mislabeled products, a narrow pre-emptive overlap might occur.

Mortier, 501 U.S. at 614. Another court describes the difference by stating, "Labeling regulation represents a subset of use regulation. *Mortier*'s permissible overlap allows states to ban EPA-registered pesticides . . . . The explicit language of section 136v(b), however, completely preempts any state regulation of the labeling itself." *Goodwin v. Bacon*, 127 Wash. 2d 50, 65, 896 P.2d 673, 681 (1995) (holding that claims based on point-of-sale signs are preempted).

The difference between regulating the use of a product by requiring applicators to provide warnings and a preempted labeling-based claim when a manufacturer is required to provide warnings is illustrated in *Ebling I* and *Ebling II*. In *Ebling I*, the Indiana Court of Appeals held that failure-to-warn claims based on a lack of notice to nonusers were preempted against both the manufacturer and the applicator. The Indiana Supreme Court granted review and reversed the conclusion of preemption for the applicator but affirmed for the manufacturer. In reaching the conclusion that the imposition of a duty to warn on an applicator is not preempted, the court made note of § 136v(a), which allows State regulation of pesticide use. The court noted:

> While FIFRA requires pesticide manufacturers to affix an approved label to their product in order to sell it, applicators, either commercial or private, are not required to label anything but, as with members of the general public, applicators are prohibited from detaching, altering, defacing, or destroying the label affixed to the pesticide by the manufacturer. 7 U.S.C. § 136j(2). The law is fairly settled that when a pesticide *manufacturer* "places EPA-approved warnings on the label and packaging of its products, its duty to warn is satisfied, and the adequate warning issue ends." *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir.1993). Because of the

> absence of an affirmative FIFRA labeling requirement for *applicators*, however, we find that the alleged state tort law duty imposed upon applicators to convey the information in the EPA-approved warnings to persons placed at risk does not constitute a requirement additional to or different from those imposed by FIFRA.

(Emphasis in original.) *Ebling II*, 753 N.E.2d at 639.

The court then stated: "From *Mortier*, we discern that, like a state or local regulatory scheme that requires permits and notice to the non-user consumer/bystander and imposes penalties, the imposition of a duty to warn on applicators is not preempted by FIFRA." *Ebling II*, 753 N.E.2d at 640. The court, however, summarily affirmed that the claims against the manufacturer were preempted. See, also, *Mann v. H.W. Andersen Products, Inc.*, 246 A.D.2d 68, 676 N.Y.S.2d 658 (1998) (claims by deformed child brought against mother's employer, where employer's use of pesticide exposed mother to pesticide, were not preempted, but claims against manufacturer were preempted).

The other applicator cases that Eyl relies on do not hold that a failure-to-warn claim brought against a *manufacturer* for failure to place devices such as warning flags is not a labeling-based claim. Instead, these cases address the narrow issue about whether such claims when brought against *applicators* are a requirement affecting the use of a product instead of being a labeling-based action. See, e.g., *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115 (2d Cir. 1989).

In most of the cases cited by Eyl, applicators of pesticides or herbicides were being regulated. If an ordinance requires an applicator to provide warnings that a product has been applied, the product's use under § 136v(a) is regulated without imposing additional labeling requirements on the manufacturer that are preempted under § 136v(b). Instead of imposing an additional burden on the manufacturer, and thus requiring the manufacturer to violate FIFRA, the applicators are simply being required in their use of the product to relay information to additional people. But if a manufacturer is required to provide additional warning materials, such as flags, signs, advertisements, or other notices, the manufacturer is being required to change the label of the product: This must be approved by the

EPA, and such a requirement on the manufacturer is preempted by FIFRA.

Eyl also relies on a federal trial court opinion holding that the Cigarette Labeling and Advertising Act, the 1965 Act discussed earlier, does not preempt failure-to-warn claims that are made by a bystander who was injured from inhaling secondhand smoke. *Wolpin v. Phillip Morris, Inc.*, 974 F. Supp. 1465 (S.D. Fla. 1997). In addition, he cites *Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941 (9th Cir. 1992), and *Macrie v. SDS Biotech Corp.*, 267 N.J. Super. 34, 630 A.2d 805 (1993). We find these cases unpersuasive and contrary to the majority of FIFRA preemption cases that address the issue whether FIFRA preempts failure to warn claims that are not directly based on the language of the label. See *Ebling I* (disagreeing with *Macrie, supra*).

In sum, under FIFRA, the inclusion of warning flags or other such materials encompasses the concept of providing information to others that there are adverse effects associated with the product. Requiring a manufacturer to provide warning signs, flags, or other devices constitutes "labeling" under the plain language of § 136(p). Claims challenging the adequacy of warnings on materials other than the direct label or package of a product necessarily infer that the labeling and packaging failed to warn. Because the manufacturer and distributor would be in no position to actually place warnings on the sites where products were being applied, the only manner in which the manufacturer could prevent liability would be to add the warning devices as part of the labeling and packaging. See *All-Pure Chemical Co. v. White*, 127 Wash. 2d 1, 896 P.2d 697 (1995).

[11] *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), *cert. denied* 510 U.S. 913, 114 S. Ct. 300, 126 L. Ed. 2d 248, and the overwhelming majority of jurisdictions that have considered this issue agree that claims based on the lack of point-of-sale signs and other such devices are labeling based and are preempted by FIFRA. Even assuming that Eyl, as an employee of the City of Wisner, was a bystander, the status of a plaintiff as a bystander does not have an effect on this determination. The effect of the plain language of § 136(p) remains the same: Labeling-based failure-to-warn claims against manufacturers are preempted. The plaintiff's status makes no difference in the determination. See

Ebling I and *Ebling II*. We hold that Eyl's claims are labeling-based failure-to-warn claims that are preempted by FIFRA.

(c) Application of Preemption to Distributors

After this case was submitted to this court following argument, we ordered the parties to provide supplemental briefs regarding whether a failure-to-warn claim is preempted when brought against a distributor. The U.S. Court of Appeals for the Ninth Circuit determined that when a "distributor's liability is essentially predicated upon the language in the manufacturer's label, we apply FIFRA's preemption provision equally to manufacturers and distributors." *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555, 562 (9th Cir. 1995). Other jurisdictions generally assume that FIFRA preempts state law failure-to-warn claims against both manufacturers and distributors. See, e.g., *Arnold v. Dow Chemical Co.*, 91 Cal. App. 4th 698, 110 Cal. Rptr. 2d 722 (2001); *Hughes v. Tennessee Seeds of Brownsville, Inc.*, 970 S.W.2d 471 (Tenn. App. 1997). We agree.

[12] Eyl's failure-to-warn claims are labeling based. Under FIFRA, a manufacturer or distributor cannot change a label. Because Eyl predicates his failure-to-warn claims on the quality of the warning, his claims are preempted against both the manufacturer and the distributor.

V. CONCLUSION

We determine that Eyl's common-law failure-to-warn claims are labeling based and preempted by FIFRA. The only claims submitted to the jury in this case were Eyl's negligence and strict liability failure-to-warn claims. The court did not submit any nonpreempted claims to the jury, and Eyl does not cross-appeal the trial court's decision to not submit a design defect claim to the jury. We hold that Eyl's claims are preempted and that the district court erred in failing to sustain the appellants' motions for a directed verdict and judgment notwithstanding the verdict. We reverse, and remand with directions to dismiss. Because we reverse, and remand with directions to dismiss, we do not address Eyl's remaining assignments of error.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STEVEN J. HAUSER, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA POLICE STANDARDS ADVISORY COUNCIL AND NEBRASKA COMMISSION ON LAW ENFORCEMENT AND CRIMINAL JUSTICE, APPELLANTS AND CROSS-APPELLEES.

650 N.W.2d 760

Filed September 6, 2002. No. S-01-467.

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.** In instances where an appellate court is required to review cases for errors appearing on the record, questions of law are nonetheless reviewed de novo on the record.
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. **Administrative Law: Statutes.** Administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act.
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.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded for further proceedings.

Don Stenberg, Attorney General, and Mark D. Starr for appellants.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., and R. Bradley Dawson, of Clough, Dawson, Piccolo & Jones, for appellee.

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

McCormack, J.

NATURE OF CASE

This case involves an Administrative Procedure Act (APA) appeal by the State from a decision of the Hall County District Court. An administrative hearing was originally held before the Nebraska Police Standards Advisory Council (Council) in regard to State Trooper Steven J. Hauser's certification as a Nebraska law enforcement officer. The Council ordered the revocation of Hauser's certification, subject to the review and approval of the Nebraska Commission on Law Enforcement and Criminal Justice (Commission). The Commission ordered that Hauser's certification be revoked. Hauser appealed to the district court, which reversed the order of the Commission.

BACKGROUND

Hauser received his certification as a law enforcement officer from the Nebraska Law Enforcement Training Center (Training Center) on November 3, 1978. He was appointed a Nebraska state trooper and deputy state sheriff on that same date.

In 1999, Allen L. Curtis, executive director of the Commission, received a petition signed by numerous residents of North Platte and vicinity requesting the revocation of Hauser's law enforcement certification. Curtis notified Hauser of the complaint by letter dated September 8, 1999, and requested that Hauser respond to the allegations of the petition. In his response letter, Hauser stated that the allegations against him were outside the scope of the rules and regulations regarding the revocation of certificates and that the allegations did not fit into the statutory definition of revocable actions.

Curtis requested that an investigation be conducted pursuant to title 79, chapter 9, of the Training Center's rules and regulations. The investigation was to review the allegations brought against Hauser and to determine if the allegations were within the purview of Neb. Rev. Stat. § 81-1403(5) (Reissue 1999) (now found at § 81-1403(6) (Cum. Supp. 2000)). Curtis notified Hauser that the investigation was being requested pursuant to 79 Neb. Admin. Code, ch. 9, § 006.02 (1998). After reviewing the results of the investigation, David A. Stolz, staff attorney for the

Training Center, was appointed to commence formal revocation proceedings against Hauser.

The Training Center, acting as a relator on behalf of the State, filed an administrative complaint against Hauser. The second amended complaint alleged that Hauser had abused his wife throughout 1998; provided false information to a law enforcement officer; and violated his duties and responsibilities as set forth in his oath of office and various policies, codes, and canons of ethics of the Nebraska State Patrol. According to the complaint, Hauser's alleged actions represented incompetence; neglect of duty; and/or physical, mental, or emotional incapacity, and warranted revocation. Hauser was sent a letter from Curtis providing him with a copy of the complaint and a copy of title 79, chapter 9.

In Hauser's amended answer, he challenged the substance of the complaint and the procedure employed by the State. He alleged that requests to have him decertified by certain citizens of North Platte did not conform to Commission rules. He also argued that the Commission and Council lacked the requisite jurisdiction to consider the matters alleged in the complaint and, further, that the allegations did not state sufficient facts to bring or maintain a revocation proceeding.

The matter was heard by the Council in August 2000. At Hauser's request, the hearing was bifurcated. The first stage addressed claims relating to the Council's authority to hear the matter, and the second addressed the merits. The evidence at the first stage demonstrated that there were no rules or regulations filed by the Council under the APA. In fact, it was the Commission who filed title 79, chapter 9, with the Secretary of State's office. There was also evidence that the Council originally reviewed the regulations in title 79, chapter 9, passed on the rules, and relayed them to the Commission. The Commission then approved and formally promulgated the rules pursuant to the APA. There was no evidence adduced at the hearing that the Nebraska State Patrol's code of ethics or the Nebraska State Patrol's disciplinary procedures and code of conduct had been promulgated under the APA or filed with the Secretary of State. In spite of these findings, the Council determined that it had

jurisdiction over the matter and proceeded to the fact allegations against Hauser.

In the second phase of the bifurcated hearing, the Council heard evidence regarding the alleged misconduct of Hauser. After deliberation, the Council ordered the revocation of Hauser's certification. The Council concluded that Hauser physically abused his wife several times in 1998 and lied to an investigating officer regarding one of those occasions. The Council also concluded that the State had proved the existence of one or more statutory grounds for revocation, which have been incorporated by reference into title 79, chapter 9. Based on the State Patrol's code of ethics, the Council determined that Hauser's actions amounted to a neglect of his duties and emotional incapacity.

The matter was then forwarded to the Commission. The Commission began hearing deliberations in closed session. It later returned to open session, and by unanimous vote of the present and participating members, it decided to revoke Hauser's certification. The Commission held that the Council had jurisdiction to hear the matter and that the hearing was properly conducted. In concluding that Hauser exhibited neglect of duty and emotional incapacity, the Commission held that Hauser's violent behaviors were violations of various State Patrol codes of ethics, canons of police ethics, and general rules of conduct.

Hauser appealed to the district court under the APA. The trial court reversed the Commission's decision, concluding that it was made in excess of the Commission's statutory authority or jurisdiction. The trial court also concluded that the Commission's decision was made upon unlawful procedure in that it had no power to revoke Hauser's certification and, further, that there were no rules and regulations governing the revocation of certificates passed by the Council. However, the trial court did not award attorney fees to Hauser.

ASSIGNMENTS OF ERROR

The Council and Commission argue that the trial court erred in (1) concluding that the regulations promulgated concerning the revocation of certificates were invalid; (2) concluding that the process used in reaching final revocation was unlawful; (3) concluding that violating the rules set by the State Patrol could

not constitute grounds for certification revocation if, in fact, the trial court was indicating that those standards must be promulgated under the APA; and (4) reversing the Commission's approval of the Council's decision to revoke Hauser's law enforcement certification.

On cross-appeal, Hauser argues that the trial court erred in not awarding attorney fees to him because the Council and Commission's position was not substantially justified.

STANDARD OF REVIEW

[1] A judgment or final order rendered by the 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. *Honda Cars of Bellevue v. American Honda Motor Co.*, 261 Neb. 923, 628 N.W.2d 661 (2001).

[2] 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] In instances where an appellate court is required to review cases for errors appearing on the record, questions of law are nonetheless reviewed de novo on the record. *Lancaster Cty. Sch. Dist. No. 0001 v. State*, 260 Neb. 108, 615 N.W.2d 441 (2000).

[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. *Heathman v. Kenney*, 263 Neb. 966, 644 N.W.2d 558 (2002).

[5] Administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act. *Honda Cars of Bellevue v. American Honda Motor Co., supra.*

ANALYSIS

The district court found that it was the Council which had the sole power as delegated by the Legislature to adopt rules and regulations concerning the revocation of law enforcement certificates.

In this case, the Council conducted a hearing of the complaints against Hauser. The Council then ordered the revocation

of Hauser's law enforcement certificate. The matter was then forwarded to the Commission which, after a hearing and vote of the Commission, revoked Hauser's certificate.

The first question we address is which entity, the Commission or the Council, is empowered to revoke law enforcement certificates. According to § 81-1403 (Cum. Supp. 2000):

> Subject to review and approval by the commission, the council shall:
>
> . . . .
>
> (6) Revoke or suspend such certificates or diplomas according to rules and regulations established by the council for reasons which shall include, but not be limited to, (a) incompetence, (b) neglect of duty, and (c) physical, mental, or emotional incapacity. Such rules and regulations shall include a procedure for hearing appeals of any person who feels that the revocation or suspension of his or her certificate or diploma was in error.

Neb. Rev. Stat. § 81-1406 (Cum. Supp. 2000) states:

> There is hereby created the Nebraska Police Standards Advisory Council. *The council shall be a special standing committee of the commission* with the express purpose of overseeing all training schools and training academies and the operation of the training center and ensuring that all rules, regulations, and policies with respect to pre-certification, certification, continuing education, and training requirements are implemented. The council shall act for the commission in all matters relating to law enforcement training and the training center but shall not have any other powers and duties with respect to the commission or any of its duties. The council shall conduct regular meetings in order to carry out its statutory duties.

(Emphasis supplied.)

[6] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Heathman v. Kenney, supra*. However, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not

resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. See *Spradlin v. Dairyland Ins. Co.*, 263 Neb. 688, 641 N.W.2d 634 (2002).

The trial court found that there were no rules or regulations adopted, promulgated, and filed with the Secretary of State by the Council. The trial court held that the Commission is a separate agency from the Council. We disagree. Both the Council and the Commission's duties are set out under Neb. Rev. Stat. § 81-1401 et seq. (Reissue 1999 & Cum. Supp. 2000). As previously stated, § 81-1406 states very specifically that "[t]he council shall be a special standing committee of the commission." According to the plain and unambiguous language of § 81-1406, the Council is a committee of the Commission. As such, it is the Commission, not the Council, which is charged with the promulgation, adoption, and filing with the Secretary of State of the rules and regulations. The Commission performed these functions in this case.

Because statutory interpretation is a question of law, our review is de novo. We conclude, therefore, that the Council and Commission's first assignment of error is correct in that the trial court erred in concluding that the regulations promulgated concerning the revocation of certificates was invalid. Since our conclusion requires that we reverse, and remand this matter to the trial court for further proceedings consistent with this opinion, it is not necessary that we address the Council and Commission's remaining assignments of error in this case, nor is it necessary that we address the cross-appeal by Hauser.

The trial court did not make a finding with regard to the code of ethics, the canons of police ethics, and the general rules of conduct. In this case, we conclude that the better course would be to remand this entire cause to the trial court rather than try to decide, piecemeal, parts of it.

CONCLUSION

For the reasons set out above, we hereby reverse the decision of the trial court and remand the cause to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. THOMAS EDWARD NESBITT, APPELLANT.

650 N.W.2d 766

Filed September 13, 2002. No. S-00-751.

1. **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.
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 Nebraska or federal Constitution. Where such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.
3. **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, no matter how those issues may be phrased or rephrased.
4. **Criminal Law: Preliminary Hearings: Probable Cause.** The purpose of a preliminary hearing is to ascertain whether a crime was committed and whether there is probable cause to believe the accused committed it.
5. **Effectiveness of Counsel: Proof.** To state a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and demonstrate that a conviction must be overturned, a defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
6. **Attorney and Client.** Except for such basic decisions as whether to plead guilty, waive a jury trial, or testify in his or her own behalf, a defendant is bound by the tactical or strategic decisions made by his or her counsel.
7. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
8. **Criminal Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
9. **Homicide: Intent: Proof.** Motive is not an element of first degree murder and does not have to be proved beyond a reasonable doubt.
10. **Criminal Law: Self-Incrimination.** The State may not impeach a defendant's exculpatory testimony, given for the first time at trial, by cross-examining the defendant about his or her failure to have told the story after receiving *Miranda* warnings at the time of the defendant's arrest.

11. **Constitutional Law: Jury Instructions.** A defendant has no constitutional right to be present at a conference in which jury instructions are formulated by counsel and the trial judge.
12. **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 (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.
13. **Jury Instructions.** The trial court is required to give an instruction where there is any evidence, which could be believed by the trier of fact, in support of a legally cognizable theory of defense.
14. **Jury Instructions: Appeal and Error.** A jury instruction which directs the attention of the jury to, and unduly emphasizes, a part of the evidence is erroneous and should be refused.
15. **Constitutional Law: Appeal and Error.** A constitutional question not properly raised in the trial court will not be considered on appeal.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Clarence E. Mock, of Johnson & Mock, for appellant, and, on brief, Thomas Edward Nesbitt, pro se.

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

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

STEPHAN, J.

Thomas Edward Nesbitt appeals from an order of the district court for Douglas County denying his motion for postconviction relief without an evidentiary hearing.

I. BACKGROUND

Following a 1986 jury trial resulting in a guilty verdict, Nesbitt was convicted of first degree murder in connection with the 1975 death of Mary Kay Harmer and sentenced to life imprisonment. His conviction and sentence were affirmed by this court on direct appeal in *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987). The underlying facts of Nesbitt's criminal trial are summarized in that opinion and will not be repeated here except as necessary to

our disposition of Nesbitt's postconviction claims. However, a more thorough recitation of the complex procedural history of this case is needed to properly analyze the issues in this appeal and will thus be provided here in some detail.

In an information filed in the district court for Douglas County on February 26, 1985, the State alleged that Nesbitt did "purposely and of deliberate and premeditated malice or in the perpetration of, or in an attempt to perpetrate a sexual assault in the first degree, kill Mary Kay Harmer." The State's evidence at trial included testimony from Michele McKeever regarding a prior uncharged act. Over a defense objection, McKeever testified that approximately 1 year prior to the date of Harmer's death, she was abducted, taken to Nesbitt's home, threatened, and raped by Nesbitt. At the close of the State's case, Nesbitt's attorney moved for a directed verdict or, alternatively, an order of dismissal. The district court ruled on the motion as follows:

> I don't feel the State has sufficiently — at least for this particular motion — proven either the killing in the perpetration or in the attempt to perpetrate a sexual assault in the first degree and I think the evidence is insufficient for me to allow it to go any further in those two areas and I am going to sustain the defendant's motion in that regard and dismiss at this time that part of the [motion] dealing with the killing in the perpetration or in the attempt to perpetrate a sexual assault in the first degree of Mary Harmer, however, I am overruling the motion at this time with regard to purposely or deliberately and premeditatedly with malice the killing of Mary Harmer, and I am going to overrule their motion there. I feel there is sufficient evidence at this time to proceed.

In his direct appeal to this court, Nesbitt assigned as error the admission of McKeever's testimony regarding the prior uncharged sexual assault, the sufficiency of the evidence to support his conviction, and the failure of the trial court to grant a mistrial due to attempted solicitation of inadmissible testimony by the prosecutor. This court found no merit in any of those assignments. *State v. Nesbitt, supra*.

In 1987 and 1988, Nesbitt filed several pro se motions with the district court in which he requested access to all of the records and court files of his case "in order to properly present and litigate the

facts and claims . . . in the Defendant/Appellants [sic] Post Conviction Motion to Vacate Sentence, that will be filed in this Court." On January 28, 1988, the district court appointed counsel "to represent the defendant in his post-conviction action." Nesbitt responded with a March 3 motion to vacate the appointment of counsel and informed the court that he had no intention of filing a postconviction motion and had not requested the appointment of counsel. In a March 4 journal entry, the district court vacated the appointment of counsel and denied Nesbitt's requests for access to the court files and records, finding that there was no action pending and no intent on the part of the defendant to file an action. Nesbitt filed an appeal from a denial of his April 7, 1988, renewed motion for access to court records and files. We summarily dismissed this appeal and issued a mandate on September 30, 1988. *State v. Nesbitt*, 230 Neb. xix (No. S-88-283, Sept. 22, 1988).

On September 7, 1990, Nesbitt filed a 501-page pro se document captioned "Defendants Verified Post-Conviction Motion to Vacate Sentence and Supporting Case Law." On January 4, 1991, he filed a pro se motion to amend this motion. At an April 23 hearing, the district court denied Nesbitt's motion to be released on bail during the pendency of his postconviction action and granted the oral motion of an attorney who appeared as Nesbitt's counsel requesting 90 days in which to file an amended postconviction motion. The court's order specifically granted counsel until July 23, 1991, to file the amended motion and further ordered that the motion be no more than 30 pages in length. Nesbitt never filed an amended motion as directed by the district court, but did appeal from the portion of the district court's April 23 order denying his request to be released on bail during the pendency of his postconviction action. We summarily affirmed, issuing our mandate on December 11, 1991. *State v. Nesbitt*, 239 Neb. xxvi (No. S-91-536, Nov. 12, 1991).

On July 16, 1998, a pleading captioned "Verified Petition and Motions to Vacate Judgment & Orders and for a New Trial/Hearing" was filed by Nesbitt. In this filing, Nesbitt asserted that the computer records of the district court contained a March 19, 1997, entry noting, "Case Disposed of by Final Order."

Nesbitt alleged that he was never given notice of this order and that he was unable to confirm the physical existence of the referenced order. No such order appears in any of the voluminous files and records presently before this court. Attached to Nesbitt's July 16 motion was a three-page outline of Nesbitt's various postconviction claims and issues. The outline, which was labeled "exhibit 1018," was neither signed nor file stamped. This document is captioned "Amended Post-Conviction Motion to Vacate Sentence" and is alleged by Nesbitt to have been the sole work product of the attorney appointed in February 1992 to represent him.

On April 2, 1999, Nesbitt filed an application for leave to commence an original action and a petition for mandamus. In his petition, Nesbitt alleged that the district court had not ruled upon his September 7, 1990, postconviction motion or his other subsequent but related filings. Nesbitt alleged that on April 4, 1991, the district court "appointed two very new and inexperienced attorneys" to amend his pro se motion. He alleged that these attorneys withdrew shortly thereafter because the judge issued an unreasonable page and time limitation on how to amend his motion. He alleged that another attorney was appointed on May 14, but such attorney had a direct conflict of interest and withdrew a short time later. On February 11, 1992, another attorney was appointed to represent Nesbitt and to amend his postconviction pleading. Nesbitt alleged that from November 1992 until March 18, 1997, this attorney accomplished virtually nothing. On March 4, 1998, Nesbitt filed a pro se motion to compel the latest counsel to provide assistance. Nesbitt alleged that the attorney was then improperly allowed to withdraw by the district court. Nesbitt alleged that he subsequently filed several motions, all of which the district court had yet to rule upon. We denied the petition for writ of mandamus but reassigned the case to a different district judge in September 1999.

After reassignment of the case, the district court held a general status conference in which Nesbitt participated by telephone. At this conference, Nesbitt alleged and the court generally agreed that the only action pending was the September 7, 1990, postconviction motion. In an order filed December 28, 1999, the district court, referring to Nesbitt's "Amended Postconviction Motion to Vacate Sentence," denied Nesbitt's motion for postconviction

relief without granting him an evidentiary hearing. Nesbitt subsequently filed a motion for new trial.

The district court ruled on Nesbitt's motion for new trial in an order filed June 15, 2000. In this order, the court noted that it had reviewed the nearly 10-year-old motion for postconviction relief and all relevant materials and affirmed its order denying postconviction relief without an evidentiary hearing. The court determined that Nesbitt could not amend his petition to state any new claims.

II. ASSIGNMENTS OF ERROR

Nesbitt assigns, restated and summarized, that the district court erred in denying him postconviction relief without an evidentiary hearing. He also assigns that the district court erred in failing to appoint him postconviction counsel and erred in failing to allow him to amend his pleading.

III. STANDARD OF REVIEW

[1] 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. Gamez-Lira, ante* p. 96, 645 N.W.2d 562 (2002); *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002); *State v. Bishop*, 263 Neb. 266, 639 N.W.2d 409 (2002).

[2] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. Where such an allegation is made, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief. *State v. Dean, ante* p. 42, 645 N.W.2d 528 (2002); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

IV. ANALYSIS

The State initially raises the issue of whether the district court referred to the proper documents when entering its order denying postconviction relief. The December 28, 1999, order of the district court expressly refers to and generally follows the issues

raised in an alleged "Amended Postconviction Motion to Vacate Sentence." The document captioned "Amended Post-conviction Motion to Vacate Sentence" was never filed with the district court and appears to be in the record only as an exhibit to one of Nesbitt's various motions. However, the December 28 order clearly considers more than the bare outline contained in the "Amended" motion. Moreover, after Nesbitt filed a motion for new trial from the December 28 order, the district court clarified in its June 15, 2000, order that it had in fact reviewed the motion Nesbitt filed "almost 10 years ago" and all other relevant materials. It is thus clear that the district court directly addressed the allegations in Nesbitt's September 7, 1990, postconviction motion, and the appeal before us is a review of that disposition.

The assignments of error set forth in Nesbitt's pro se brief to this court with respect to such disposition by the district court are vague. In general, however, each assignment asserts that the district court erred in denying Nesbitt's motion for postconviction relief without an evidentiary hearing. His brief acknowledges that the "[e]rrors presented to Court below by way of appellant's 9-7-90 Verified postconv. motion, are the same ones assigned as error on this appeal." Brief for appellant at 2. For this reason, we consider each allegation in Nesbitt's September 1990 motion in light of the proposition that an evidentiary hearing on a motion for postconviction relief should be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Constitutions of Nebraska and the United States, unless the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief. See, *State v. Dean, supra*; *State v. Caddy, supra.* We also consider Nesbitt's claims that the district court erred in denying him an opportunity to amend his motion and denying his motion for the appointment of postconviction counsel.

1. Complaint and Information

Although the first section of Nesbitt's motion for postconviction relief is entitled "The Complaint and Information," he does not identify any specific deficiency in either of those documents. Instead, Nesbitt's argument seems to be directed

toward the sufficiency of the circumstantial evidence used by the prosecution to establish the elements of his first degree murder conviction. To the extent this assignment involves a perceived defect in the information or complaint, it is procedurally barred because it could have been raised on direct appeal. See, *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

[3] Insofar as Nesbitt alleges insufficiency of the evidence to support his conviction, this claim was argued and decided against Nesbitt in his direct appeal and is now barred in this postconviction action. *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987). A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased. *State v. Soukharith, supra*; *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000).

2. Preliminary Hearing

Nesbitt alleges in this section of his motion that he appeared before the county court for the purpose of a preliminary hearing but that he ultimately waived his right to such a hearing after his motion to close the proceedings to the public was denied. Nesbitt appears to argue that the county court's decision to overrule his motion for closure unconstitutionally coerced him into waiving his rights at the preliminary hearing for fear that the evidence adduced at the hearing might taint the jury panel.

[4] At the outset, we note that the county court's decision to overrule Nesbitt's motion for closure had nothing to do with the issues to be determined at his preliminary hearing. The purpose of a preliminary hearing is to ascertain whether a crime was committed and whether there is probable cause to believe the accused committed it. Neb. Rev. Stat. § 29-506 (Reissue 1995); *State v. Rossbach, ante* p. 563, 650 N.W.2d 242 (2002); *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998). Therefore, an examination of whether the media attention generated by this case made it difficult or impossible to later impanel an impartial jury is irrelevant in this context. If, for whatever reason, Nesbitt wished to challenge the validity of his waiver of the preliminary hearing, he could have done so by filing a plea in abatement or a motion to

quash. See, *State v. Hill, supra*; *State v. Moss*, 182 Neb. 502, 155 N.W.2d 435 (1968). Nesbitt's failure to do so bars him from now litigating an issue that could have been raised and litigated at an earlier time. See *State v. Soukharith, supra*. Moreover, any defect in Nesbitt's waiver of his preliminary hearing was ultimately cured by the jury's subsequent finding that he was guilty beyond a reasonable doubt. See *State v. Hill, supra*.

3. Arraignment

Nesbitt makes three seemingly unrelated arguments under this section of his motion. We address each one separately.

(a) Plea in Abatement

[5] Nesbitt first argues that his counsel was ineffective for failing to file a plea in abatement at or before his arraignment. To state a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and demonstrate that a conviction must be overturned, a defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Long, ante* p. 85, 645 N.W.2d 553 (2002); *State v. Dean, ante* p. 42, 645 N.W.2d 528 (2002). The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *State v. Long, supra*; *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

In this case, the jury's subsequent finding of guilt beyond a reasonable doubt resolved any questions about whether probable cause existed to bind Nesbitt over for trial. See *State v. Hill, supra*. Thus, Nesbitt has not shown and cannot show that his counsel's decision not to file a plea in abatement prejudiced him in any way. See, *State v. Cook*, 257 Neb. 693, 601 N.W.2d 501 (1999); *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). This argument is without merit.

(b) Statute of Limitations

Nesbitt also argues that his trial counsel was ineffective because he failed to argue that the statute of limitations had run

on the felony murder charge. Neb. Rev. Stat. § 29-110 (Reissue 1985) provides a statute of limitations on prosecution of all felonies except treason, murder, arson, and forgery. Nesbitt argues that because the statute of limitations had run on the predicate felony of first degree sexual assault underlying the felony murder charge, the statute of limitations had also run on the felony murder charge.

We addressed and rejected a similar argument in *State v. White*, 239 Neb. 554, 477 N.W.2d 24 (1991). Moreover, the trial court dismissed the felony murder portion of the information at the conclusion of the State's case in chief, and Nesbitt was subsequently convicted of premeditated first degree murder. Trial counsel could not have been ineffective in failing to raise a defense to a charge that was dismissed, and this argument is without merit.

(c) Entry of Plea of Not Guilty

Finally, Nesbitt claims that his arraignment was unconstitutional because he did not personally enter his plea of not guilty. The record reflects that defense counsel entered a plea of not guilty on Nesbitt's behalf and in Nesbitt's presence. Although the *decision* as to what plea to enter belonged solely to Nesbitt, see, *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); *State v. Sayers*, 211 Neb. 555, 319 N.W.2d 438 (1982); ABA Standards for Criminal Justice Prosecution and Defense Function 4-5.2 (3d ed. 1993), there is no requirement, constitutional or otherwise, that the accused actually speak the words of the plea himself. If Nesbitt wished to enter a different plea or take a different course, he could have interjected and corrected his counsel and the judge as he in fact did on numerous occasions throughout the pretrial and trial process. There is nothing in the record to suggest that counsel entered a plea different from that which Nesbitt would have entered had he spoken the words himself. This argument is without merit.

4. Depositions

In this section of his motion, Nesbitt alleges that his state and federal constitutional rights were violated during the discovery phase of his case. He alleges three separate violations, which we individually address.

(a) Date Change

Nesbitt first alleges that the prosecutor engaged in misconduct by intentionally changing the date of five scheduled depositions to deprive Nesbitt of the opportunity to personally attend those depositions. Nesbitt alleges that the depositions were originally scheduled for a Friday and that the prosecutor rescheduled them for the next day, Saturday, because he knew that detainees at the Douglas County jail were required to make advance arrangements for transportation if they wished to attend case-related functions on weekends. The record affirmatively establishes that this allegation is incorrect.

A hearing to order and schedule the depositions at issue was held on Monday, December 30, 1985. At this hearing, the prosecutor indicated that he would be traveling out of the state in the near future but could accommodate defense counsel by conducting the depositions on New Year's Day or the upcoming Saturday or Sunday. After some discussion, the district court approved the scheduling of the depositions on Saturday, which was January 4, 1986, but misstated the date as January 3. By Nesbitt's own admission, the depositions were conducted on Saturday, January 4, as originally scheduled. Therefore, the record affirmatively establishes that the date of the depositions was never changed from the date the court originally approved.

Moreover, given that the hearing on this matter was held 6 days prior to the taking of the depositions, Nesbitt had ample time to secure transportation arrangements to attend the depositions. The fact that such arrangements were not made may be due to Nesbitt's own negligence or perhaps a miscommunication between Nesbitt and defense counsel, but it certainly is not attributable to any form of prosecutorial misconduct. This argument is without merit.

(b) Deposition Questions

Nesbitt next alleges that his counsel was ineffective for failing to ask Kenneth G. Miller, the State's lead investigator, a list of 22 detailed deposition questions that Nesbitt had personally prepared. Nesbitt alleges that these questions, if asked, would have favorably affected the outcome of his subsequent motion in

limine that sought to exclude the testimony of McKeever and/or any reference to the McKeever incident.

[6] At the outset, we note that "except for such basic decisions as . . . whether to plead guilty, waive a jury trial, or testify in his or her own behalf, a defendant is bound by the tactical or strategic decisions made by his or her counsel." *State v. Sayers*, 211 Neb. 555, 562, 319 N.W.2d 438, 442 (1982). See, also, *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); *People v. Towey*, 92 Cal. App. 4th 880, 112 Cal. Rptr. 2d 326 (2001); ABA Standards for Criminal Justice Prosecution and Defense Function 4-5.2 (3d ed. 1993). Consequently, defense counsel was under no obligation to ask Miller the questions Nesbitt had provided. Except for those basic decisions listed above, and others of similarly fundamental import, the control and direction of the case rests in the sound discretion of defense counsel and not the accused. *Id.*

The fact that defense counsel has authority over strategic decisions such as whom to call and what questions to ask does not, however, mean that defense counsel's decisions cannot be considered ineffective if those decisions ultimately prejudice the accused. Nesbitt claims that his counsel was constitutionally ineffective for failing to propound certain questions to the deponent. Fourteen of the twenty-two proposed questions involve single or multiple levels of hearsay. See Neb. Rev. Stat. § 27-802 (Reissue 1995). Given the strong presumption that trial counsel acted reasonably, see, e.g., *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000), we cannot conclude that defense counsel was deficient in not asking questions that called for inadmissible answers.

Nesbitt alleges that his attorney failed to question Miller concerning the cause of Harmer's death. However, select portions of Miller's deposition were read into the record by Nesbitt's counsel during the trial. Those portions indicate that Miller was asked by Nesbitt's counsel if he had knowledge to indicate that Harmer had met "a violent death," to which Miller answered no. Therefore, the records and files affirmatively prove that Nesbitt's counsel did not fail to question Miller in this regard. See, e.g., *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000).

Nesbitt also alleges that his attorney failed to question Miller about whether a private investigator or the county attorney's office had provided information to the media in order to influence the outcome of his trial. However, Nesbitt has failed to allege any specific facts demonstrating how he was prejudiced by this alleged omission. Accordingly, Nesbitt is not entitled to an evidentiary hearing on this issue.

Finally, Nesbitt alleges that his attorney failed to question Miller about the substance of police reports regarding the McKeever incident, which reports were subsequently lost or destroyed. Nesbitt alleged generally that such reports were "relevant, favorable and material to the defense" and "would have made a difference on [sic] the outcome of this case." However, he made no allegations regarding the specific factual content of such reports or the extent of Miller's knowledge concerning them. We conclude that Nesbitt's conclusory allegations are insufficient to state a claim for postconviction relief and that the district court did not err in denying relief as to these allegations without an evidentiary hearing.

(c) Stipulation Concerning Deposition Testimony

During Miller's deposition, the State and defense counsel stipulated that if Miller were unavailable to testify at trial, admissible portions of Miller's deposition could be read to the jury as a substitute for his live testimony. This stipulation was made because Miller was undergoing chemotherapy treatments and there was a real possibility that he could be very ill at the time of trial. A few days before Miller was scheduled to testify for the defense, he informed Nesbitt's counsel that he was undergoing chemotherapy and was very ill. Miller's doctor recommended that he remain in the hospital, and Miller did not subsequently testify in person. Pursuant to the stipulation, select portions of Miller's deposition were read to the jury by Nesbitt's counsel as a part of his case in chief.

[7] Nesbitt now claims that his trial counsel had no authority to enter into a stipulation that usurped his constitutional right to confront Miller and that counsel was ineffective for entering into the stipulation, because, if required to testify in person, Miller would have provided exculpatory and impeachment evidence "which

would have made a difference on [sic] the outcome of this case." Nesbitt, however, does not identify in his motion the substance of such evidence. In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Dean, ante* p. 42, 645 N.W.2d 528 (2002). Because Nesbitt makes no factual allegations regarding the nature of the evidence favorable to his case which he contends that Miller could have supplied if testifying in person, he has not alleged a basis for postconviction relief in this regard.

5. Sequestration of Witnesses

At a pretrial hearing, both parties agreed that all trial witnesses would be sequestered. See Neb. Rev. Stat. § 27-615 (Reissue 1995). The prosecution, however, asked the district court to except Miller from the sequestration order to allow him to assist the State in obtaining witnesses and presenting its case. See § 27-615(3). Defense counsel did not object to Miller's presence in the courtroom on the conditions that Miller remained in the back row of the courtroom and that he was personally admonished by the court not to discuss the substance of any witness' testimony with any other witness. The court obliged defense counsel's conditions, and Miller was allowed to remain in the courtroom during the trial. Nesbitt now argues that the district court erred in excepting Miller from the sequestration order and that his counsel was ineffective for not objecting to Miller's presence in the courtroom. To the extent Nesbitt's argument assigns error to the district court, it is procedurally barred because this issue could have been raised on direct appeal. See, *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001); *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

To the extent this allegation involves a claim of ineffective assistance of counsel, Nesbitt has failed to and cannot plead that he was prejudiced by defense counsel's performance. See *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). Before the trial began, the State indicated that it did not intend to call Miller as a witness, and it did not do so. Nesbitt's counsel offered select portions of Miller's deposition testimony during

Nesbitt's case in chief, but Miller's deposition was taken *prior* to trial and thus could not have been influenced by his presence in the courtroom. This assignment of error is thus without merit.

6. Constitutionality of Nebraska's Felony Murder Doctrine

In this section of his motion, Nesbitt argues that Neb. Rev. Stat. § 28-303(2) (Reissue 1995), Nebraska's felony murder statute, is unconstitutional. (We note that at the time the crime was committed, Neb. Rev. Stat. § 28-401 (Reissue 1975) was in effect, but although amended and renumbered since that time, there are no substantive changes.) The constitutionality of this statute was recently reaffirmed by this court. See, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999). Moreover, this issue is not material to this case because the trial court dismissed the felony murder portion of the information at the conclusion of the State's case in chief, and Nesbitt was subsequently convicted of premeditated first degree murder under Neb. Rev. Stat. § 28-302(1) (Reissue 1995).

7. Jury

In this section of his postconviction motion, Nesbitt asserts that the district court erred (1) in failing to grant additional peremptory challenges to the defense, (2) in failing to sequester the jury during the trial, (3) in failing to individually question each prospective and potential juror about any knowledge of the case he or she may have gained from the media, and (4) in allowing the prosecutor to inquire as to whether any potential juror had any opinions or feelings that would prevent him or her from finding Nesbitt guilty of an offense punishable by death. Nesbitt also argues that his counsel was ineffective for failing to raise the four aforementioned arguments on direct appeal.

To the extent these arguments assign error to the district court, they are procedurally barred. Both Nesbitt and defense counsel were aware of the facts underlying these allegations at the time of the direct appeal and thus could have asserted them at that time. As previously noted, a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those

issues may be phrased or rephrased. *State v. Soukharith, supra*; *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000).

However, Nesbitt's allegation that defense counsel was ineffective for failing to make these same arguments on direct appeal is not procedurally barred. We address each argument in turn.

(a) Peremptory Challenges

Nesbitt alleges that his counsel was ineffective for not arguing on direct appeal that the district court erred in failing to "grant additional peremptory challenges to the defense." Neb. Rev. Stat. § 29-2005 (Reissue 1995) provides in pertinent part:

> Every person arraigned for any crime punishable with death, or imprisonment for life, shall be admitted on his or her trial to a peremptory challenge of twelve jurors, and no more . . . . The attorney prosecuting on behalf of the state shall be admitted to a peremptory challenge of twelve jurors in all cases when the offense is punishable with death or imprisonment for life . . . [*p*]*rovided,* that in all cases where alternate jurors are called, as provided in section 29-2004, then in that case both the defendant and the attorney prosecuting for the state shall each be allowed one added peremptory challenge to each alternate juror.

Because Nesbitt was charged with first degree murder, which carries a maximum penalty of death or life imprisonment, see, currently, Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000), Nesbitt was entitled to 12 peremptory challenges for use during the selection of the original 12 jurors. In addition, because the district court exercised its discretionary authority under Neb. Rev. Stat. § 29-2004 (Reissue 1995) to select alternate jurors, Nesbitt was also entitled to one additional peremptory challenge to be used during the alternate juror selection process.

Nesbitt asserts that he is unable to state the specifics of this claim because he has repeatedly been denied access to the court records he needs to properly research this issue. The record indicates that Nesbitt has in fact made numerous but unsuccessful attempts to obtain the complete voir dire testimony. However, the portions of the voir dire that are contained in the record establish that Nesbitt was present with counsel during the voir dire examination, and thus he has personal knowledge of any alleged

deficient performance of his counsel. Despite this personal knowledge, Nesbitt does not allege that he was denied the peremptory challenges to which he was entitled under § 29-2005, nor does he allege that his attorney requested additional peremptory challenges. Moreover, to state a claim for postconviction relief, Nesbitt must plead both that his trial counsel was deficient and that such deficient performance resulted in prejudice. The missing voir dire transcripts relate solely to the factor of whether counsel was deficient, but Nesbitt has nevertheless completely failed to plead facts demonstrating how any deficient performance of his counsel prejudiced him. Nesbitt therefore has failed to properly plead facts which, if proved, would entitle him to postconviction relief on this claim, and the district court properly denied an evidentiary hearing.

(b) Sequestration During Trial

Nesbitt also alleges that defense counsel was ineffective for failing to argue on direct appeal that the district court erred in failing to sequester the jury during trial. Again, Nesbitt claims that he is unable to state his claim with greater specificity because of the absence of pertinent court records. We disagree. The "records" that Nesbitt presumably needs to state this claim are not court records under the district court's control, but, rather, are newspaper clippings and other media releases that would show how the media's influence was so pervasive and biased that the district court abused its discretion in not sequestering the jury to protect them from these allegedly improper materials. See, Neb. Rev. Stat. § 29-2022 (Reissue 1995); *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989) (holding decision to sequester jury subject to abuse of discretion standard). Consequently, Nesbitt has no viable claim that he was prevented by the district court from gaining access to the materials he needed to properly state his claim on this issue. Nesbitt has failed to plead facts demonstrating his counsel was ineffective, and this argument is without merit.

(c) Individual Voir Dire

Nesbitt argues that his defense counsel was ineffective for not arguing on direct appeal that the district court erred by not allowing each potential juror to be individually questioned to determine whether he or she had become biased by the extensive

media coverage surrounding the trial. Nesbitt further argues that this failure prejudiced him by allowing biased jurors to be impaneled during his trial.

The record reflects that an oath was administered to all prospective jurors. During the initial stages of jury selection, the trial judge announced that he would permit counsel to question each prospective juror individually, outside the presence of the others, regarding exposure to pretrial publicity. The record index indicates that 52 prospective jurors and 6 prospective alternate jurors were individually examined. However, the record is incomplete with respect to the substance of these examinations, as it includes a verbatim transcript of the individual examinations of only 12 of the prospective jurors and all 6 of the prospective alternates. Of these, Nesbitt's counsel exercised one challenge for cause, which was sustained. The record further reflects that Nesbitt was present with counsel during the individual examinations.

While the record of voir dire examination is incomplete, we view it as sufficient to establish the fact that each prospective juror and alternate was questioned individually, out of the presence of the others, on the issue of pretrial publicity. That being so, and absent any allegation that Nesbitt was not permitted to be present during any portion of this examination, it was incumbent upon him to allege specific facts regarding any claimed bias on the part of one or more jurors who participated in the verdict in order to support his claim that counsel was ineffective in not raising the issue on direct appeal. He did not do so, and the district court therefore did not err in denying an evidentiary hearing on this issue.

(d) "Death Qualification"

Finally, Nesbitt alleges that his defense counsel was ineffective for failing to argue on direct appeal that Neb. Rev. Stat. § 29-2006(3) (Reissue 1995) is unconstitutional because it allows a juror to be removed for cause if "his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death." We disagree.

This court and the U.S. Supreme Court have held on numerous occasions that it is constitutionally permissible to remove a

prospective juror for cause if his or her opposition to the death penalty is such that it would prevent or substantially impair his or her ability to be an impartial juror. See, *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986); *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986). Defense counsel was not ineffective for failing to raise an argument that has no merit.

8. Evidence of Prior Uncharged Crime

In this lengthy section of his postconviction motion, Nesbitt primarily argues that the evidence relating to the prior uncharged sexual assault on McKeever was improperly admitted into evidence. As noted, McKeever was allowed to testify over objection that in November 1974, she was abducted by Nesbitt, taken to his home, threatened, and raped.

Much of Nesbitt's argument in this regard is framed as trial court error in admitting the testimony. All allegations of trial court error are now barred, as the admission of the prior bad acts evidence could have been and in fact was raised on direct appeal. See *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987). Thus, we do not address Nesbitt's arguments alleging district court error with respect to McKeever's testimony, including his allegations concerning lost reports, unavailable witnesses, lack of judicial corroboration, or improper cross-examination. To the extent Nesbitt characterizes the error as ineffective assistance of counsel, it is not barred and is discussed below.

(a) § 29-110 Statute of Limitations

Nesbitt argues that his trial counsel was ineffective for failing to raise a statute of limitations defense to the use of McKeever's testimony and related evidence. He argues that because the McKeever prior bad act evidence related to an incident that occurred on November 11, 1974, it was precluded by the statute of limitations provisions of Neb. Rev. Stat. § 29-110 (Reissue 1985). He contends that he specifically told his counsel to make the statute of limitations argument and that counsel failed to raise the argument as directed, to his prejudice because it would have resulted in the inadmissibility of the evidence. We disagree.

Section 29-110 only proscribes *prosecution* for a felony that is time barred by its provisions. Nesbitt was not prosecuted for the assault on McKeever, and thus § 29-110 is inapplicable. See *In re Interest of Hollenbeck*, 212 Neb. 253, 322 N.W.2d 635 (1982) (holding § 29-110 inapplicable to allegations of incest relied upon in juvenile proceedings seeking termination of parental rights). Because § 29-110 is inapplicable to prior bad acts evidence, defense counsel was not ineffective for failing to raise the argument. This argument is without merit.

(b) Miller Deposition

Nesbitt further alleges that his counsel was ineffective for failing to develop testimony that would help to impeach McKeever during Miller's deposition. Nesbitt's arguments regarding Miller's deposition have been previously addressed in this opinion and need not be repeated here.

(c) Constitutionality of § 27-403

Finally, Nesbitt alleges that Neb. Rev. Stat. § 27-403 (Reissue 1995) unconstitutionally shifts the burden of proof to the defendant in a criminal case. This argument could have been raised on direct appeal. Nesbitt does not allege ineffective assistance of counsel in failing to raise this argument, and it is now procedurally barred in this postconviction action.

9. Right to Confront Miller

In this section of his motion, Nesbitt simply restates the same argument he made under his "Sequestration of Witnesses" section, i.e., that his defense counsel was ineffective for stipulating away his right to confront Miller and that the district court also violated his confrontation rights by accepting the stipulation. To the extent this argument assigns error to the district court, it is procedurally barred. *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000); *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000). To the extent this argument restates an ineffective assistance claim against defense counsel, Nesbitt once again fails to properly plead how counsel's performance prejudiced him. Nesbitt, not the State, offered portions of Miller's deposition at trial, and Nesbitt has not identified any of the deposition testimony which was prejudicial to him. Nesbitt states that

if Miller had testified in person, he would have provided "extremely important exculpatory testimony," and that Miller was an "extremely vital exculpatory witness," but he again fails to state what that testimony might have been. Without alleging the substance of Miller's anticipated testimony, Nesbitt has again failed to plead a constitutional violation. Consequently, this assignment is without merit.

10. Issues Relating to Dismissal of Felony Murder Charge

In this section of his motion, characterized by Nesbitt as the "most seriously important" issue of this postconviction proceeding, Nesbitt alleges that his counsel, the district court, and this court on direct appeal failed to realize that the "Specific Directed Verdict of Acquittal" entered at the end of the State's case in chief completely acquitted him of all charges. We disagree.

After the State rested, defense counsel moved for an order of dismissal on the ground that the State had failed to prove its prima facie case. The court found that there was insufficient evidence of a sexual assault or an attempted sexual assault on Harmer and thus dismissed the felony murder theory. However, the court specifically held that it was not dismissing the premeditated murder theory. Defense counsel then moved for a mistrial, arguing that in dismissing the felony murder theory, the court was in effect ruling that "a substantial majority of the testimony offered by the State is not relevant." Defense counsel also argued that the court was in effect ruling that Harmer was never sexually assaulted, while still allowing the State to allege that the sexual assault of Harmer was a motive for the premeditated killing. The motion for mistrial was overruled.

Nesbitt argues that premeditated murder and felony murder are simply alternate means of committing the crime of first degree murder, so that when he was acquitted of felony murder by the district court's dismissal of that charge, he was therefore acquitted of first degree murder altogether. He contends that this "acquittal" barred the State under double jeopardy principles from proceeding on the premeditation theory. To the extent Nesbitt alleges this argument as ineffective assistance of counsel, it is not procedurally barred.

Part of Nesbitt's premise is correct, but his conclusion is ultimately incorrect. We held in *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998), that premeditated murder and felony murder are simply alternate methods of committing first degree murder. To that extent, we agree with Nesbitt. Nevertheless, it is clear that double jeopardy principles did not apply to the premeditation theory in this case.

[8] The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. White, supra*. We have construed Nebraska's double jeopardy clause as providing the same protections. *Id.* Nesbitt's argument relates to the first of these three protections. This protection, however, does not apply to Nesbitt in the instant case because there has never been a second prosecution. Nesbitt was tried once on alternative theories of first degree murder, and our case law clearly permits the assertion of alternative theories in one murder prosecution. See *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991) (holding when defendant is charged in alternative with premeditated murder and felony murder, jury need not be unanimous under which theory it convicts). The Double Jeopardy Clause only bars the State from reprosecuting a defendant at a *subsequent* proceeding under a different theory of criminal liability for the offense of first degree murder. *State v. White, supra*. Because Nesbitt was charged at one trial under alternative theories, he was put in jeopardy for first degree murder only once. Nesbitt's double jeopardy argument lacks legal merit, and thus his counsel could not have been ineffective for failing to raise it.

Nesbitt also relies upon the principle of collateral estoppel embodied in the Double Jeopardy Clause. This principle provides "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Nesbitt argues that pursuant to the principle of collateral estoppel, the dismissal of the felony murder theory resulted in a

resolution in his favor of all of the ultimate facts relating to the sexual assault of Harmer and that the State was therefore precluded from inferring that a sexual assault on Harmer was the motive for premeditated murder.

[9] Again, however, Nesbitt's argument lacks legal merit. As the Eighth Circuit Court of Appeals found in its review of Nesbitt's habeas corpus action alleging this very issue, the collateral estoppel principle, like the concept of double jeopardy itself, applies only in successive prosecution cases and does not apply to a single trial in which conviction was sought on alternative theories of proving the same offense. *Nesbitt v. Hopkins*, 86 F.3d 118 (8th Cir. 1996). Moreover, even if the principle of collateral estoppel applied to a single trial of multiple counts, the principle would still not apply to the instant case. In a criminal case, a fact previously determined is not an "ultimate fact" precluded by the collateral estoppel principle unless it was necessarily determined by the fact finder against the government and, in the second prosecution, that " 'same fact is required to be proved beyond a reasonable doubt in order to convict.' " *Id.* at 120, quoting *Prince v. Lockhart*, 971 F.2d 118 (8th Cir. 1992). The district court dismissed the felony murder charge in this case after finding that there was insufficient evidence of a sexual assault upon Harmer for the jury to determine that such assault occurred beyond a reasonable doubt. The State, however, was not required to prove the sexual assault of Harmer beyond a reasonable doubt in order to establish premeditated murder. Although Nesbitt generally argues that the State impermissibly used evidence of a sexual assault on Harmer to infer a motive for her premeditated killing, motive is not an element of first degree murder and does not have to be proved beyond a reasonable doubt. See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). The resolution of the felony murder theory therefore did not resolve an ultimate fact in Nesbitt's favor, and the principle of collateral estoppel would not apply to this case.

Nesbitt's argument that he was acquitted of premeditated first degree murder is entirely without legal merit, and the district court did not err in denying an evidentiary hearing on this ground. To the extent Nesbitt's other allegations of error in his motion rest

on his acquittal/double jeopardy argument, they are similarly without merit.

11. Allegations of Government Misconduct

In this section of his motion, Nesbitt generally alleges that there was a conspiracy involving law enforcement officials, prosecutors, and the news media to convict him at all costs and that perjury and governmental misconduct so tainted his trial that he was denied his right to a fair and impartial trial. Although he makes numerous claims including destruction of evidence, withholding of exculpatory evidence, use of perjured testimony, government interference with both witnesses and his attorney-client privilege, improper use of the media by the prosecution to influence the trial, and improper closing argument, he does not characterize any of these errors as ineffective assistance of counsel, nor does he allege that he was unaware of any of these errors at the time of his direct appeal. Because these alleged errors could have been brought on direct appeal, they are now procedurally barred. See *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

With respect to certain of the alleged errors in this section, however, Nesbitt alleges that relevant proceedings were not transcribed on appeal and/or that he has been denied access to relevant records and thus cannot make complete factual allegations in his motion. Specifically, in his argument relating to the improper use by the State of perjured testimony, Nesbitt asserts that the prosecutor knowingly solicited a false statement from a witness. Nesbitt further asserts that defense counsel timely objected to the statement as hearsay. The portions of the record that Nesbitt claims were not transcribed with respect to this issue are the arguments of counsel in chambers on the hearsay objection. Although these arguments were not recorded, the record clearly reveals that the objection of defense counsel was sustained and that therefore no allegedly "perjured" testimony was admitted in this regard. We fail to see how the untranscribed arguments of counsel would help Nesbitt state a claim for the improper use of perjured testimony when the testimony in question was not received in evidence.

Nesbitt also alleges that there are numerous documents and records related to his destruction-of-evidence claim that were not transcribed on direct appeal, even though requested. Because any

transcription error could have been raised at the time of the direct appeal, the issue is now procedurally barred. See *State v. Caddy, supra*. Similarly, although Nesbitt alleges he was denied access to records relating to the improper use of the media by the prosecutor, any denial of access to such records in this postconviction motion is irrelevant because the issue of improper use of the media could have been raised on direct appeal and is now procedurally barred. Finally, although Nesbitt also alleges that the closing arguments were not transcribed, any transcription error relating to closing arguments could have been raised on direct appeal and is now procedurally barred. Moreover, we note that the bill of exceptions before us contains a transcription of both parties' closing arguments.

12. *Doyle v. Ohio* Issues

In this section of his motion, Nesbitt alleges that the prosecution was erroneously allowed to impeach his trial testimony both on cross-examination and during closing argument by referring to his post-*Miranda* silence, in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). With respect to this alleged error, Nesbitt asserts both that the district court erred in allowing the impeachment and that his trial counsel was ineffective for failing to object. Nesbitt's claim that the district court erred in allowing the impeachment could have been made on direct appeal and is therefore procedurally barred. See, e.g., *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001); *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001). Nesbitt's assertion that his trial counsel was ineffective, however, is not barred, as he had the same counsel at trial as he did on direct appeal. See *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

Some additional background is necessary to our analysis of this issue. Nesbitt testified at trial that he and Harmer, along with one or two other persons at various times, were in his home on the night of November 30, 1975. He testified that all persons in the home were using controlled substances. According to Nesbitt's testimony, Harmer excused herself to go to the bathroom, and when she did not return a short time later, he went to the bathroom and found her lying on the floor in a pool of vomit. He testified that after determining that she was dead, he cleaned

her body and disposed of it, first wrapping it in carpet and placing it in a garage, and then, on the following day, placing the body in a manhole at a housing development near Carter Lake, Iowa. He assumed that Harmer died of a drug overdose and denied killing her.

Nesbitt testified on direct examination that law enforcement officers came to his home in 1975 shortly after Harmer's death. He admitted that on this occasion, he told police that Harmer had been at his home on the night of November 30, but had left the next morning. He testified that he did not report Harmer's death to authorities because he did not trust them. Nesbitt further testified that he had had a similar conversation a few days later with other officers who had contacted a female acquaintance of Nesbitt's concerning Harmer's disappearance. Several days after these conversations, Nesbitt left Omaha and moved to Chicago, Illinois, where he assumed a new identity. He testified that in 1978, law enforcement officials located him in Illinois, ascertained his true identity, and questioned him about Harmer's disappearance. Nesbitt alleges that he was given *Miranda* warnings at the time of this questioning and on five subsequent occasions between 1978 and 1985 when he was questioned by police.

On cross-examination, Nesbitt again admitted that he originally told law enforcement authorities in 1975 that Harmer left his home while he was asleep. Later in the cross-examination, he was asked:

> Q Did you ever tell the story that you told this jury today to anyone who was investigating this case or anyone involved in law enforcement?
>
> A This is not a story; this is what happened.
>
> Q I ask you have you ever told this to anyone who was investigating the case or anybody who involved [sic] in law enforcement before today?
>
> A No.

Nesbitt's counsel did not object to these questions. In his closing argument, the prosecutor made the following statements:

> The first time anybody heard Mr. Nesbitt say that, [referring to his testimony that Harmer died of a drug overdose] that's involved in law enforcement or had anything to do

> with the case, other than he says his attorneys, was yesterday morning.
>
> . . . .
>
> . . . To talk real briefly about his testimony, of course, he is the last person to testify. He has had access to every report, every deposition — he sat in on some — and he is going to get on the stand and he's going to be real straightforward with you and tell you what happened . . . .
>
> . . . .
>
> . . . When the defendant testified, and [defense counsel] apparently thought I was trying to be a comic or it was a ridiculous cross examination, was the first time I ever talked to him in my life . . . .
>
> . . . .
>
> . . . There wasn't one time — and I think this offends me more than about anything else about this case — there wasn't one time from November 30th on, until today, that Mr. Nesbitt couldn't have told the Harmers where their daughter's body was anytime. And he didn't have to do it himself, but he sure could have let them know.

[10] In *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the Court held that a state may not impeach a defendant's exculpatory testimony, given 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. The Court held that because *Miranda* implicitly assures that silence will carry no penalty, it is "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." 426 U.S. at 618. This court adopted the prohibition in *Doyle* against the use of a defendant's silence during the postarrest, post-*Miranda* time period in *State v. Lofquest*, 227 Neb. 567, 418 N.W.2d 595 (1988). In that case, however, we noted that the Supreme Court limited the *Doyle* rule in *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), by holding that a prosecutor's references to postarrest, pre-*Miranda* silence do not necessarily violate a defendant's due process rights. See, also, *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981) (finding no merit to claim that prosecutor's

reference to defendant's failure to make exculpatory statement to police before arrest fell within holding of *Doyle*). Recently, in *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002), we held 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.

We initially address the prosecutor's remarks during closing argument that Nesbitt was the last to testify and that he had access to all the reports and depositions. In *State v. Jacob*, 253 Neb. 950, 974, 574 N.W.2d 117, 137 (1998), the prosecutor made a similar reference to the defendant's testimony during closing argument, stating:

> "Credibility, ladies and gentlemen. Does it make sense? As you judge credibility, ladies and gentlemen, recall. Recall. Who has had five years to think of his answers, five years to run through all of this. Five years to prepare. Who sat through this trial and heard every witness and every question. Who sat on the stand and didn't want to answer the question that was posed, he wanted to give his own answer. Credibility, ladies and gentlemen. That's your job to decide."

We held that such statements did not comment upon the defendant's post-*Miranda* silence and did not violate *Doyle.* We reach the same conclusion here. The fact that defense counsel did not make a *Doyle* objection to this statement by the prosecutor does not amount to ineffective assistance of counsel.

However, the remaining *Doyle* issues in this case are more problematic. The prosecutor's remarks about Nesbitt's first disclosing his account of Harmer's death and his disposition of her body during his trial testimony resemble the facts we considered in *State v. Lofquest, supra.* In that case, a defendant who had testified on his own behalf was asked on cross-examination, " 'As a matter of fact, the first time you've told this story to anyone in law enforcement is today?' " *Id.* at 569, 418 N.W.2d at 596. In closing arguments, the prosecutor also said:

> " 'It wasn't me.' But, who does he tell that story to? Did he tell it to the police? No. He admitted to you this morning that he knew that if he told the police where he was, the police would go out and they would look for tire tracks

> and they'd look for cigarette butts; they'd be trying to verify his story. He said he knew that. And he didn't tell them anything."

State v. Lofquest, 227 Neb. 567, 569, 418 N.W.2d 595, 596-97 (1988). In both instances, defense objections were overruled. We noted that the generalized questions and comments made it "nearly impossible to discern, for purposes of a *Doyle* inquiry, what period of silence the prosecution was referring to, pre-*Miranda* or post-*Miranda*." 227 Neb. at 570, 418 N.W.2d at 597. We therefore held:

> In a case such as this where a pre-*Miranda* and post-*Miranda* timeframe may exist, difficulties arise when general references are made to a defendant's silence, which a reasonable juror could construe as including the post-*Miranda* silence period. We cannot allow prosecutors to sidestep the *Doyle* protections by skirting the edge of the law with vague and imprecise references to a defendant's silence. For these reasons we conclude that appellant's constitutional right to due process of law was violated.

State v. Lofquest, 227 Neb. at 570, 418 N.W.2d at 597. After determining that the error was not harmless, we reversed the conviction.

In *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), the defendant admitted the killing with which he was charged but testified that it was committed in self-defense. During the trial, a deputy sheriff testified that after his arrest, the defendant told the deputy a trace metal test on the defendant's hands was not necessary because he had killed the victim. The deputy was asked, " 'When [the defendant] made that statement . . . did he offer any explanation or excuse for the action he had taken?' " The deputy responded, "None." *Id.* at 914, 510 N.W.2d at 66. On cross-examination, the defendant was asked if he had shown the deputy any marks on his neck from the alleged grabbing by the victim, and the defendant responded, " 'No, I didn't talk to anybody when I came in.' " *Id.* at 915, 510 N.W.2d at 66. Finally, during closing arguments, the prosecutor remarked:

> "[I]f a guy was claiming—if he were claiming that he shot a guy because he was defending himself from him, wouldn't

> he have said, 'Look at the marks on my neck,' or, 'He was trying to get me,' or, 'Look at this, what he did,' or, 'He was trying to knock me down.' He didn't say that. He just said, 'Why brother [sic] [with the trace metal test], I shot him.' Now, you know, he's explained later what he says happened, but why didn't he explain that to the officer on the scene when he was first in custody in the sheriff's office?"

Id. We noted that the testimony and comments were clearly in reference to a postarrest, post-*Miranda* timeframe and thus in violation of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). Finding, however, that defense counsel did not object to the questions at least in part because of a consciously chosen trial strategy, we held that any error was waived.

On the two occasions when Nesbitt spoke with Omaha police in 1975, he had neither been accused of killing Harmer nor given *Miranda* warnings. Thus, if the prosecutor's cross-examination and argument were clearly limited to Nesbitt's silence on those occasions, there would not be a *Doyle* issue. However, the questions asked and argument made can reasonably be interpreted as extending beyond these two occasions into the post-*Miranda* period. Thus, under our reasoning in *State v. Lofquest*, 227 Neb. 567, 418 N.W.2d 595 (1988), the prosecutor's questions under consideration here were susceptible to a *Doyle* objection insofar as they were not limited to Nesbitt's two 1975 contacts with Omaha police in the days following Harmer's death.

The State argues that the decision to object or not object is part of trial strategy to which we must give deference. That is generally true, but unlike the circumstances in *State v. Myers, supra*, the record in this case does not affirmatively establish that Nesbitt's trial counsel made a conscious, strategic decision not to assert a *Doyle* objection to the prosecutor's questions and argument about Nesbitt's pretrial, post-*Miranda* silence with respect to his exculpatory account of Harmer's death. Thus, Nesbitt has pled facts entitling him to an evidentiary hearing on this issue.

13. Jury Instructions

In this section of his motion, Nesbitt generally alleges that the district court erred by omitting necessary jury instructions and/or

refusing to give instructions proposed by the defense. Any error by the district court could have been raised on direct appeal and is now procedurally barred.

[11] Nesbitt also makes a general allegation that he was not allowed to personally participate in the jury instruction conference. This does not raise a constitutional issue that would entitle Nesbitt to postconviction relief, as we have previously held that a defendant has no constitutional right to be present at a conference in which jury instructions are formulated by counsel and the trial judge. See *State v. Bear Runner*, 198 Neb. 368, 252 N.W.2d 638 (1977).

Finally, Nesbitt generally asserts that his counsel was ineffective with regard to jury instructions both at trial and on direct appeal. This argument is not procedurally barred. Nesbitt's argument addresses omitted instructions by topic, and we adopt the same format in analyzing his claims.

(a) Corpus Delicti

Nesbitt argues that the district court failed to give an instruction on this issue which was requested by his trial counsel. Because this claim asserts error on the part of the district court only, it could have been raised on direct appeal and is procedurally barred in this postconviction action.

(b) Motive

Nesbitt argues that the district court erred in its duty to properly instruct the jury regarding the permissible use of the prior bad act evidence, i.e., the McKeever testimony. This argument also alleges error by the district court that is procedurally barred in this postconviction action.

Although Nesbitt contends that his counsel adamantly objected to the district court's errors, he also alleges counsel was ineffective because Nesbitt had prepared a jury instruction on the "failed motive" issue and given it to codefense counsel with instructions that it be proposed at the jury instruction conference and such was not done. He alleges that an evidentiary hearing is necessary to determine whether counsel was ineffective in failing to propose the instruction.

[12] We agree with the district court that no evidentiary hearing was required in this regard. To establish reversible error

from a court's refusal to give a requested instruction, an appellant has the burden to show (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). Nesbitt's proposed instruction provided:

> The jury are [sic] instructed that the State claims in support of it's [sic] prosecution that the motive of intent or purpose to kill pursuant to the alleged offense now charged, was that Mary K. Harmer, as the victim of an attempted or perpetrated sexual assault was killed so that she would not be able to identify the accused as the perpetrator of such an assault.
>
> With reference to this claim, you are instructed that the State has failed to support such a position of motive for intent or purpose to kill, and all evidence presented to you on that topic is hereby withdrawn from your consideration and you are instructed to disregard the same.
>
> Further, the absence of all evidence of motive for intent or purpose to kill, is a material circumstance that should be considered by yourselves in connection with all other facts in determining the guilt or innocence of the accused.

This instruction implies that motive is an element that the State must prove in order to establish the elements of first degree murder and, thus, is an incorrect statement of the law. See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). Moreover, the proposed instruction directs the jury to disregard portions of the evidence, which directly infringes upon the province of the jury as a fact finder in a criminal case. The instruction appears to be based largely on Nesbitt's acquittal/double jeopardy theory, which we have held to be without merit. Because the proposed instruction is an incorrect statement of the law, Nesbitt cannot show that any failure of counsel to propose the instruction was ineffective, and the district court did not err in denying an evidentiary hearing on this issue.

(c) Theory of Defense

Nesbitt argues next that the district court erred in not instructing the jury regarding his theory of defense. It is not clear what

instruction he contends should have been given, but in any event, any such error by the trial court could have been asserted on direct appeal and is now procedurally barred.

Nesbitt also alleges that he drafted a proposed instruction which he asked his attorneys to request during the instruction conference. He alleges that his counsel was ineffective for failing to propose his drafted instruction.

Nesbitt's proposed instruction provided:

> The jury are [sic] instructed that the accused is not required to prove his innocence or to produce any evidence to that effect.
>
> Further you are instructed that the defense has offered evidence in support of it's [sic] position that the death of Mary K. Harmer was the result of a drug related overdose and not from some criminal act of the accused where such evidence shall be considered by yourselves in connection with all other facts and circumstances in determining your verdict. If you should thereupon find that the prosecution's evidence does not refute the defense position and beyond a reasonable doubt, then you must acquit the defendant.

[13,14] The trial court is required to give an instruction where there is any evidence, which could be believed by the trier of fact, in support of a legally cognizable theory of defense. *State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837 (1998). This proposed instruction does not relate to a theory of defense, but merely directs the jury to consider the defense's contention that Harmer died of a drug overdose. A jury instruction which directs the attention of the jury to, and unduly emphasizes, a part of the evidence is erroneous and should be refused. *State v. Harrison*, 221 Neb. 521, 378 N.W.2d 199 (1985). Furthermore, the jury instructions, taken as a whole, correctly stated the law as it relates to this issue. The jury was instructed on the burden of proof and the presumption of innocence. The jury was also properly instructed on the elements of first degree murder, requiring proof beyond a reasonable doubt that Nesbitt killed Harmer purposely and with deliberate and premeditated malice. A separate instruction unduly emphasizing a portion of the evidence was therefore not warranted. Nesbitt has not pled facts which, if

proved, would demonstrate that defense counsel was ineffective. This argument is without merit.

(d) Prior Bad Act

Nesbitt generally alleges that the district court erred in giving all of the instructions relating to the limited admissibility of the prior bad act testimony of McKeever. Any such error by the district court could have been raised on direct appeal and is now procedurally barred.

Nesbitt also alleges that he prepared a proposed instruction on this issue that was not offered by his counsel at the instruction conference and contends that an evidentiary hearing on this issue is thus required. Nesbitt's proposed instruction provided:

> The jury are [sic] instructed that evidence was received in this case relative to an alleged similar act allegedly committed by the accused in connection with an event which the witness, Michele McKeever, was involved. Such evidence was not admitted for your consideration in order to prove a character trait of the accused to show that he acted in conformity therewith, but rather, this evidence was received solely for the limited purpose of show [sic] a plan and or preparation of the accused for tending to establish the material elements of deliberation and premeditation.
>
> Further you are instructed that the accused is not on trial for any conduct not charged in Instruction No. 5 nor is this evidence in and of itself material to prove the commission of the present offenses charged.

This requested instruction is incorrect. The McKeever evidence was admitted for the purpose of showing plan, motive, preparation, and identity, as correctly stated in instruction No. 14 which was given to the jury. Instruction No. 14 also informed the jury that they were not to consider the evidence for any other purpose. Because Nesbitt's proposed instruction is incorrect and the jury instructions that were given adequately instructed the jury on the matter, Nesbitt cannot show that his counsel was ineffective for failing to propose the instruction. The district court did not err in denying an evidentiary hearing on this ground.

(e) Reasonable Doubt

Nesbitt also argues that the district court erred in instructing the jury on reasonable doubt. To the extent he alleges error by the district court, such error is procedurally barred in this postconviction action, as it could have been raised on direct appeal. Moreover, the instruction given by the district court was the NJI Crim. 14.08 standard instruction on reasonable doubt. The constitutionality of such instruction was confirmed by this court during the pendency of Nesbitt's trial in *State v. Beard*, 221 Neb. 891, 381 N.W.2d 170 (1986), and has been reaffirmed by this court in *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), *abrogated on other grounds, State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995), and *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). See, also, *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

Nesbitt further alleges that he drafted a proposed instruction on reasonable doubt that was not submitted by his counsel at the jury instruction conference. He alleges that the failure of his counsel to submit the instruction resulted in ineffective assistance of counsel. Nesbitt's proposed instruction provided:

> The jury are [sic] instructed that the guilt of the accused is not to be inferred because the facts are consistent with guilt, but, on the contrary, before there can be a verdict of guilty you must believe from all the legal evidence when taken together and beyond a reasonable doubt on each and every material element that the facts proved are inconsistent with his innocence.
>
> Proof beyond a reasonable doubt is proof so great and convincing that you would not hesitate to act upon it in the most important and graver transactions of life.
>
> If from all the legal evidence when taken together produces only a firm belief or conviction about the existence of any one or more material elements then you must acquit the accused, or, if two conclusions can readily or reasonably be drawn from the legal evidence, one of innocence and one of guilt, you should adopt that of innocence. Furthermore you must remember that facts or evidence

> based on suspicion, speculation or mere conjecture may never support your verdict.

As noted, the instruction given by the district court has been consistently found by this court to be adequate and constitutional and, thus, a sufficient definition of reasonable doubt. Because the standard jury instruction already defines reasonable doubt, Nesbitt cannot show that his trial counsel was ineffective in failing to propose his instruction. The district court did not err in denying an evidentiary hearing on this ground.

(f) Multiple Witnesses

Finally, Nesbitt alleges that although the district court, via instruction No. 17, instructed the jury regarding the credibility of the witnesses and the weight to be given their testimony, it omitted an instruction concerning the number of witnesses that testified for each party. To the extent this is alleged as error by the district court, it could have been brought on direct appeal and is now procedurally barred in this postconviction action.

Nesbitt also alleges, however, that his counsel was ineffective in failing to bring the relevant instruction to the attention of the court. He alleges the proper instruction to be:

> The weight to be given to any particular legal evidence is not necessarily determined by the number of witnesses testifying on behalf of each side. You may find that the testimony of a smaller number of witnesses for one side is more credible than the testimony of a greater number of witnesses for the other side.

Nesbitt alleges that trial counsel's failure to make certain that this instruction was given resulted in prejudice because it allowed the jury to erroneously presume that the number of witnesses testifying for each side was "an automatic determinant factor for their consideration in the weight to be given the evidence." Nesbitt does not allege facts relating to how such an erroneous presumption, even if made, would have had a reasonable probability of affecting the outcome of the proceedings and has therefore failed to properly plead ineffective assistance of counsel in this regard. The district court did not err in denying an evidentiary hearing on this ground.

Nesbitt also alleges that the district court erred in its failure to either admonish, limit, or strike the "inadmissible prejudicial testimony" of certain witnesses after defense counsel properly objected. Nesbitt has alleged only error by the district court, which could have been raised on direct appeal and is now procedurally barred.

In a subsequent section of his motion, Nesbitt alleges that trial counsel was ineffective generally regarding the jury instruction issues and that appellate counsel ineffectively raised the corpus delicti issue on direct appeal. These allegations are substantially related to those set forth above or to his acquittal/double jeopardy argument and are without merit for the reasons outlined.

14. Sufficiency of Evidence

Nesbitt contends in this section of his motion that the trial court and this court on direct appeal failed to properly analyze his sufficiency of the evidence claim. Much of his argument in this regard is related to his acquittal/double jeopardy argument, which we have concluded is without merit. This claim is also procedurally barred, as the issue was raised and litigated on direct appeal. *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987).

Nesbitt also alleges that his counsel was deficient at trial and on direct appeal in failing to properly litigate the sufficiency of the evidence issues. Again, much of his argument in this regard is related to his unsound acquittal/double jeopardy theory, and counsel therefore was not deficient in not asserting it at trial or on appeal. Notably, Nesbitt also admits that his attorney directly raised the sufficiency of the evidence issue in the double jeopardy context in a motion for rehearing filed after the direct appeal. That motion was denied by this court.

15. Direct Appeal

In this section of his motion, Nesbitt alleges that he was denied his fundamental right, granted by Neb. Const. art. I, § 23, to personally file a direct appeal from his conviction. He alleges that he never knowingly and voluntarily acquiesced to the filing of the direct appeal by his counsel and now asserts that his postconviction motion should be considered as his direct appeal.

Nesbitt's argument in this regard is both legally and factually inaccurate. Article I, § 23, of the Nebraska Constitution grants "an aggrieved party" the right to appeal. Such language does not restrict counsel from filing an appeal on behalf of an aggrieved party. Moreover, throughout his motion, Nesbitt alleges that he directed counsel to raise certain issues in the direct appeal. These allegations are a direct contrast to his assertion that he never authorized the filing of the direct appeal. The direct appeal filed by counsel on Nesbitt's behalf sufficiently satisfied his right to a direct appeal, and this argument is without merit.

Nesbitt also alleges that he was denied access to his counsel during the preparation of the direct appeal because he was removed from the jurisdiction and collect telephone calls from him to his attorney's office were refused. He contends that he was thus denied the opportunity to give advice and suggestions to counsel on how to proceed on direct appeal. Once again, this factual allegation directly conflicts with Nesbitt's other assertions that he specifically directed counsel to raise certain issues on appeal. Nesbitt has failed to allege a constitutional violation and is not entitled to an evidentiary hearing on this matter.

16. § 29-2308

In this section of his motion, Nesbitt appears to attack the constitutionality of Neb. Rev. Stat. § 29-2308 (Reissue 1995). That statute provides in relevant part:

> No judgment shall be set aside, new trial granted, or judgment rendered in any criminal case on the grounds of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure if the appellate court, after an examination of the entire cause, considers that no substantial miscarriage of justice has actually occurred.

Nesbitt generally argues that any harmless error analysis undertaken by this court pursuant to § 29-2308 on his various postconviction claims violates his right to a trial by jury. To the extent this argument is not procedurally barred due to Nesbitt's failure to raise it on direct appeal, it is without merit, as subsequent review by a court does not infringe upon a party's initial right to a jury trial.

17. Presentence Investigation Report

[15] In this section of his motion, Nesbitt initially alleges that Neb. Rev. Stat. § 29-2261(6) and/or (7) (Reissue 1995) is unconstitutional on its face and as applied. This issue was not raised before the district court prior to sentencing. A constitutional question not properly raised in the trial court will not be considered on appeal. *State v. Victor*, 259 Neb. 894, 612 N.W.2d 513 (2000). Because this argument was not raised prior to sentencing, it is now procedurally barred.

Moreover, in *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), we held that § 29-2261 did not violate the constitutional right to confrontation. To the extent Nesbitt alleges ineffective assistance of counsel with respect to his constitutionality claim, it is therefore without merit.

Nesbitt next alleges that the district court erred in denying him an opportunity to review the presentence investigation report and in refusing to append it with information necessary to negate improper factual allegations within the report. Any alleged error by the district court could have been raised on direct appeal and is procedurally barred in this postconviction action.

Nesbitt also alleges, however, that his counsel was ineffective in failing to consult with him regarding the contents of the report and failing to make it available for Nesbitt's review. Two hearings were held in this case in connection with Nesbitt's sentencing. At an April 4, 1986, hearing at which Nesbitt was present, Nesbitt's counsel objected to portions of the presentence investigation report and the district court heard arguments regarding aggravating and mitigating circumstances. Nesbitt was also present at an April 17 sentencing hearing. Prior to imposing sentence on April 17, the judge asked if either defense counsel or the defendant wished to address the court and Nesbitt made a statement generally attacking the judicial process involved in his trial. He did not complain at that time that he had not been given an opportunity to review the presentence investigation report.

In *State v. Plant*, 248 Neb. 52, 532 N.W.2d 619 (1995), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), the defendant filed a postconviction motion alleging he received ineffective assistance of counsel because he

was not given the opportunity to review the presentence investigation report prior to sentencing. At his sentencing hearing, Plant's attorney addressed concerns with the presentence investigation report, and immediately thereafter Plant was asked whether he wished to address the court. Plant addressed the court, but did not mention that he had not personally reviewed the presentence investigation report.

On appeal, we noted that a defendant has a qualified right to personally review his presentence investigation report with his counsel, subject to the district court's supervision. We found, however, that a defendant waives that right by failing to notify the district court when given an opportunity that the defendant has not personally reviewed the report and wishes to do so. Because the record before us affirmatively establishes that Nesbitt had an opportunity to inform the district court that he had not personally reviewed the report but failed to do so, he has waived his right to review the presentence investigation report. Due to this waiver, Nesbitt's ineffective assistance of counsel argument is without merit. The district court did not err in denying an evidentiary hearing on this ground.

18. Ineffective Assistance of Counsel Claim

In this section of his postconviction motion, Nesbitt first alleges that the standard announced in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), adopted by this court for analyzing ineffective assistance of counsel claims is partially unconstitutional. He alleges that because the prejudice prong of this standard requires a demonstration of a reasonable probability that but for counsel's deficient performance the result of the proceeding would have been different, his right to a trial by a jury of his peers was unconstitutionally infringed. Nesbitt appears to argue that if a court instead of a jury is allowed to review the record to determine whether the result of the proceeding would have been different, there is a violation of his constitutional rights. We find this argument to be without merit, as any subsequent review by a court does not deny a defendant his original right to a trial by jury.

Nesbitt also generally alleges that he received ineffective assistance from his trial counsel. In this regard, he lists 10 "issues

of error regarding defense counsel's deficient and or ineffective performances." After reviewing this list, we conclude that it is nothing more than a summation of the ineffective assistance arguments previously addressed throughout his postconviction motion and determined in other portions of this opinion. There is no need to repeat or reconsider them here.

Nesbitt also alleges in this section of his motion that his counsel was deficient on direct appeal. In this regard, he alleges that counsel engaged in a "feeble" attempt on direct appeal to raise the issues of inadequate corpus delicti, admissibility of the prior bad acts evidence, and sufficiency of the evidence. To the extent these issues have not been addressed by previous portions of this opinion, we note that Nesbitt does not allege how counsel was deficient and does not allege what prejudice resulted due to any deficiency. He has thus failed to adequately plead ineffective assistance of counsel. His allegation that counsel deficiently raised the acquittal/double jeopardy argument on rehearing to this court is similarly without merit, as we have determined that the argument itself is without substance.

Nesbitt finally alleges that his appellate counsel failed to request and have prepared an adequate bill of exceptions at the time of the direct appeal and that those portions of the bill of exceptions that were properly requested were not provided to this court for that appeal. He argues that the omitted portions were necessary for a plain error review of the factual issues related to his "acquittal." Because we have determined that Nesbitt's "acquittal" argument is without legal merit, any error by counsel in failing to provide this court with such portions of the bill of exceptions could not have resulted in prejudice to Nesbitt.

We note that Nesbitt lists in his motion all of the portions of the bill of exceptions and records in this case that had not been transcribed at the time he filed his postconviction motion. Many of these portions relate to arguments made by counsel, and many more have subsequently been transcribed and are now part of the record before this court. We conclude that none of the missing portions of the record are necessary to the resolution of any of Nesbitt's postconviction claims.

19. Amendment

Nesbitt argues that because certain records were not transcribed at the time his motion was filed, he should be allowed to amend his motion. As noted, we conclude that the missing portions of the record are not germane to any viable postconviction claim alleged by Nesbitt.

Moreover, we note that pursuant to Neb. Rev. Stat. § 25-852 (Reissue 1995), "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, permit a party upon motion to amend any pleading, process, or proceeding by . . . inserting other allegations material to the case . . . ." See, also, *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000). The decision to grant or deny an amendment to a pleading rests in the discretion of the court. See *id*. On the record before us, it is clear that the district court did not abuse its discretion. We note that Nesbitt has failed to file an amended petition at any time in the last 10 years even after having at least four different counsel appointed for the express purpose of assisting him in that task.

20. Appointment of Postconviction Counsel

Nesbitt also assigns as error the failure of the district court to appoint counsel to represent him in this proceeding. The record reflects that Nesbitt is currently represented by experienced counsel who appeared on his behalf at oral argument before this court. Accordingly, the issue of whether the district court should have appointed counsel is moot.

V. CONCLUSION

Nesbitt has alleged sufficient facts to entitle him to an evidentiary hearing on his postconviction claim that his trial counsel was ineffective in not asserting *Doyle* objections to certain questions asked by the prosecutor during his cross-examination of Nesbitt which were sufficiently broad to be construed as challenging his post-*Miranda* silence. We therefore reverse the order of the district court to the extent that it denied Nesbitt an evidentiary hearing on this issue because the files and records before us do not affirmatively establish that Nesbitt is not entitled to postconviction relief. We agree with the district court that all other grounds for postconviction relief asserted by Nesbitt

are either procedurally barred, based upon inadequate factual allegations, or shown by the files and records to be without merit, and we therefore affirm the dismissal of those claims.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
RUSSELL W. HARMS, APPELLANT.

650 N.W.2d 481

Filed September 13, 2002. No. S-00-1157.

SUPPLEMENTAL OPINION

Appeal from the District Court for Nemaha County: DANIEL BRYAN, JR., Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

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.

PER CURIAM.

This matter is before us on the motion for rehearing of the appellant, Russell W. Harms, regarding our opinion reported at *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002). Harms claims, in seeking rehearing, that we applied an incorrect standard of review in analyzing whether the erroneous admission of certain testimony relating to his post-*Miranda* request for an attorney and post-*Miranda* refusal to speak to a police officer was harmless beyond a reasonable doubt. We overrule the motion for rehearing, but substitute for the present analysis following the subheading "3. HARMLESS ERROR," *id*. at 831-37, 643 N.W.2d at 375-78, the following language:

Having determined that portions of the testimony of Dr. Sanat Roy and Officer Daniel White were improperly admitted pursuant to *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), 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' ").

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.

State v. Lara, 258 Neb. 996, 1002, 607 N.W.2d 487, 491-92 (2000). We explained in *Lara* that the burden rests on the appellant in a bench trial because of the "presumption" that the trial court, sitting as the fact finder, disregards inadmissible evidence. See *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991). Our examination of the evidence and the district court's findings are in accordance with these standards.

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). 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. Thus, the evidence properly considered by the trial court contained exactly the same evidence that was improperly before the court.

In addition, although Harms argues to the contrary, the record does not indicate that the district court relied upon the inadmissible evidence. 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.

There is no other indication in the record that the court specifically relied upon the inadmissible evidence.

Moreover, the State offered a substantial amount of evidence regarding Harms' sanity at trial. Several individuals testified to Harms' calm demeanor immediately after the shooting. Shawn 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." Kenneth Hatten, another eyewitness, also testified that Harms did not hurry to leave the area after shooting Tennyson Kelsay, but, rather, drove away "[s]low, deliberate, like watching." Both White and Eric 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. Holly Plager, a dispatcher for the Nemaha County Sheriff's Department, 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 v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), 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.

Portions of the testimony offered by Dr. William Logan, Harms' expert witness, also 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.

While we recognize that Harms also presented considerable evidence at trial on the issue of his sanity, based upon the cumulative nature of the inadmissible evidence, the court's articulated findings, and the admissible evidence evaluated as a whole, we determine that Harms has failed to establish that the district court resolved the factual issue of his sanity through the use of the erroneously admitted evidence. For these reasons, we determine that the *Wainwright* errors which occurred at trial were harmless beyond a reasonable doubt.

FORMER OPINION MODIFIED.
MOTION FOR REHEARING OVERRULED.

ADRIAN R. REGIER, BY LORIE REGIER, GUARDIAN AND CONSERVATOR, APPELLANT, V. GOOD SAMARITAN HOSPITAL, KEARNEY, NEBRASKA, A CORPORATION, ET AL., APPELLEES.

651 N.W.2d 210

Filed September 20, 2002. No. S-01-631.

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. ____: ____: ____. 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.
3. **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.
4. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.

5. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the petition is to be construed liberally, and 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.
6. ____: ____. 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.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed.

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

Patrick G. Vipond and Shun Lee Fong, of Lamson, Dugan & Murray, L.L.P., for appellee John Finkner, M.D.

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

MILLER-LERMAN, J.

NATURE OF CASE

Lorie Regier (Regier), the guardian and conservator of Adrian R. Regier (Adrian), appeals from the order of the district court for Buffalo County which sustained the demurrer of John Finkner, M.D., and dismissed Regier's cause of action against Finkner without leave to replead. We reverse.

STATEMENT OF FACTS

On January 8, 2001, Regier filed a petition against various defendants, including Finkner. This appeal is limited to the dismissal of Regier's cause of action against Finkner, without leave to replead. We summarize the facts alleged by Regier in her petition. Adrian was born on July 6, 1980, and lives in Perkins County, Nebraska. Regier is Adrian's mother. On September 26, 1997, Adrian sustained a concussion while playing high school football. He was taken from the field to the Community Hospital in McCook, Nebraska, where he was admitted to the emergency room at approximately 9:45 p.m. and treated by Corrine Phillips-Ward, M.D., and Elizabeth Edwards, M.D. At approximately 11:45 p.m., Phillips-Ward contacted the Good Samaritan Hospital (Good Samaritan) in Kearney, Nebraska, and spoke with Finkner. Good Samaritan is a " 'regional referral center' "

and has "specialized capabilities," including helicopter ambulance service, a shock-trauma unit, and neurosurgery expertise. Although paragraph 10 of the petition alleges that Finkner is an employee of the "Community Hospital," given the remaining allegations in the petition and the parties' briefs, we understand this statement to be an allegation that Finkner is an employee of Good Samaritan. It is alleged that notwithstanding the fact that Good Samaritan had the specialized capabilities or facilities needed by Adrian and the " 'capacity' " to treat Adrian, upon receiving the call from Phillips-Ward, Finkner refused to accept Adrian's transfer from the Community Hospital to Good Samaritan. There is no suggestion in the petition that in this telephone call, Finkner said anything of medical substance. Adrian was not taken to Good Samaritan.

Sometime after 3:45 a.m. on September 27, 1997, Adrian was transferred to Lincoln General Hospital in Lincoln, Nebraska. Upon arrival, his intracranial pressure was measured at 60. A CAT scan of his head revealed severe cerebral edema due to his head injury. Despite efforts by the medical staff at Lincoln General Hospital to relieve Adrian's intracranial pressure by controlled ventilation and intermittent mannitol, Adrian did not make significant neurological improvement and sustained severe traumatic brain injury.

With respect to Finkner, the petition alleges, inter alia, that Finkner's refusal to accept the transfer of Adrian was in violation of Good Samaritan's hospital standards, bylaws, rules, and regulations regarding the acceptance of transfer patients and that it also violated the general industry standard regarding the acceptance of transfer patients. The petition does not recite or suggest the substance of the standards, bylaws, rules, and regulations or that Finkner had agreed to adhere to them.

On February 12, 2001, Finkner filed a demurrer claiming, inter alia, that the petition failed to state a cause of action against him. On March 19, the district court held a hearing on Finkner's demurrer. In an order dated May 7, the district court sustained Finkner's demurrer. The district court stated that Finkner had not been an attending physician for Adrian and that "no physician-patient relationship ha[d] been or could be alleged." The district court concluded that Finkner had no liability to Adrian, because Adrian

had never been received by or entered into Good Samaritan for treatment. Based upon these determinations, the district court dismissed Regier's cause of action against Finkner, stating:

> The Court finds that [Regier] has failed to state a cause of action against defendant Finkner. It also appears to this Court that it will not be possible for [Regier], given the facts presented in the petition, to set forth sufficient facts upon which a cause of action against . . . Finkner can be alleged. The Court therefore dismisses this cause of action.

The district court entered its order dismissing Regier's cause of action against Finkner without leave to amend. Regier appeals.

ASSIGNMENTS OF ERROR

On appeal, Regier assigns two errors. Regier claims, restated, that the district court erred (1) in sustaining Finkner's demurrer and (2) in dismissing Regier's cause of action against Finkner without leave to amend.

STANDARDS OF REVIEW

[1,2] 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. *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002); *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002). 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. *Shirley v. Neth, ante* p. 138, 646 N.W.2d 587 (2002); *Spradlin v. Dairyland Ins. Co.*, 263 Neb. 688, 641 N.W.2d 634 (2002); *Mulinix v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001). Whether a petition states a cause of action is a question of law regarding which an appellate court has an obligation to reach a conclusion independent of the inferior court. *Shirley, supra*.

ANALYSIS

[3,4] At issue in this case is whether Regier's petition states a cause of action against Finkner and, if not, whether the district

court should have granted leave to Regier to replead. 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. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). A statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Spradlin, supra*.

[5,6] In determining whether a cause of action has been stated, the petition is to be construed liberally, and 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. *Chambers, supra*; *Spradlin, supra*. 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. *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002).

The relevant portions of the petition regarding Finkner are paragraphs 10 and 36. Paragraph 10 reads as follows: "At all times pertinent hereto, Defendant FINKNER was an employee and/or agent of the Defendant COMMUNITY HOSPITAL [sic] acting within the scope and course of such employment and/or agency in the rendition of his medical services." Paragraph 36 alleges the following:

> Defendant FINKNER was negligent in his medical care and treatment of Adrian in one or more of the following particulars:
>
> a) in failing to accept the transfer of Adrian to the Defendant GOOD SAMARITAN given Adrian's medical condition and the capacity and the specialized capabilities of Defendant GOOD SAMARITAN to treat that condition in violation of the applicable standard of care in the provisions of 42 U.S.C.§1395dd [(1994), Emergency Medical Treatment and Active Labor Act];
>
> b) in failing to accept the transfer of Adrian to the Defendant GOOD SAMARITAN given Adrian's medical

condition and the Defendant hospital's specialized capabilities and capacity to treat that condition in violation of hospital standards, bylaws, rules and regulations for the acceptance of transfer and care of patient's [sic] in Adrian's condition;

c) in failing to accept the transfer of Adrian to the Defendant GOOD SAMARITAN given Adrian's medical condition and said Hospital's specialized capabilities and capacity to treat that condition in violation of industry standards for the acceptance of transfer and care of patients in Adrian's condition.

In her brief before this court, Regier asserts that "the facts alleged in the Petition support both a general negligence claim and a medical malpractice claim against . . . Finkner." Brief for appellant at 12. Regier acknowledges that Finkner did not "treat" Adrian; however, Regier asserts that "Finkner, as the emergency room physician, [was] contractually obligated to provide emergency room services . . . and owed a duty to Adrian." Brief for appellant at 13.

This court has previously recognized that generally, a physician's duty to exercise the required skill or standard of care must arise out of the physician-patient relationship and that the relationship can be said to arise when the physician undertakes treatment of the patient. *Flynn v. Bausch*, 238 Neb. 61, 469 N.W.2d 125 (1991). See, also, *Gallion v. Woytassek*, 244 Neb. 15, 504 N.W.2d 76 (1993). We have also previously stated that the "existence of a physician-patient relationship is normally a question of fact" and "the party claiming the existence of the relationship must allege some facts to show that the relationship came into existence." *Id.* at 20, 504 N.W.2d at 80. In *Flynn*, we acknowledged that "[s]ome courts . . . have held that a physician-patient relationship is not a necessary prerequisite for sustaining an action in medical malpractice, and have grounded liability upon the traditional duty analysis for negligence." *Id.* at 65, 469 N.W.2d at 128. We noted, however, that under the facts of the *Flynn* case, nothing was called to our attention to support the imposition of such a duty, and, therefore, it was not necessary to determine in *Flynn* the general question of whether liability can exist absent an underlying physician-patient relationship.

In the instant case, Regier alleges in her petition that Finkner was "negligent in his medical care and treatment of Adrian." The petition contains no allegations, however, that Finkner undertook to provide any medical care or treatment to Adrian. See *id*. To the contrary, the petition alleges that Finkner refused to accept the transfer and thus alleges facts that no physician-patient relationship based on treatment came into existence. Finally, although in her brief Regier claims that the allegations in the petition support a general negligence claim against Finkner, the petition fails to allege facts establishing that under existing Nebraska jurisprudence, Finkner owed a duty to Adrian. See *id*.

We acknowledge that there are allegations that Finkner's refusal to accept Adrian's transfer was in violation of Good Samaritan's bylaws, rules, and regulations, although the substance of such bylaws, rules, and regulations are not alleged. The petition alleges that Finkner is an employee and agent of Good Samaritan; however, it does not allege that he was subject to a contract which obligated him to follow the bylaws, rules, and regulations which might have benefited Adrian. The allegations against Finkner do not state what, if any, undertakings Finkner assumed.

As noted, the petition fails to allege facts setting forth a physician-patient relationship between Finkner and Adrian. Furthermore, the petition sets forth no facts establishing a duty Finkner owed to Adrian. Accordingly, the petition does not adequately plead a cause of action under Nebraska law against Finkner, and the district court correctly so ruled.

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. *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002). While the current allegations in the petition fail to state a cause of action against Finkner, it is possible that Regier might be able to amend the petition by alleging facts imposing a duty on the part of Finkner in favor of Adrian. Accordingly, the district court erred in denying Regier leave to replead.

CONCLUSION

The petition does not adequately plead a cause of action against Finkner. However, a reasonable possibility exists that

amendment will correct the defect. Although the district court correctly sustained Finkner's demurrer to the petition, it erred when it denied leave to replead. We, therefore, reverse the district court's order.

REVERSED.

WRIGHT, J., not participating.

JOSHUA FISCHER, APPELLANT, V.
ASHLEIGH CVITAK, APPELLEE.
652 N.W.2d 274

Filed September 20, 2002. No. S-01-711.

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. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **Actions: Final Orders: Appeal and Error.** An order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of incidental matters.

Appeal from the County Court for Lancaster County: JEAN A. LOVELL, Judge. Appeal dismissed.

Eddy M. Rodell, of Wolgamott & Rodell, P.C., for appellant.

Susan Kubert Sapp and Pamela K. Epp, of Cline, Williams, Wright, Johnson & Oldfather, P.C., for appellee.

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

CONNOLLY, J.

Joshua Fischer appeals the county court's order dismissing his petition to establish paternity, awarding attorney fees against him for filing a frivolous pleading, and awarding fees to a guardian ad litem. Fischer filed this appeal more than 30 days after the order awarding attorney fees was entered but within 30 days of the

order granting fees to the guardian ad litem. The appellee, Ashleigh Cvitak, contends that the final order was the order awarding attorney fees against Fischer for filing a frivolous pleading and that because Fischer did not appeal within 30 days of that order, this appeal was filed late. We agree and dismiss for lack of jurisdiction.

BACKGROUND

On December 21, 2000, Fischer signed a receipt in the presence of a notary public. In the receipt, Fischer acknowledged that he had received notice that a child had been born; that Cvitak, as the biological mother, intended to relinquish the child for adoption; and that he was identified as a possible biological father. Fischer further acknowledged that he received by hand delivery the documents required to be served on him by Neb. Rev. Stat. §§ 43-104.08, 43-104.12, and 43-104.13 (Reissue 1998 & Cum. Supp. 2000). He also acknowledged that he was aware that he had the right to file a notice of intent to claim paternity under Neb. Rev. Stat. § 43-104.02 (Reissue 1998). The receipt stated, "I hereby acknowledge and accept service of such documents and expressly waive the notice and service by registered or certified mail, or by publication, that I may be entitled to receive under Neb. Rev. Stat. §§ 43-104.08, 43-104.12 and 43-104.13 (1995)." Fischer does not deny that he received the proper documents. The record shows that Fischer was given the documents in person by Cvitak's attorney.

On January 3, 2001, the Nebraska Department of Health and Human Services Finance and Support certified that 5 days had passed since the birth of the child and that a notice of intent to claim paternity had not been filed. On February 9, Fischer filed a notice of intent to claim paternity, and on March 15, he filed a petition to establish paternity. Cvitak moved for summary judgment and requested attorney fees for Fischer's filing of a frivolous pleading.

On April 9, 2001, the county court sustained the motion for summary judgment and dismissed the case. On April 13, the court sustained the motion based on a frivolous pleading and awarded attorney fees.

On May 11, 2001, the guardian ad litem moved for payment of her fees. On May 23, the county court awarded fees to the guardian ad litem as a charge upon Lancaster County.

Fischer filed his notice of appeal on June 18, 2001. In July, Cvitak moved for summary dismissal, contending that Fischer failed to timely file a notice of appeal.

ASSIGNMENTS OF ERROR

Fischer assigns that the county court erred in (1) sustaining the motion for summary judgment and (2) ordering him to pay attorney fees.

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. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Id.*

ANALYSIS

Fischer contends that the county court's order did not become final until the court awarded fees to the guardian ad litem. Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000) requires a notice of appeal to be filed within 30 days of a final order. Here, if the order awarding attorney fees was a final order, Fischer filed his appeal too late. But, if the order awarding fees to the guardian ad litem prevented the earlier order from becoming final, Fischer filed his appeal in time.

Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2000) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In

> the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The guardian ad litem was not a party to the action, and the guardian's fees did not constitute a "claim" that would make § 25-1315 applicable. Thus, we analyze the problem under Neb. Rev. Stat. § 25-1902 (Reissue 1995), which 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.

[3] We have stated that an order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of incidental matters. *Dorshorst v. Dorshorst*, 174 Neb. 886, 120 N.W.2d 32 (1963).

Here, there was no motion outstanding for the guardian's fees when the action was dismissed and the award of attorney fees was made. The April 13, 2001, order determined all the issues in the action, and nothing was reserved for decision by the court. The award of the guardian's fees was incidental to the orders dismissing the case and awarding attorney fees. Fischer was required to file his notice of appeal within 30 days of the order awarding attorney fees. Because he failed to timely file a notice of appeal, this court lacks jurisdiction over the appeal. The appeal is dismissed.

APPEAL DISMISSED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL L. JONES, APPELLANT.

650 N.W.2d 798

Filed September 20, 2002. No. S-01-854.

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. **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. **Courts: Affidavits.** Challenges to the ability of a defendant to proceed in forma pauperis are to occur in the district court, and the district court is charged with the responsibility of granting or denying a motion to proceed in forma pauperis.
4. **Courts: Jurisdiction: Appeal and Error.** Lower courts are divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected.
5. **Jurisdiction: Affidavits: Appeal and Error.** An in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and an affidavit of poverty.
6. **Postconviction: Constitutional Law: Proof.** 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.
7. **Postconviction: Effectiveness of Counsel: Public Officers and Employees: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by lawyers employed by the same public defender's office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.
8. **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, no matter how those issues may be phrased or rephrased.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Michael L. Jones, pro se.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

WRIGHT, J.

NATURE OF CASE

Michael L. Jones seeks review of the order of the Douglas County District Court denying his motion for postconviction relief.

SCOPE 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. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002).

[2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Dean, ante* p. 42, 645 N.W.2d 528 (2002).

FACTS

Jones filed a motion for postconviction relief pursuant to Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995) on June 7, 2001. Jones alleged that he had been charged by information on July 26, 1989, with 17 counts of robbery and 16 counts of use of a firearm to commit a felony. In October 1989, he pled guilty to four of the counts, and under the terms of a plea agreement, the other counts were dismissed. He was then found guilty of three counts of robbery and one count of use of a firearm, and he was sentenced to a term of 25 to 50 years in prison. A detailed statement of facts regarding the trial court's acceptance of Jones' plea is set forth in the analysis section of this opinion.

In his postconviction motion, Jones asserts that he was not fully apprised of the consequences of accepting the plea agreement. He claims that the trial court did not explain his rights to him and that his counsel did not inform him in detail of the consequences of the plea agreement. Jones claims that he would have insisted on a trial if he had been better informed.

Jones also asserts that an evidentiary hearing is warranted because his counsel provided ineffective assistance during the plea agreement, sentencing, and the appeal process. Jones claims that his court-appointed counsel, who was employed by the Douglas County public defender's office, "appeared to be [only]

a go-between for arranging a plea bargain" and that he felt compelled to plead guilty. Jones alleges that at the plea hearing, the trial court did not advise him of his right to effective assistance of counsel and that his attorney "stood moot [sic] and allowed this unconstitutional oversight to occur without objection."

Jones also alleges that his counsel advised him to state on the record that he had committed the robberies. He suggests that his sentence was to 20 more years in prison than had been represented to him by counsel.

The district court denied Jones' motion for postconviction relief without a hearing, and Jones timely appealed.

ASSIGNMENTS OF ERROR

Jones assigns two errors: (1) The district court erred in denying his rights under article I, § 13, of the Nebraska Constitution, which provides that all courts shall be open and every individual shall have a remedy by due course of law, and (2) the district court erred in finding that any issues raised by Jones were or could have been raised on direct appeal.

ANALYSIS

JURISDICTION

We first address the State's position that this court lacks jurisdiction over the instant appeal because there is no order in the record granting Jones permission to proceed in forma pauperis. The following statutes are applicable:

> An order sustaining or overruling a motion filed under sections 29-3001 to 29-3004 shall be deemed to be a final judgment, and an appeal may be taken from the district court as provided for in appeals in civil cases. A prisoner may, in the discretion of the appellate court and upon application to the appellate court, be released on such recognizance as the appellate court fixes pending the determination of the appeal.

§ 29-3002.

> Any county or state court, except the Nebraska Workers' Compensation Court, may authorize the commencement, prosecution, defense, or appeal therein, of a civil or criminal case in forma pauperis. An application to proceed in forma pauperis shall include an affidavit stating that the affiant is

> unable to pay the fees and costs or give security required to proceed with the case, the nature of the action, defense, or appeal, and the affiant's belief that he or she is entitled to redress.

Neb. Rev. Stat. § 25-2301.01 (Cum. Supp. 2000).

> (1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application: (a) Has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious. 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. The motion objecting to the application shall specifically set forth the grounds of the objection. An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. . . . If an objection is sustained, the party filing the application shall have thirty days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security notwithstanding the subsequent expiration of any statute of limitations or deadline for appeal. In any event, the court shall not deny an application on the basis that the appellant's legal positions are frivolous or malicious if to do so would deny a defendant his or her constitutional right to appeal in a felony case.

Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2000).

[3] In *State v. Dallmann*, 260 Neb. 937, 947, 621 N.W.2d 86, 96 (2000), we addressed the timing of a jurisdictional challenge in a case in which a party wished to proceed in forma pauperis: "Section 25-2301.02 makes clear that challenges to the ability of a defendant to proceed in forma pauperis are to occur in the district court and that the district court is charged with the responsibility of granting or denying the motion to proceed in forma pauperis."

[4,5] We also stated:

> "We have uniformly held that lower courts are divested of subject matter jurisdiction over a particular case when an

> appeal of that case is perfected. . . . [W]e [have] held that an in forma pauperis appeal is perfected when the appellant timely filed a notice of appeal and an affidavit of poverty.
>
> "Although 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. . . . For example, the lower court must forward to the appellate court the notice of appeal, requests for the transcript and the bill of exceptions, and the docket fee or poverty affidavit. Sections 25-2301 and 25-2308 require the lower court to act if it determines that the allegations of poverty are untrue or if it determines that the appeal is not taken in good faith.
>
> "Generally, appellants are entitled to the benefits of an in forma pauperis appeal when the affidavit of poverty and notice of appeal are filed and stand uncontradicted and unobjected to. If there is no hearing on the poverty affidavit and the appeal, or when there is a hearing and the evidence is uncontradicted, the trial court has a duty to allow the appellant to proceed in forma pauperis."

Dallmann, 260 Neb. at 947-48, 621 N.W.2d at 96.

In *In re Interest of N.L.B.*, 234 Neb. 280, 450 N.W.2d 676 (1990), the appellant had filed both a notice of appeal and a poverty affidavit within the time prescribed by statute. However, the trial court did not enter an order authorizing the appellant to proceed in forma pauperis within 30 days. The appellee claimed that in addition to filing a poverty affidavit, the party appealing must also obtain authorization from the trial court to proceed in forma pauperis.

In rejecting the appellee's contention, we stated:

> [A]lthough it may be customary and a mark of prudence for an appellant to obtain authorization of the trial court in order to forestall any finding of a lack of good faith and possible dismissal of the appeal, contrary to appellee's assertion, there is no statutory requirement that such authorization be obtained in order to make the affidavit effective.

Id. at 282, 450 N.W.2d at 679. We held, based on the statute in effect at the time, that this court obtained jurisdiction when a party filed a notice of appeal and an affidavit of poverty.

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. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002). In the present case, the record contains no order granting or denying Jones' in forma pauperis request. Nor does it contain any objection to the request. The absence of an order allowing a party to proceed in forma pauperis does not divest this court of jurisdiction over an appeal. See *In re Interest of N.L.B., supra*. This court obtained jurisdiction over the appeal upon the timely filing of a notice of appeal and a proper in forma pauperis application and affidavit. The State's assertion that this court lacks jurisdiction has no merit, and we therefore proceed to consider the merits of the postconviction motion.

Postconviction Motion

[6] Jones argues that the district court violated article I, § 13, of the Nebraska Constitution, which provides that the courts shall be open to all, when it refused to grant him an evidentiary hearing on his motion for postconviction relief. When such a 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. See *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

Jones claims that at trial, he was represented by an attorney who worked in the Douglas County public defender's office and that he was represented on direct appeal by a second attorney from the Douglas County public defender's office. The only issue raised on direct appeal was excessiveness of the sentence. Jones asserts that because both attorneys worked for the same entity, appellate counsel was not able to raise any claim of ineffectiveness of trial counsel on direct appeal.

[7] We have held that when a defendant was represented both at trial and on direct appeal by lawyers employed by the same public defender's office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief. See *State v. Soukharith*, 260 Neb. 478, 618

N.W.2d 409 (2000). Therefore, Jones' claim of ineffective assistance of counsel is properly before us.

Jones' brief does not provide specifics as to errors allegedly made by his trial counsel. 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. Dean, ante* p. 42, 645 N.W.2d 528 (2002).

In his postconviction motion, Jones suggests several items which he believes demonstrate ineffective assistance of his trial counsel: (1) Jones did not enter his plea voluntarily, knowingly, and intelligently, and counsel did not object when the trial court failed to adequately inform Jones of his constitutional rights; (2) if counsel had provided better information to him, Jones would have insisted on going to trial; (3) counsel advised Jones to expressly state in open court on the record that he committed the robberies; and (4) counsel failed to object to Jones' sentence, which was to 20 more years in prison than had been represented to him by counsel. Jones states that he was charged with a number of crimes which allegedly occurred during a 2-week crime spree "wherein several [r]obberies were committed with the use of a hand gun, but one which was subsequently agreed among the parties to have been inoperable."

We first consider Jones' assertion that his plea was not entered voluntarily, knowingly, and intelligently. We have held that in most cases, a voluntary guilty plea waives all defenses to a criminal charge. However, in this case, the postconviction action brought by Jones, who was convicted on the basis of a guilty plea, may be considered on the allegation that the plea was the result of ineffective assistance of counsel. See *State v. Bishop*, 263 Neb. 266, 639 N.W.2d 409 (2002).

When Jones entered his plea, the trial court informed him that he had originally been charged with one count of second degree forgery, 18 counts of robbery, and 16 counts of use of a firearm to commit a felony. The State indicated that the plea agreement provided for Jones to enter guilty pleas to four counts and that the remainder of the charges would be dropped. Jones indicated that he understood the agreement. Jones' trial counsel noted that another charge could be filed in Iowa, but it was understood that

Iowa would await resolution of the Nebraska charges before taking further action, and Jones indicated that he understood.

The trial court informed Jones of his constitutional rights and asked whether he was satisfied with his attorney and whether he had had a chance to talk to the attorney about the case. Jones was informed of the possible penalties for the charges. The court asked Jones whether any promises had been made to him in exchange for the guilty plea and whether he had consumed any alcoholic beverages or taken any drugs or medication in the previous 24 hours.

The trial court proceeded to review for Jones the constitutional rights he was waiving by entering a guilty plea, including the right to a public trial by jury, the right to an attorney at no cost, the right to cross-examine witnesses, the right to a speedy trial, the right to testify in his own defense, the right to remain silent, the right to subpoena witnesses, and the right to be presumed innocent until the State proved each and every element of the crimes beyond a reasonable doubt. Jones indicated that he understood each of these rights.

The trial court also informed Jones that if he pled guilty, he would waive the right to require the State to prove that any statement he made to police had been made of his own free will after he was advised of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and after a knowing and intelligent waiver of those rights. Jones indicated he understood that right as well.

Jones entered guilty pleas to three charges of robbery and one charge of use of a firearm to commit a felony. The trial court then asked Jones to state the factual basis for the charges. Jones stated that he robbed the clerk at the Travel Inn on July 4, 1989. Jones showed a gun to the clerk, but it was not loaded, it had no trigger, and the side panel was torn off. The victim did not know the gun was inoperable, Jones said.

On June 19, 1989, Jones asked the clerk at the Colonial Hotel for change and then demanded the money in the cash register when it was opened. On July 3, Jones and a friend went into the Rodeway Inn and asked for a room. When the clerk rang up the amount and opened the cash register, Jones' friend brandished a pistol and Jones took the money from the cash register. The

State indicated that the evidence would show that the victims were able to identify Jones and that he made a statement to a police officer.

Jones' counsel noted that he had discussed with Jones the possibility of using the defense of being under the influence of a controlled substance, but counsel believed that Jones' impaired state could serve only as a mitigating factor. Jones indicated to the trial court that he understood he was waiving the legal defense of intoxication by entering a guilty plea.

The trial court found a factual basis for the guilty pleas and found that they were made knowingly, understandingly, and intelligently. The remaining counts were dismissed.

At sentencing, Jones' counsel asked the trial court to impose consecutive sentences of 3 to 5 years in prison. Jones stated that he had a problem with cocaine, and he expressed remorse and asked for an opportunity to return to society in the future.

The trial court noted that Jones was originally facing a sentence of 400 to 1,200 years in prison based on the number of charges. The maximum sentence for the charges to which Jones pled guilty was 60 to 170 years in prison. The court then entered this sentence:

> On Count VII, that of robbery, it's the sentence of The Court that you be confined in the Nebraska Department of Correctional Services in Lincoln for a period of not less than 10 nor more than 20 years. On Count VIII, use of a firearm in the commission of a felony, that you be confined in the Nebraska Department of Correctional Services in Lincoln for a period of not less than 5 nor more than 10 years, to be consecutive. On Count IX, that of robbery, that you be confined in the Nebraska Penal—or Nebraska Department of Correctional Services at Lincoln for a period of not less than 10 nor more than 20 years, to be consecutive. The final count of robbery is going to be concurrent with all the other sentences. That's 15 to 30 years, to be concurrent with any other sentence imposed. I'm also giving you credit from the date of your arrest, from July 6th, 1989, until the date of sentence.

In *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), this court first specified the requirements for finding that a guilty plea

has been entered freely, intelligently, voluntarily, and understandingly. We held that the court must inform and examine the defendant to determine that he or she understands (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 show that there is a factual basis for the plea and that the defendant knew the range of penalties for the crime with which he or she was charged. We have often reiterated these requirements. See, e.g., *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997).

The record in this case shows that Jones was informed of all of his rights as required by *Irish*. Jones was told that he had originally been charged with one count of second degree forgery, 18 counts of robbery, and 16 counts of use of a firearm to commit a felony and that the plea agreement provided that the majority of the charges would be dropped if Jones entered guilty pleas to four counts. He indicated he understood that he had the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination. Jones provided a factual basis for the plea when he explained the circumstances of each of the crimes. He stated that he understood the range of penalties for the crimes and indicated that he understood the rights as explained to him by the trial court. The record affirmatively shows that Jones entered his plea freely, intelligently, voluntarily, and understandingly, and there is no basis for a claim that he would not have entered the plea if counsel had properly objected when Jones was allegedly inadequately informed of his constitutional rights.

Jones also complains because his trial counsel advised him to expressly state in open court on the record that he committed the robberies. Under *Irish*, there must be a factual basis stated for the plea. The trial court asked Jones to describe the crimes in order to provide that factual basis. If Jones had refused to provide the information, the State would have been able to provide the details of the crimes. This allegation provides no basis for postconviction relief.

In addition, Jones asserts that his trial counsel provided ineffective assistance by failing to object to the sentence, which

was to 20 more years in prison than had been represented to him by counsel. The trial court had informed Jones of the possible penalties for the crimes with which he was charged. Counsel requested a sentence of 3 to 5 years in prison for each count. The alleged excessiveness of the sentence was raised on direct appeal, and the sentence was affirmed. Since the issue was decided on direct appeal, it will not be considered further. This assignment of error has no merit.

[8] Jones also asserts that the district court erred in denying his motion for postconviction relief when it found that all his alleged errors were or could have been raised on direct appeal. As this court has often held, a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased. *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000). Jones' claims on postconviction relate to the entry of his guilty plea and to his sentencing. The sentencing issue was raised on direct appeal, and the sentence was affirmed. Any issues related to the guilty plea were known to Jones at the time of the direct appeal and could have been raised then. Those issues can be raised now only if Jones received ineffective assistance of counsel on appeal. The records and files affirmatively show that Jones is entitled to no relief.

The district court did not err in denying an evidentiary hearing or in denying the postconviction motion.

CONCLUSION

The record supports the judgment of the district court, which denied Jones' motion for postconviction relief without an evidentiary hearing. The judgment of the district court is affirmed.

AFFIRMED.

BRAXTON D. REICHENEKER, A MINOR, BY AND THROUGH MICHAEL L. REICHENEKER, HIS FATHER AND NEXT FRIEND, APPELLANT, V. LOIS A. REICHENEKER AND EUGENE F. REICHENEKER, WIFE AND HUSBAND, APPELLEES.

651 N.W.2d 224

Filed September 27, 2002. No. S-01-493.

1. **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.
2. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
3. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion.
4. **Pleadings.** Amendment of a petition is not a matter of right.
5. **Invitor-Invitee: Words and Phrases.** An invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant for the mutual advantage of both parties.
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.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Steven W. Dowding, of Dowding, Dowding & Dowding, for appellant, and, on brief, Denzel Rex Busick.

William T. Wright and Trent W. Steele, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellees.

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

WRIGHT, J.

NATURE OF CASE

Braxton D. Reicheneker, a minor, filed suit by and through Michael L. Reicheneker, his father and next friend (collectively referred to as "the plaintiffs"), against Lois A. Reicheneker and Eugene F. Reicheneker (the defendants). The plaintiffs alleged that on August 5, 1993, Braxton was injured while under the care and supervision of Lois, his grandmother, and that such injuries were proximately caused by the negligence of the defendants. The plaintiffs' motion for directed verdict was overruled, and they appeal from a jury verdict in favor of the defendants.

SCOPE OF REVIEW

[1] 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. *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002).

FACTS

On August 5, 1993, Braxton visited the home of his grandparents, the defendants. At that time, Eugene operated a carpet laying business out of his home. While preparing for work on the day before Braxton's visit, Eugene used a carpet knife to pry open a container of carpet paste located in an unfinished storage room in the basement. His practice was to return any knife to a toolbox on the shelf. However, on this day, he left the knife on a bucket of paste in the room.

The defendants often babysat for Braxton, who at the time was almost 3 years old. On August 5, 1993, Michael called Lois and asked if she would watch Braxton while Braxton's mother went swimming. Lois let Braxton play outside and then took him inside because she was waiting for a telephone call. Braxton followed Lois into the basement storage room, where she had gone to get some clothes.

Lois testified that she did not remember seeing the carpet knife when she entered the storage room. After she removed some clothes from a barrel, she heard Braxton cry. She turned and saw him holding a carpet knife. When Lois picked Braxton up, she noticed that there was blood on his cheek. She then realized that Braxton had injured his eye. It was later determined that his cornea was lacerated, and a part of his lens had to be surgically removed.

In their petition, the plaintiffs alleged that the defendants were negligent (1) in failing to exercise reasonable care to keep the carpet knife in a location safely out of Braxton's reach, (2) in failing to warn Braxton or his parents that the knife was present, and (3) in failing to exercise reasonable care in watching or supervising Braxton in their home.

At the close of the evidence, the plaintiffs' motion to amend the pleadings to conform to the evidence was overruled. The plaintiffs also moved for a directed verdict. As a part of the motion, they requested a jury instruction defining a business invitee, which the trial court denied. The defendants also moved for a directed verdict, claiming that the plaintiffs had failed to prove a prima facie case. The motion was sustained in part as to the theory of premises liability as it related to Lois.

The jury was instructed that the claim against Lois was based on a failure to supervise Braxton. The instructions stated that the claim against Eugene was based on maintaining an unsafe premises for a child. The jury subsequently returned a verdict in favor of the defendants.

The plaintiffs moved for judgment notwithstanding the verdict or, in the alternative, for new trial. They argued that certain parts of the defendants' testimony at trial were judicial admissions that bound both defendants. The trial court overruled the motion, and the plaintiffs timely appealed.

ASSIGNMENTS OF ERROR

The plaintiffs' assignments of error can be summarized and restated as follows: The trial court erred in (1) overruling their motion for directed verdict, motion for judgment notwithstanding the verdict, and alternative motion for new trial; (2) partially

sustaining the defendants' motion for directed verdict; (3) denying their motion to amend the petition; (4) refusing to instruct the jury on the theory that Braxton was a business invitee or to otherwise modify its instruction as to the defendants' duties; and (5) failing to instruct the jury under the standards of *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

ANALYSIS

We initially point out that the plaintiffs' cause of action accrued in 1993, and therefore, our decision in *Heins* does not apply. In *Heins*, this court abolished the common-law distinction between licensees and invitees for determining the duties owed to persons entering premises. The court announced a new rule setting forth a list of factors "to be considered in evaluating whether a landowner or occupier has exercised reasonable care for the protection of lawful visitors." *Id.* at 761, 552 N.W.2d at 57. The new rule was made prospective in application, as the court stated it would be applied to causes of action arising after the filing of *Heins*. The rule set forth in *Heins* does not apply here.

The plaintiffs first argue that the defendants' trial testimony constituted judicial admissions of negligence and that, therefore, the trial court erred in not granting the plaintiffs' motion for a directed verdict on the issue of liability and in not granting the plaintiffs' posttrial motion for judgment notwithstanding the verdict on the same issue.

At trial, Eugene testified that he had made a mistake in failing to put away the knife and that he felt he was negligent and responsible for Braxton's accident. Lois testified that she felt she was negligent in failing to inspect the room before allowing Braxton to enter.

The plaintiffs assert both defendants also admitted that they knew Braxton did not appreciate the dangers of a carpet knife and that they had made a mistake in protecting him from such danger. The plaintiffs claim that the above statements were judicial admissions and therefore entitled them to a directed verdict on the issue of liability.

[2] A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true. *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 583 N.W.2d 331 (1998). The plaintiffs rely on *Southwestern Truck Sales & Rental Co. v. Johnson*, 165 Neb. 407, 417, 85 N.W.2d 705, 711 (1957), in which we stated:

> [W]here a party testifies clearly and unequivocally to a fact which is within his own knowledge, such testimony may be considered as a judicial admission. That rule has particular application where, as here, the parties so testifying made no effort to retract, qualify, or otherwise explain the positive force of their own evidence.

It is not disputed that both the defendants believed they were at fault for Braxton's injury. The issue is whether such statements entitled the plaintiffs to a judgment on the issue of liability.

Here, the defendants' statements that they felt responsible for the accident were their opinions, which may be considered by the jury. The statements are evidence of the parties' state of mind as to how they felt. However, these statements were not judicial admissions which would require a court to direct a verdict on the issue of liability.

Although their statements were admissible, they did not constitute judicial admissions which require the directing of a verdict against the defendants. The trial court did not err in denying the motion for a directed verdict based upon the defendants' statements that they felt they were negligent.

The plaintiffs next argue that the trial court erred in sustaining a partial directed verdict in favor of Lois. 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. *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002).

The plaintiffs had requested that jury instruction NJI2d Civ. 8.51 be read to the jury with regard to both the defendants. NJI2d Civ. 8.51 (2001) states in relevant part:

INJURY TO CHILDREN, WHETHER TRESPASSER, LICENSEE OR BUSINESS VISITOR

> Before the plaintiff can recover against the defendant . . . the plaintiff must prove, by the greater weight of the evidence, each and all of the following:
>
> 1. That there was (a, an artificial) condition on defendant's (premises), at a place where the defendant knew, or had reason to know, children were likely to be;
>
> 2. That the defendant knew, or had reason to know, of the existence of this condition;
>
> 3. That the defendant knew, or had reason to know, that the condition involved an unreasonable risk of death or serious bodily harm to children likely to be there.

The question is whether there was any evidence from which to infer that Lois knew or should have known that a dangerous condition existed. Lois stated that she knew Eugene had used a carpet knife in the storage room the night before the accident but that she did not have any reason to believe that the carpet knife had not been put away. Lois testified that she knew Eugene kept tools for his carpet business in a toolbox in the storage room. Eugene had not previously left knives lying around and had always put away the knives. Lois had never before seen a knife within Braxton's reach.

Giving all reasonable inferences to the plaintiffs, we cannot say that Lois knew or had reason to know of this dangerous condition. The trial court did not err in refusing to give the instruction to the jury regarding premises liability as to Lois or in granting a partial directed verdict on this issue.

[3,4] The plaintiffs next assert that the trial court erred in denying their motion to amend the petition. Permission to amend a pleading is addressed to the discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion. *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 558 N.W.2d 531 (1997), *overruled on other grounds, Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000).

Amendment of a petition is not a matter of right. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998).

At the close of the evidence, the plaintiffs moved to amend their petition to insert a business invitee allegation. The trial court sustained the defendants' objection because the amendment restructured the petition and contained a theory of recovery involving Lois on both supervision and premises liability. The court stated that all theories of recovery would be appropriately charged to the jury but later decided not to submit to the jury the plaintiffs' theory that Braxton had the status of a business invitee.

The plaintiffs argue that based on the evidence adduced at trial, Braxton was a business invitee because consideration had been paid or furnished by Michael for the babysitting services which the defendants had provided to Braxton. The defendants testified that Lois babysat as often as two or three times a week for short periods and that Michael would occasionally pay cash or sometimes do work for the defendants. Lois testified that she did not receive payment on this particular occasion. She enjoyed the opportunity to spend time with Braxton. The plaintiffs claim this arrangement was a quid pro quo and that the defendants received sufficient consideration to clothe Braxton with the status of being a business invitee while on the premises for babysitting purposes.

[5] In *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 415, 513 N.W.2d 495, 502 (1994), we stated: "In general, an invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant for the mutual advantage of both parties." In *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001), we stated that if the invitation relates to the business of the one who gives it, or is given for the mutual advantage of a business nature for both parties, the party receiving the invitation is an invitee.

Contrary to the plaintiffs' assertion, we find that the evidence did not establish that Braxton was a business invitee or that the defendants were involved in a babysitting business. We cannot conclude that because the defendants enjoyed the company of Braxton, there was a mutual advantage of a business nature

between the parties. Braxton's visits to the defendants' home did not relate to a babysitting business operated by the defendants, and the relationship between the defendants and Braxton did not constitute a business venture. Thus, the trial court did not abuse its discretion in denying the plaintiffs' motion to amend their petition.

[6] The plaintiffs also claim that the trial court erred in refusing to instruct the jury on the theory that Braxton was a business invitee or, in the alternative, in refusing to modify the instruction to include a duty to inspect the premises and protect Braxton from any dangerous conditions. 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. *Mobeco Indus. v. City of Omaha*, 257 Neb. 365, 598 N.W.2d 445 (1999).

As previously discussed, there was no evidence to establish that Braxton was a business invitee on the defendants' premises. The plaintiffs failed to establish that this instruction was warranted by the evidence. Therefore, the trial court properly refused to so instruct the jury.

The plaintiffs argue that if the jury was not given a business invitee instruction, then the instruction given should have been modified to include a duty to inspect. The plaintiffs claim that even though the original petition did not specifically allege a failure to inspect, the other allegations of negligence are broad enough to encompass the duty to inspect. The plaintiffs argue that the instruction given by the trial court did not provide as much protection as the business invitee instruction and was therefore contrary to the law and public policy aimed at the protection of young children. The plaintiffs assert that in premises liability cases involving children, the jury should be instructed that the owner or occupier had a duty to inspect the premises.

The jury was instructed to assess whether Lois had negligently supervised Braxton. Lois testified that Eugene always put away his tools in the storage room and that he never left sharp items lying in low places. The evidence does not establish that Lois knew or should have known that there was a dangerous

condition existing on the premises which would impose a duty on her to inspect the home.

CONCLUSION

For the reasons set forth above, the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MIGUEL CASTILLO ZARATE, APPELLANT.

651 N.W.2d 215

Filed September 27, 2002. No. S-01-1175.

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. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court.
3. **Postconviction: Prisoners: Standing: Probation and Parole: Words and Phrases.** Court-ordered probation constitutes "custody under sentence" for postconviction relief remedies under the Nebraska Postconviction Act.
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 Nebraska or federal Constitution.
5. **Constitutional Law: Effectiveness of Counsel: Proof.** In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant.
6. **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.
7. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based on a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that, but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
8. **Effectiveness of Counsel: Presumptions.** In determining whether counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.

9. **Criminal Law: Pleas: Effectiveness of Counsel.** Where a defendant is represented by counsel during the plea process and enters a plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.
10. ____: ____: ____. A defendant who pleads guilty upon the advice of counsel may attack only the voluntary and intelligent character of the guilty plea by showing that the advice received from counsel was not within the range of competence demanded of attorneys in criminal cases.
11. **Attorney and Client: Pleas.** When a defendant pleads guilty on the advice of counsel, the attorney has the duty to advise the defendant of the available options and possible consequences.
12. **Pleas: Effectiveness of Counsel.** A guilty plea must represent the informed, self-determined choice of the defendant among practicable alternatives; a guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising the defendant regarding the consequences of entering a guilty plea and of the feasible options.
13. **Pleas: Words and Phrases.** Direct consequences of a guilty plea are those which result in a definite, immediate, and largely automatic effect on the range of the defendant's punishment.
14. **Pleas: Courts: Constitutional Law.** Trial courts are free to advise defendants of the collateral consequences of their pleas, but are constitutionally 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.
15. **Pleas.** A defendant's incomplete awareness of collateral consequences of a guilty plea does not render that plea involuntary.
16. ____. If a consequence flowing from a plea is "collateral," then the defendant need not be informed of it before entering the plea.
17. **Pleas: Courts: Effectiveness of Counsel.** Since the collateral consequences doctrine provides a test for determining the voluntary and intelligent character of a plea, it is applied both to the trial court, as a measure of its performance in establishing the voluntary and intelligent nature of the plea before accepting it, and to defense counsel, as a measure of his or her performance in providing a defendant with the information necessary to render the plea voluntary and intelligent.
18. **Pleas: Effectiveness of Counsel: Constitutional Law.** The possibility of deportation is a collateral consequence of a guilty plea, and counsel's alleged failure to inform a defendant of the possibility of deportation does not render the defendant's guilty plea involuntary or unintelligent for constitutional purposes.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Sean J. Brennan for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

GERRARD, J.

NATURE OF CASE

The defendant, Miguel Castillo Zarate, appeals from the district court's denial, without an evidentiary hearing, of Zarate's motion for postconviction relief. The sole question presented by this appeal is whether Zarate is entitled to an evidentiary hearing on the claim that Zarate's counsel was ineffective in not advising Zarate that pleading guilty to attempted possession of a controlled substance could result in deportation.

BACKGROUND

Zarate was charged by information on May 2, 1997, with possession of a controlled substance with intent to deliver in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1995). Zarate was found guilty pursuant to a guilty plea and, on September 14, 1998, was sentenced to probation for a period of 3 years and fined $1,500.

Zarate filed a motion for postconviction relief on March 26, 2001, alleging that he was denied his constitutional right to effective assistance of counsel. Zarate alleged that he is not a U.S. citizen and that his attorney was aware of that fact. Zarate further alleged that he was not aware at the time of his guilty plea, and his attorney did not advise him, that Zarate could be deported from the United States as a consequence of his conviction of the crime alleged in the information. Zarate alleged that had he known that deportation was a possible consequence of a criminal conviction, he would not have entered a plea of guilty. Zarate claimed that the performance of his attorney was deficient because Zarate's attorney failed to inform Zarate of the immigration consequences of a guilty plea. The parties have stipulated that the sentencing court made no inquiry regarding Zarate's citizenship during the taking of Zarate's plea.

The district court denied Zarate's motion without an evidentiary hearing, and Zarate appealed. We moved the appeal to our docket and granted Zarate's motion to expedite the appeal because of imminent deportation proceedings pending against Zarate.

ASSIGNMENT OF ERROR

Zarate assigns that the district court erred in denying Zarate an evidentiary hearing and dismissing Zarate's motion for postconviction relief.

STANDARD OF REVIEW

[1,2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001). However, when reviewing a question of law, an appellate court reaches a conclusion independent of the lower court. *Id.*

ANALYSIS

[3] We first note that although Zarate was not sentenced to incarceration, court-ordered probation constitutes "custody under sentence" for postconviction relief remedies under the Nebraska Postconviction Act. See, Neb. Rev. Stat. § 29-3001 (Reissue 1995); *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992). At the time that Zarate's postconviction motion was filed, his term of probation had not yet expired and he was in "custody" for postconviction purposes. The record also reflects that the State had filed a motion for revocation of Zarate's probation, which was pending at the time the instant appeal was taken. Consequently, we conclude that on the record presented to us, Zarate is entitled to ask for postconviction relief. See *id.*

[4,5] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Dean, ante* p. 42, 645 N.W.2d 528 (2002). In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant. *Thomas, supra*.

[6,7] 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. Bishop*, 263 Neb. 266, 639 N.W.2d 409 (2002). When a conviction is based on a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that, but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *Thomas, supra*. In this case, Zarate has alleged that he would have insisted on going to trial had he been informed of the possibility of deportation. For purposes of determining whether he is entitled to an evidentiary hearing, Zarate properly alleged facts sufficient to satisfy the prejudice requirement of an ineffective assistance of counsel claim.

[8] The initial question, however, is whether Zarate's counsel was deficient—that is, whether counsel failed to perform at least as well as a criminal lawyer with ordinary training and skill in the area. See *State v. Long, ante* p. 85, 645 N.W.2d 553 (2002). In determining whether counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

[9,10] Stated more specifically, the question presented is whether Zarate's guilty plea was "involuntary" or "unintelligent" as a result of ineffective assistance of counsel, because Zarate's counsel failed to supply Zarate with relevant information regarding the consequences of the plea. "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' " *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), quoting *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). "[A] defendant who pleads guilty upon the advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.' " *Hill*, 474 U.S. at 56-57, quoting *Tollett v. Henderson*, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973).

[11,12] When a defendant pleads guilty on the advice of counsel, the attorney has the duty to advise the defendant of the available options and possible consequences. *Hawkman v. Parratt*, 661 F.2d 1161 (8th Cir. 1981). A guilty plea must represent the

informed, self-determined choice of the defendant among practicable alternatives; a guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising the defendant regarding the consequences of entering a guilty plea and of the feasible options. *Id.*

[13-15] In conducting this inquiry, federal courts and many state courts have adopted an analysis that distinguishes between the direct and collateral consequences of a guilty plea, for purposes of determining those consequences of which a defendant must be informed for the plea to be intelligent and voluntary. This court recently engaged in such an analysis in *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002), in determining of which consequences a court must advise a defendant before accepting his or her guilty plea. Direct consequences are those which result in a definite, immediate, and largely automatic effect on the range of the defendant's punishment. *Id.*, citing *U.S. v. Amador-Leal*, 276 F.3d 511 (9th Cir. 2002), *cert. denied* 535 U.S. 1070, 122 S. Ct. 1946, 152 L. Ed. 2d 849. Trial courts are free to advise defendants of the collateral consequences of their pleas, but are constitutionally 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 *Schneider, supra*. See, also, *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). A defendant's incomplete awareness of collateral consequences of a guilty plea does not render that plea involuntary. *U.S. v. Del Rosario*, 902 F.2d 55 (D.C. Cir. 1990).

[16,17] If a consequence flowing from a plea is "collateral," then the defendant need not be informed of it before entering the plea. *Santos v. Kolb*, 880 F.2d 941 (7th Cir. 1989). Since this doctrine provides a test for determining the voluntary and intelligent character of the plea, it is applied both to the trial court, as a measure of its performance in establishing the voluntary and intelligent nature of the plea before accepting it, and to defense counsel, as a measure of his or her performance in providing a defendant with the information necessary to render the plea voluntary and intelligent. *Id.* Cf. *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992) (guilty plea not involuntary where counsel failed to advise defendant of possibility of restitution,

because restitution is condition of probation rather than criminal penalty).

A review of the relevant law demonstrates—and the pending deportation proceedings against Zarate empirically substantiate—that Zarate's guilty plea to attempted possession of a controlled substance with intent to deliver rendered him vulnerable to deportation. See 8 U.S.C. § 1227(2)(B)(i) (Supp. IV 1998) ("[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State . . . relating to a controlled substance . . . is deportable"). The fact that Zarate was sentenced only to probation is of no matter. See, *Kolios v. Immigration and Naturalization Service*, 532 F.2d 786 (1st Cir. 1976); *Gonzalez de Lara v. United States*, 439 F.2d 1316 (5th Cir. 1971). Deportation was a potential consequence of Zarate's guilty plea.

The overwhelming majority of courts to have addressed the question, however, have held that deportation is a collateral consequence of the criminal process, and hence that, nothing else appearing, the failure to advise the defendant of the possibility of deportation does not amount to ineffective assistance of counsel. See, *U.S. v. Banda*, 1 F.3d 354 (5th Cir. 1993); *Varela v. Kaiser*, 976 F.2d 1357 (10th Cir. 1992); *U.S. v. Del Rosario, supra*; *U.S. v. George*, 869 F.2d 333 (7th Cir. 1989); *U.S. v. Yearwood*, 863 F.2d 6 (4th Cir. 1988); *United States v. Campbell*, 778 F.2d 764 (11th Cir. 1985); *United States v. Santelises*, 509 F.2d 703 (2d Cir. 1975); *State v. Muriithi*, 273 Kan. 952, 46 P.3d 1145 (2002); *State v. Montalban*, 810 So. 2d 1106 (La. 2002); *People v Davidovich*, 463 Mich. 446, 618 N.W.2d 579 (2000); *People v. Ford*, 86 N.Y.2d 397, 657 N.E.2d 265, 633 N.Y.S.2d 270 (1995); *State v. Dalman*, 520 N.W.2d 860 (N.D. 1994); *People v. Huante*, 143 Ill. 2d 61, 571 N.E.2d 736, 156 Ill. Dec. 756 (1991); *Com. v. Frometa*, 520 Pa. 552, 555 A.2d 92 (1989); *State v. Ginebra*, 511 So. 2d 960 (Fla. 1987); *Mott v. State*, 407 N.W.2d 581 (Iowa 1987); *Tafoya v. State*, 500 P.2d 247 (Alaska 1972); *State v. Rosas*, 183 Ariz. 421, 904 P.2d 1245 (Ariz. App. 1995); *State v. Santos*, 136 Wis. 2d 528, 401 N.W.2d 856 (Wis. App. 1987); *State v. Chung*, 210 N.J. Super. 427, 510 A.2d 72 (1986). See, generally, Annot., 90 A.L.R. Fed. 748 (1988); Annot., 65 A.L.R.4th 719 (1988). But

see *People v. Pozo*, 746 P.2d 523 (Colo. 1987) (en banc). As explained by the Seventh Circuit:

> [A]ctual knowledge of consequences which are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea. A deportation proceeding is a civil proceeding which may result from a criminal prosecution, but is not a part of or enmeshed in the criminal proceeding. It is collateral to the criminal prosecution. While the Sixth Amendment assures an accused of effective assistance of counsel in *"criminal prosecutions,"* this assurance does not extend to collateral aspects of the prosecution.

(Emphasis in original.) *George*, 869 F.2d at 337. Accord *Varela, supra*. As further stated by the Supreme Court of Florida:

> The focus of whether counsel provided constitutionally effective assistance in the context of a plea is whether counsel provided his client "with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial." . . . A defendant's lack of knowledge that a plea of guilty may lead to deportation does nothing to undermine the plea itself which is, in effect, "a confession in open court as to the facts alleged."

(Citation omitted.) *Ginebra*, 511 So. 2d at 961-62. Accord *Rosas, supra*.

[18] We agree with the foregoing analysis, and likewise hold that the possibility of deportation is a collateral consequence of a guilty plea and that counsel's alleged failure to inform a defendant of the possibility of deportation does not render the defendant's guilty plea involuntary or unintelligent for constitutional purposes. Compare *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002). Because the facts alleged in Zarate's motion for postconviction relief, even if proved, would be insufficient to establish that Zarate's guilty plea was involuntary or unintelligent, Zarate is not entitled to an evidentiary hearing. See *State v. Dean, ante* p. 42, 645 N.W.2d 528 (2002).

In arguing to the contrary, counsel for Zarate relies primarily on four cases from state appellate courts. See, *Pozo, supra*; *People v. Padilla*, 151 Ill. App. 3d 297, 502 N.E.2d 1182, 104 Ill. Dec. 522 (1986), *disapproved, People v. Huante*, 143 Ill. 2d 61,

571 N.E.2d 736, 156 Ill. Dec. 756 (1991); *Com. v. Wellington*, 305 Pa. Super. 24, 451 A.2d 223 (1982), *disapproved, Com. v. Frometa*, 520 Pa. 552, 555 A.2d 92 (1989); *Edwards v. State*, 393 So. 2d 597 (Fla. App. 1981), *disapproved, State v. Ginebra*, 511 So. 2d 960 (Fla. 1987). Of these cases, only *Pozo, supra*, remains good law. Zarate's brief does not mention that the other three decisions, from state intermediate appellate courts, have each been expressly disapproved by their respective state supreme courts. See, *Huante, supra*; *Frometa, supra*; *Ginebra, supra*. Courts are not well served when attorneys attempt to rely on authority which has been overruled.

We also note that the circumstances of Zarate's guilty plea, as evidenced by the record, do not serve to overcome the strong presumption that counsel acted reasonably. See *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). According to the presentence investigation, Zarate was driving a rented vehicle on Interstate 80 in Lancaster County when he was stopped for speeding by the Nebraska State Patrol. Zarate gave permission for the officer to search the vehicle, and approximately 62 pounds of marijuana were found in the trunk. Zarate was initially charged by information with a Class III felony, punishable by a maximum of 25 years' imprisonment, a $25,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Reissue 1995).

Given those circumstances, a sentence of 3 years' probation and a $1,500 fine appears to be advantageous to the defendant, and it is difficult to say that counsel would have acted deficiently in recommending or permitting the acceptance of such a plea agreement. In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel. *People v. Ford*, 86 N.Y.2d 397, 657 N.E.2d 265, 633 N.Y.S.2d 270 (1995).

We observe that the circumstances of the instant case are distinguishable from situations in which a defendant has been offered affirmative misadvice or misstatements regarding the immigration consequences of a guilty plea. Federal and state courts have recognized that counsel's affirmative misadvice or misstatements regarding deportation or other collateral consequences of a plea may, under certain circumstances, constitute

ineffective assistance of counsel. See, e.g., *In re Resendiz*, 25 Cal. 4th 230, 19 P.3d 1171, 105 Cal. Rptr. 2d 431 (2001); *People v. McDonald*, 296 A.D.2d 13, 745 N.Y.S.2d 276 (2002) (citing cases). Zarate has not made such an allegation in the present case.

Finally, although it is not pertinent to our disposition of the instant appeal, we note that several jurisdictions require, by statute or court rule, that prior to acceptance of a plea of guilty or nolo contendere, trial courts must advise defendants of the immigration consequences of the plea. See 2 Austin T. Fragomen, Jr., et al., Immigration Law and Business § 6.13 (2002) (listing jurisdictions). Nebraska has recently adopted such a law, making this (in all likelihood) a case of last impression. See 2002 Neb. Laws, L.B. 82. However, L.B. 82 came into effect on July 20, 2002, well after the acceptance of Zarate's plea in the present case. In any event, Zarate has not presented us with any claim based on the trial court's failure to advise him of the consequences of his plea.

CONCLUSION

Zarate's allegation, that his counsel failed to inform him of the immigration consequences of his guilty plea, does not support a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution. Zarate has not alleged facts which, if proved, would constitute an infringement of his rights under the Nebraska or federal Constitution. Therefore, the district court did not err in dismissing Zarate's motion without an evidentiary hearing. The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF ANTHONY R. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. TAMMY R., APPELLANT, AND DAVID A., APPELLEE.

651 N.W.2d 231

Filed September 27, 2002. No. S-01-1252.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the

trial court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another.

2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
5. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a special proceeding for appellate purposes.
6. **Final Orders: Appeal and Error: Words and Phrases.** To be final and appealable, an order in a special proceeding must affect a substantial right. A substantial right is an essential legal right, not a mere technical right.

Appeal from the Separate Juvenile Court of Douglas County: GERALD E. ROUSE, Judge. Appeal dismissed.

Craig H. Borlin for appellant.

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

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

STEPHAN, J.

Significant amendments to the Nebraska Juvenile Code were effected by the enactment of 1998 Neb. Laws, L.B. 1041. One of these amendments, codified at Neb. Rev. Stat. § 43-292.02 (Reissue 1998), requires the State to file a petition to terminate parental rights in the case of a juvenile who has been in foster care under the responsibility of the State for 15 or more months of the most recent 22 months, unless a court determines that the case falls within one of the exceptions specified in the statute. Following an evidentiary hearing, the separate juvenile court of Douglas County determined that Anthony R., Tamarrah R., and David A., Jr., all of whom had previously been adjudicated under Neb. Rev. Stat. § 43-247(3) (Reissue 1998), had been in

out-of-home placement for the requisite period and that the facts did not fall within any of the statutory exceptions. The court therefore ordered that the matter be referred to the State for the filing of a motion to terminate parental rights. Tammy R., the mother of the three children, seeks appellate review of that order. We conclude that the order is not final and appealable and, therefore, dismiss the appeal for lack of jurisdiction.

FACTS

On November 16, 1999, the State filed an amended petition for adjudication in the separate juvenile court of Douglas County. The amended petition alleged that all three children lacked proper parental care by reason of the faults or habits of their mother and that two of the children lacked proper parental care by reason of the faults or habits of the mother's boyfriend with whom she and the children resided. Specifically, the amended petition alleged, inter alia, that the mother had subjected Anthony to inappropriate physical discipline and that both the mother and her boyfriend had subjected Anthony to inappropriate sexual contact. The State also alleged that the mother and her boyfriend engaged in domestic violence in the presence of the children, placing them at risk for harm. After a trial, the juvenile court adjudicated all three children to be within the meaning of § 43-247(3)(a) and ordered that the children remain in the temporary custody of the Nebraska Department of Health and Human Services (DHHS).

After conducting a dispositional/permanency planning hearing with respect to the three children on August 18, 2000, the juvenile court adopted the proffered DHHS case plan and determined that the permanency objective was reunification with the mother. The court further determined, however, that for health and safety reasons, it was in the children's best interests to remain in the temporary custody of DHHS. On August 28, 2000, the juvenile court issued an order nunc pro tunc correcting an error that was made in its previous adjudication order. The mother perfected an appeal from this order which, on the mother's motion, was dismissed before submission.

On May 4, 2001, the juvenile court held another review and permanency hearing regarding the three children. At this hearing, the court received several exhibits, including a case plan and

court report prepared by Kelli Mitchell, the DHHS child protection and safety worker assigned to the case. The case plan recommended that the mother participate in, inter alia, a sex offender/victimization program and a specialized parenting therapy program. The case plan also recommended that the court find an exception to the termination requirement of § 43-292.02 on the ground that the mother had "not had ample opportunity to resolve the conditions that brought the case to Court." The court accepted the recommendations of the case plan and found that a "compelling reason" existed pursuant to § 43-292.02(3)(b) not to refer the matter to the State for the filing of a motion to terminate the mother's parental rights. The court also found that reasonable efforts had been made to reunify the children with their mother; that due to safety concerns, visitation should be suspended until the mother achieved progress in her prescribed therapeutic program; and that temporary custody of the children should remain with DHHS. Finally, the court ordered the mother to participate in and successfully complete the programs referenced in the case plan.

On October 12, 2001, another review hearing was held. The State offered several exhibits, one of which was an updated case plan and court report created by Mitchell. The updated plan recommended a primary permanency objective of reunification with the mother and an alternative plan of adoption. The case plan again recommended that the court find an exception to the § 43-292.02(1) termination filing requirement because the mother "has not had adequate time to participate in services that may correct the conditions adjudicated." Both the State and the guardian ad litem disagreed with the case plan's recommendation that an exception or "compelling reason" be found. The State and the guardian ad litem argued that the children had been in out-of-home placement for over 2 years, that the mother continued to maintain that she had not abused the children, and that the mother had not taken reasonable steps to complete her therapy.

In an order filed October 17, 2001, the separate juvenile court found that the children had been in out-of-home placement for the requisite time period under § 43-292.02(1)(a) and, contrary to the recommendation of the case plan, concluded that there

was no sufficient reason to suspend the requirement that the State file a motion to terminate the mother's parental rights with respect to the three children. The court ordered that the matter be referred to the State for that purpose. The mother perfected an appeal from this order, and we removed the case to this court's docket on our own motion 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

The mother assigns, rephrased and reordered, that the separate juvenile court erred (1) in determining that a "compelling reason" did not exist to prevent referral of the case to the State for the filing of a motion to terminate her parental rights, (2) in referring the case to the State for the filing of a motion to terminate her parental rights in the absence of a finding that termination would be in the best interests of the children, (3) in conducting a permanency hearing less than annually from the date of the previous permanency hearing, and (4) in ordering the suspension of supervised visitation in its May 4, 2001, order.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over another. *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001); *In re Interest of Kiana T.*, 262 Neb. 60, 628 N.W.2d 242 (2001).

[2] 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.*, 263 Neb. 544, 641 N.W.2d 55 (2002); *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002); *In re Change of Name of Davenport*, 263 Neb. 614, 641 N.W.2d 379 (2002).

ANALYSIS

The juvenile code, as amended by L.B. 1041, operative July 1, 1998, provides at § 43-292.02:

> (1) A petition shall be filed on behalf of the state to terminate the parental rights of the juvenile's parents . . . if:
>
> (a) A juvenile has been in foster care under the responsibility of the state for fifteen or more months of the most recent twenty-two months[.]
>
> . . . .
>
> (3) The petition is not required to be filed on behalf of the state . . . if:
>
> (a) The child is being cared for by a relative;
>
> (b) The Department of Health and Human Services has documented in the case plan or permanency plan, which shall be available for court review, a compelling reason for determining that filing such a petition would not be in the best interests of the juvenile; or
>
> (c) The family of the juvenile has not had a reasonable opportunity to avail themselves of the services deemed necessary in the case plan or permanency plan approved by the court if reasonable efforts to preserve and reunify the family are required under section 43-283.01.

Neb. Rev. Stat. § 43-292.03(1) (Reissue 1998) provides:

> Within thirty days after the fifteen-month period under subsection (1) of section 43-292.02, the court shall hold a hearing on the record and shall make a determination on the record as to whether there is an exception under subsection (3) of section 43-292.02 in this particular case. If there is no exception, the state shall proceed as provided in subsection (1) of section 43-292.02.

As we noted in *In re Interest of Dewayne G. & Devon G.*, 263 Neb. 43, 54-55, 638 N.W.2d 510, 519 (2002), the purpose of L.B. 1041 was to change the emphasis of the juvenile code " 'from reunification of the family . . . to the primary criteria of the health and safety of the child,' " and to help resolve the problem of " 'children being left too long in foster care, often for many years.' " Quoting Floor Debate, L.B. 1041, 95th Leg., 2d Sess. 11548 (February 12, 1998).

The order we are asked to review in this case is one made pursuant to § 43-292.03(1). The separate juvenile court found no basis for an exception to the § 43-292.02 requirement that the State file a petition to terminate parental rights as to children who have been in foster care for the requisite period of time. We have not previously decided whether such an order is final and appealable. The State argues that it is not. In the alternative, the State argues that any appeal from such an order must be reviewed by a three-judge juvenile court review panel pursuant to Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Reissue 1998) before it can be considered by an appellate court.

[3,4] In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Dustin H. et al.*, 259 Neb. 166, 608 N.W.2d 580 (2000); *In re Interest of Alycia P.*, 258 Neb. 258, 603 N.W.2d 7 (1999). See, also, *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002); *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002). 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. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001); *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000).

[5,6] A proceeding before a juvenile court is a special proceeding for appellate purposes. *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000); *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000). To be final and appealable, an order in a special proceeding must affect a substantial right. *Id.* A substantial right is an essential legal right, not a mere technical right. *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998).

In support of her argument that the order is final and appealable, the mother relies upon *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998). That case was decided under the juvenile code as it existed prior to the enactment of L.B. 1041 and did not involve an appeal from an order pursuant to § 43-292.03(1). In *In re Interest of Tabatha R.*, we held that an

initial dispositional order which did not include a rehabilitation plan for either parent deprived them of any opportunity for reunification with their child and thus affected a substantial right. In the present case, it is clear that the mother was given an opportunity for reunification through a case plan approved by the juvenile court which had been in effect for more than a year prior to the October 17, 2001, order referring the matter to the State for the filing of termination proceedings. *In re Interest of Tabatha R.* does not support the argument that the order before us affected a substantial right of the mother.

To determine appealability of an order of the juvenile court finding no compelling reason to further suspend the statutory obligation of the State to file a motion to terminate parental rights pursuant to § 43-292.02(1), we must consider the nature of the order and what parental rights, if any, it affected. See *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999). We conclude that the order altered the procedural posture of this juvenile proceeding but did not adjudicate or affect any substantial right of the mother. The filing of a petition to terminate parental rights, standing alone, does not affect any parental right. If such a petition is filed in this case pursuant to the court's order, the mother will receive notice and an opportunity to be heard in accordance with statutorily prescribed procedures. See Neb. Rev. Stat. §§ 43-291 and 43-292 (Reissue 1998). If the filing of a petition for termination of parental rights ultimately results in an order adverse to the mother, it is well established that such an order is final and appealable. See, e.g., *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Interest of Clifford M. et al., supra*. Accordingly, we conclude that the order before us does not affect a substantial right of the mother.

For these reasons, we conclude that the order entered by the separate juvenile court on October 17, 2001, pursuant to § 43-292.03(1) is not a final and appealable order, and we are therefore without jurisdiction to review it.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. GEARY L. DANDRIDGE, APPELLANT.

651 N.W.2d 567

Filed October 4, 2002. No. S-01-239.

1. **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.
2. **Postconviction: Constitutional Law: Proof.** A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the state or federal Constitution.
3. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
4. **Postconviction: Appeal and Error.** An appellate court will not entertain a successive postconviction motion unless the motion affirmatively shows on its face that the ground for relief could not have been asserted at the time the movant filed the prior motion.
5. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
6. **Postconviction: Constitutional Law: Effectiveness of Counsel.** There is no constitutional guarantee of effective assistance of counsel in a postconviction action.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Geary L. Dandridge, pro se.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

HENDRY, C.J.

INTRODUCTION

In April 2000, Geary L. Dandridge filed a second motion for postconviction relief, pro se, in Lancaster County District Court. The district court denied the motion without a hearing, determining that the claims asserted by Dandridge were procedurally barred. Dandridge timely 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 1992, Dandridge was convicted of possession of a controlled substance and being a felon in possession of a firearm. Dandridge's resulting sentences were enhanced upon a finding that Dandridge was a habitual criminal. Dandridge's convictions and sentences were affirmed by the Nebraska Court of Appeals. *State v. Dandridge*, 1 Neb. App. 786, 511 N.W.2d 527 (1993). Dandridge retained private counsel during his trial, but was represented by the Lancaster County public defender during his direct appeal.

In 1996, Dandridge filed his first motion for postconviction relief, pro se. In this motion, Dandridge raised two issues. First, Dandridge asserted that his conviction for possession of a controlled substance violated double jeopardy. Second, Dandridge asserted that his trial counsel was ineffective. Dandridge did not assert, however, that his direct appeal counsel was ineffective. The district court dismissed the motion without an evidentiary hearing.

After filing an appeal of the district court's decision, Dandridge filed a motion in the district court for appointment of counsel to assist him on appeal. The district court granted the motion, appointing the Lancaster County public defender. On appeal, Dandridge again asserted double jeopardy and ineffective assistance of trial counsel claims. This court concluded that Dandridge was procedurally barred from asserting either claim, since both claims could have been raised on direct appeal. *State v. Dandridge*, 255 Neb. 364, 585 N.W.2d 433 (1998).

In April 2000, Dandridge filed his second motion for postconviction relief, pro se, in which he asserted three claims. First, Dandridge asserted that his direct appeal counsel was ineffective. Dandridge argues that this claim is not procedurally barred because counsel appointed to represent him during the appeal of his first postconviction motion could not have raised this claim due to a conflict of interest. Second, Dandridge asserted that his postconviction appeal counsel was ineffective. Third, Dandridge asserted that under the plain error doctrine, his conviction for possession of a controlled substance was void on double jeopardy grounds. The district court denied Dandridge's motion without a hearing. Dandridge appealed.

ASSIGNMENTS OF ERROR

Dandridge assigns, rephrased, that the district court erred in (1) failing to find that due to a conflict of interest created when the Lancaster County public defender was appointed to represent him in his first postconviction appeal, Dandridge was unable to assert an ineffective assistance of direct appeal counsel claim during the first postconviction proceeding, and (2) failing to find that his postconviction counsel was ineffective.

STANDARD OF REVIEW

[1] 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. *Hall v. State, ante* p. 151, 646 N.W.2d 572 (2002).

[2] A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the state or federal Constitution. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

[3] An appellate court does not consider errors which are argued but not assigned. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997); *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995).

ANALYSIS

Ineffective Assistance of Direct Appeal Counsel

Dandridge asserts his direct appeal counsel rendered ineffective assistance. According to Dandridge, his direct appeal counsel was ineffective for failing to (1) assert that his conviction for possession of a controlled substance violated double jeopardy, (2) assert that his trial counsel was ineffective, (3) adequately challenge his felon in possession of a firearm conviction, and (4) adequately challenge his habitual criminal sentence enhancement.

[4,5] We first must determine whether Dandridge is procedurally barred from asserting this claim. An appellate court will not entertain a successive postconviction motion unless the motion affirmatively shows on its face that the ground for relief could not have been asserted at the time the movant filed the prior motion. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999). The need for

finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *Hall v. State, supra*.

Dandridge argues that his claim is not procedurally barred because his second postconviction motion presented his first opportunity to raise this claim. According to Dandridge, since the Lancaster County public defender represented him during his direct appeal, the district court created a conflict of interest by again appointing the Lancaster County public defender to represent him during his first postconviction appeal. Dandridge contends that due to this conflict of interest, this is his first opportunity to assert an ineffective assistance of direct appeal counsel claim.

This court considered a similar situation in *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000). There, the defendant's first postconviction motion requested relief on the ground that he had received ineffective assistance from trial counsel. The defendant was represented by attorneys from the Sarpy County public defender's office, both at trial and on direct appeal. This court held that the defendant's claim was not procedurally barred since "his first opportunity to assert ineffective assistance of trial counsel was in his motion for postconviction relief." *Id.* at 483-84, 618 N.W.2d at 415.

Unlike *Soukharith*, the record here indicates that Dandridge had an earlier opportunity to assert his ineffective assistance claim. In Dandridge's first postconviction motion, which he filed pro se, he did not allege ineffective assistance of direct appeal counsel. It was only after Dandridge appealed the dismissal of that motion that the district court appointed the Lancaster County public defender to represent him. Dandridge could have asserted the ineffective assistance claim at the time he filed his first postconviction motion, but he failed to do so. Nothing on the face of Dandridge's motion affirmatively contradicts this conclusion. See *State v. Ryan, supra*.

Because Dandridge was not represented by the Lancaster County public defender during the period in which his first postconviction motion was filed, considered, and ruled upon by the district court, we find no merit to Dandridge's conflict of interest argument. Therefore, we determine that Dandridge is procedurally barred from asserting the ineffective assistance of direct

appeal counsel claim and that Dandridge's arguments to the contrary are without merit.

Ineffective Assistance of Postconviction Appeal Counsel

Dandridge next asserts that his postconviction appeal counsel was ineffective. As support for this argument, Dandridge argues that in 1993, the Nebraska Legislature amended Neb. Rev. Stat. § 29-3004 (Reissue 1995) to provide that attorneys appointed to represent a defendant in a postconviction proceeding "shall be competent and shall provide effective counsel."

[6] A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the state or federal Constitution. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001). In *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001), we ruled that notwithstanding the 1993 amendment to § 29-3004, there is no constitutional guarantee of effective assistance of counsel in a postconviction action. *State v. Hunt, supra*. Dandridge's ineffective assistance of postconviction counsel claim, premised upon § 29-3004, is without merit.

Other Issues

Finally, Dandridge raises two other issues in his brief. Dandridge argues that the district court erred in (1) failing to grant him an evidentiary hearing on his motion and (2) rejecting his argument that under the plain error doctrine, his conviction for possession of a controlled substance constituted a double jeopardy violation. We do not consider these issues because neither issue was assigned as error by Dandridge. An appellate court does not consider errors which are argued but not assigned. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997); *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995).

CONCLUSION

For these reasons, we affirm the decision of the district court.

Affirmed.

STATE OF NEBRASKA, APPELLEE, V. SHIREEN D. TYMA, APPELLANT.

651 N.W.2d 582

Filed October 4, 2002. No. S-01-1070.

1. **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.
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: 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. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
5. **Statutes: Probation and Parole: Words and Phrases.** The plain and ordinary meaning of the language of Neb. Rev. Stat. § 29-2262.01 (Reissue 1995) prohibits those placed on probation by a court of this state and inmates who have been released on parole by any court from acting as undercover agents for, or employees of, law enforcement agencies. The exclusionary rule provided by § 29-2262.01 does not apply unless the informant is both (1) in jail, on probation, or on parole and (2) acting as an undercover agent or employee of a law enforcement agency.
6. **Criminal Law: Conspiracy: Statutes.** Neb. Rev. Stat. § 28-202 (Reissue 1995) adopts the unilateral approach to the agreement element of conspiracy as found in the Model Penal Code. Under the unilateral approach, only the defendant need agree with another person; the second party can feign agreement.
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. **Speedy Trial: Pretrial Procedure: Final Orders: Notice: Appeal and Error.** A necessary concomitant to the right to immediately appeal from the denial of a motion to discharge, based upon an alleged violation of the right to a speedy trial, is the right to an appropriate pretrial disposition of the motion. Where a motion to discharge on speedy trial grounds is submitted to a trial court, that motion is inferentially denied where the trial court proceeds to trial without expressly ruling on the motion. At that point, the denial of the defendant's motion is a final, appealable order, and the defendant must secure his or her rights to appellate review by filing a timely notice of appeal.
9. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
10. ____. Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it

uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

Robert Wm. Chapin, Jr., 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.

Shireen D. Tyma (Tyma) was charged by information in the district court for Hall County with conspiracy to commit murder in the first degree, a Class II felony. The object of the alleged conspiracy was Tyma's estranged husband, Tim Tyma (Tim). Following a bench trial, Tyma was convicted and sentenced to incarceration for 8 to 15 years. She perfected this direct appeal from her conviction and sentence. We removed the appeal 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).

BACKGROUND

Prior to the filing of the information, the county court for Hall County issued three search warrants based upon affidavits submitted by Officer Kelly Williams of the Grand Island Police Department. The first warrant authorized the search of Tyma's residence in Grand Island and any vehicles registered to Tyma and/or Jasper and Shirley Leago, her parents. The execution of this warrant resulted in the seizure of various items of personal property from the residence, including videotapes, notes, notebooks, and 21 rolls of undeveloped 35-mm film. The second search warrant authorized the search of the Leagos' residence in Grand Island. Its execution resulted in the seizure of a .38-caliber Smith & Wesson five-shot revolver, serial No. J53212, in a brown holster with four rounds in the cylinder. The third search warrant was accompanied by an order requiring Tyma to submit a handwriting sample, which was subsequently obtained.

After she was charged but prior to trial, Tyma filed a motion to suppress the handwriting sample, all evidence seized from her residence, and any other evidence seized from "any other place in which she had an expectation of privacy." After conducting an evidentiary hearing, the district court entered an order suppressing the handwriting sample as violative of Neb. Rev. Stat. § 29-3303(3) (Reissue 1995), which provides that in order to obtain a warrant for evidence of "identifying physical characteristics," the affidavit must affirmatively show that the identified or described individual has refused to voluntarily provide the desired evidence. The court also suppressed all evidence seized from Tyma's residence based upon its determination that the factual assertions set forth in Williams' affidavit were not sufficiently corroborated and that the affidavit therefore failed to show probable cause. The court also determined that Tyma lacked standing to challenge the search of the Leagos' residence and the resulting seizure of the .38-caliber revolver and thus overruled the motion to suppress as to that evidence.

The State perfected an interlocutory appeal of the district court's ruling on Tyma's motion to suppress to a single judge of the Nebraska Court of Appeals pursuant to the summary review procedure provided by Neb. Rev. Stat. § 29-824 (Cum. Supp. 2000). In an unpublished opinion, the reviewing judge determined that Williams' affidavits established probable cause to believe that a crime had been committed and that evidence thereof would be found in Tyma's residence. *State v. Tyma*, No. A-00-764, 2000 WL 1673125 (Neb. App. Oct. 31, 2000) (not designated for permanent publication). The judge therefore reversed that part of the district court's order suppressing the evidence seized at Tyma's residence. However, the judge affirmed that part of the district court's order suppressing the handwriting sample for failure to comply with § 29-3303(3) and remanded the cause to the district court for proceedings consistent with the opinion.

Following remand but prior to trial, Tyma filed a motion to dismiss on the ground that her right to a speedy trial had been violated. At a pretrial hearing on July 27, 2001, the State offered a "Waiver of Right to Speedy Trial" executed by Tyma and her attorney, which was received without objection. At the conclusion of the hearing, the court took the motion under advisement.

A bench trial was held on August 1, 2001. The State called several witnesses, including Tim, Kenneth Moore, and Leo Purvis. Tim identified Tyma's handwriting on several documents offered in evidence by the State. Moore and Purvis testified concerning their oral and written communications with Tyma regarding the planned killing of Tim, which we will discuss in greater detail in our analysis of Tyma's assignment of error challenging the sufficiency of the evidence to support her conviction.

Tyma called two witnesses at trial. Williams, the police officer who had executed the affidavits upon which the search warrants were issued, testified that during the investigation, he asked Purvis on two occasions to "[w]ear a wire" in order to surreptitiously record conversations with Tyma. On the first occasion, no tape recording was made because of a technical malfunction. On the second occasion, a recording was made and subsequently transcribed by Williams. Tyma offered the transcript of that conversation, which was received in evidence.

Jasper Leago testified he had been in possession of the .38-caliber revolver for approximately 25 years before it was seized from his residence pursuant to the search warrant. He stated that he was unaware the weapon had been removed from his home during 1999. He explained that the weapon did not appear to have been moved from the location in the home where he stored it, that he kept the house locked when he was away, and that Tyma did not have keys to the residence. Leago testified that he had never seen the weapon in the possession of Tyma or Moore, but he said that during a conversation with Moore in early 1999, he mentioned the fact that he owned a .38-caliber Smith & Wesson revolver, which he described in some detail.

The record includes a docket entry dated August 21, 2001, stating: "Motion to Dismiss overruled. Defendant found guilty. Sentencing 9/25/01." The sentence was pronounced from the bench at a sentencing hearing on September 25, 2001, and in a journal entry bearing the same date.

ASSIGNMENTS OF ERROR

Tyma assigns that "the Court of Appeals erred when modifying the lower courts [sic] decision to grant Appellant's Motion

to Suppress in total by ruling that the handwriting samples had not been improperly seized." She further assigns, restated, that the district court erred in (1) allowing Tim to identify her handwriting, (2) failing to exclude Purvis' testimony pursuant to Neb. Rev. Stat. § 29-2262.01 (Reissue 1995), (3) finding that she had conspired with Moore and Purvis to murder Tim when no evidence of any agreement between herself and Moore or Purvis was adduced, (4) holding that her right to a speedy trial had not been denied, and (5) finding that her due process rights had not been denied by the conduct of the State.

STANDARD OF REVIEW

[1] 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. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002); *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (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. 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. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[3] 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. Davlin, supra*; *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002); *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001).

ANALYSIS

Motion to Suppress

Tyma's argument with respect to the disposition of her motion to suppress is somewhat imprecise. Her first assignment of error refers only to her contention that the handwriting samples she was ordered to submit should have been suppressed. In fact, they were. In the ruling on the State's interlocutory appeal from the suppression order, the single judge of the Court of Appeals held:

> Having found that the affidavits establish probable cause to believe that a crime has been committed and that evidence thereof will be found in Tyma's residence, I reverse the district court's order suppressing the evidence secured in the search of her residence. *However, having found that the affidavit submitted in support of the order to obtain handwriting samples did not comply with the identifying physical characteristics act, I uphold the district court's suppression of the handwriting exemplars.* I remand the cause to the district court for Hall County for further proceedings consistent with this opinion.

(Emphasis supplied.) *State v. Tyma*, No. A-00-764, 2000 WL 1673125 at *10 (Neb. App. Oct. 31, 2000) (not designated for permanent publication). The handwriting samples were not offered at trial.

[4] Tyma also argues that the evidence seized from her home should have been suppressed due to the inadequacy of the affidavits upon which the search warrants were based. This argument fails for two reasons. First, Tyma's assignments of error do not refer to the ruling of the Court of Appeals with respect to evidence seized from Tyma's home. An appellate court does not consider errors which are argued but not assigned. *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998); *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996). Second, Tyma does not identify any evidence seized from her home which was received at trial, and our review of the record reveals none. The State did offer several photographic prints made from undeveloped rolls of film seized from Tyma's residence, but the district court sustained Tyma's objections to the offer of these exhibits and did not receive them.

Although Tyma argues briefly that the affidavits did not contain a sufficient description of the weapon seized from the Leagos' home, she does not specifically assign error with respect to the refusal of the district court to suppress this evidence. Moreover, there is nothing in the record which would indicate that Tyma had a reasonable expectation of privacy in the Leagos' home. Tyma's first assignment of error is without merit.

Handwriting Identification

In her second assignment of error, Tyma contends that the district court erred in permitting Tim to testify, over her foundational

objection, that her handwriting appeared on several documents which authorities obtained from Moore and Purvis. Neb. Rev. Stat. § 27-901 (Reissue 1995) provides in pertinent part:

> (1) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (2) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> . . . .
>
> (b) *Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.*

(Emphasis supplied.)

In *State v. Schwartz*, 239 Neb. 84, 474 N.W.2d 461 (1991), we held that the trial court did not err in permitting a motel clerk to testify that certain initials on motel register receipts were written by her coworkers. The clerk testified that her identification of the initials was based upon her familiarity with the handwriting of her coworkers gained in the course of her employment. We noted that because the clerk's familiarity with her coworkers' handwriting was not acquired for purposes of litigation, the requirements of § 27-901 were met and that the testimony was properly admitted.

The record in this case clearly establishes that Tim was familiar with the handwriting of Tyma and that this familiarity was not acquired for purposes of litigation. He testified that during the years that they lived together as a married couple, he observed Tyma's handwriting on a daily basis on notes written to him, calendars, and other family documents. This testimony satisfied the foundational requirements of § 27-901, and the district court did not err in receiving the testimony over Tyma's foundational objection.

Purvis Testimony

In her third assignment of error, Tyma argues that the district court erred in permitting Purvis to testify at trial because he was an "inmate" within the meaning of § 29-2262.01, which provides:

> A person placed on probation by a court of the State of Nebraska, an inmate of any jail or correctional or penal facility, or an inmate who has been released on parole, probation, or work release shall be prohibited *from acting as an undercover agent* or employee of any law enforcement agency of the state or any political subdivision. Any evidence derived in violation of this section shall not be admissible against any person in any proceeding whatsoever.

On July 26, 2001, Tyma filed a motion in limine requesting that the court prohibit the State from calling Purvis as a witness. She asserted in the motion that Purvis' testimony would be in violation of § 29-2262.01 because he was "an inmate in a correctional or penal facility and/or was on parole at the time he was used to acquire information from the defendant." At a hearing on this motion held on the following day, the court noted that it was presented with no evidence concerning the applicability of § 29-2262.01 to Purvis. Tyma's counsel stated that he would "like to check on that issue and reserve the right to put forth evidence regarding his status." There was no further discussion of the motion at that hearing, and the record reflects no ruling on the motion.

The issue of Purvis' testimony next arose on the first day of trial. The court acknowledged receipt of a motion in limine filed by defense counsel on the preceding day, but that motion does not appear in the transcript. The court permitted Tyma's counsel to offer evidence on the motion prior to the commencement of trial. Through the testimony of a Hall County corrections employee, it was established that Purvis was booked into the Hall County jail at 5:10 p.m. on December 15, 1999, and released on his own recognizance at 6 p.m. the same day. Defense counsel also elicited testimony from Williams, the investigating officer, with respect to the motion in limine. Williams testified that he first came into contact with Purvis at approximately 2 p.m. on December 15, after learning from Tyma's roommate that Purvis and Tyma were conspiring to kill Tim. Williams further testified that he went to Purvis' house to question him and that his first contact with Purvis lasted only 5 minutes. Williams stated that upon leaving Purvis' home, he was told by a police dispatcher that an outstanding warrant for Purvis' arrest existed because Purvis had failed to pay a

fine. Williams testified that he then placed Purvis under arrest and that Purvis was transported to the Hall County Safety Center.

Williams testified that he questioned Purvis at the police station for approximately 2 hours concerning his involvement in an alleged conspiracy with Tyma to kill Tim. Williams testified that he neither paid nor promised anything to Purvis in exchange for Purvis' statement. Williams told Purvis, however, that if he continued to cooperate, Williams would talk with the county attorney about obtaining Purvis' release on a recognizance bond and not filing charges against Purvis for possession of a weapon that was found in his home. Williams then testified that after he finished questioning Purvis, he booked him into jail and called the county attorney, who informed him that only a judge could order a recognizance bond but that she would forgo filing a weapons charge if Purvis continued to cooperate. Williams testified that he called a county judge and requested that Purvis be released on a recognizance bond, which subsequently occurred after Purvis had spent approximately an hour in jail.

Williams further testified that after Purvis was released from jail, Purvis voluntarily came back to the police station, at which time Williams asked Purvis to wear a concealed recording device in an effort to record a conversation with Tyma. Williams stated that Purvis wore the device on two occasions and indicated that the first attempt failed to produce a recording but that the second attempt yielded a partial recording of a conversation between Purvis and Tyma.

At the conclusion of this evidence, the district court took the motion in limine under advisement and commenced trial. The State called Purvis during its case in chief. The record reflects no ruling on the motion in limine prior to Purvis' testimony. On direct examination, Purvis testified that he met Tyma outside a bar 2 or 3 months before his December 1999 arrest. He testified that between September and December, he had conversations with Tyma in which she stated that she wanted Tim to be dead. Purvis identified a pistol that Tyma had given him and testified that she had given him money on several occasions "because she wanted her husband dead." Purvis admitted having several conversations with Tyma "about killing her husband" and testified that Tyma had shown him photographs of Tim. Purvis identified

several handwritten notes given to him by Tyma during this period. He admitted that during the period Tyma was giving him money and sex, he told her he would kill Tim, although he had no intention of doing so. Defense counsel did not object to any portion of Purvis' direct testimony on the basis of § 29-2262.01.

On cross-examination, Purvis testified that he and Tyma had agreed that he would be paid $100,000 to kill Tim, but stated that he was interested only in continuing his sexual relationship with Tyma and had no intention of actually carrying out the murder. Purvis also confirmed that the State had agreed not to pursue certain criminal charges against him in exchange for his testimony. At the conclusion of Purvis' testimony, defense counsel stated that he was renewing the defense motion that Purvis' testimony be stricken pursuant to § 29-2262.01. The court overruled the motion, stating that it did not find the statute applicable.

[5] Assuming without deciding that the issue was raised in a timely and appropriate manner, we agree that § 29-2262.01 does not make Purvis' testimony inadmissible. 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. *State v. Portsche*, 261 Neb. 160, 622 N.W.2d 582 (2001). The plain and ordinary meaning of the language of § 29-2262.01 prohibits those placed on probation by a court of this state and inmates who have been released on parole by any court from acting as undercover agents for, or employees of, law enforcement agencies. The exclusionary rule provided by § 29-2262.01 does not apply unless the informant is both (1) in jail, on probation, or on parole and (2) acting as an undercover agent or employee of a law enforcement agency. *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). Purvis' trial testimony elicited by the State related exclusively to his contacts with Tyma during the months preceding his arrest and brief incarceration on December 15, 1999. The record contains no evidence that Purvis was an inmate, parolee, or probationer or that he was acting as an undercover agent or employee of a law enforcement agency during this time period. Although Purvis arguably served as an undercover agent when he subsequently

agreed to wear a hidden recording device in order to record conversations with Tyma, the State did not offer any evidence obtained in this manner. We conclude that the district court correctly determined that § 29-2262.01 did not require the exclusion of Purvis' trial testimony.

Sufficiency of Evidence

Tyma was convicted of criminal conspiracy, the elements of which are defined by Neb. Rev. Stat. § 28-202(1) (Reissue 1995) as follows:

> 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.

In her fourth assignment of error, Tyma contends that the district court erred in finding her guilty of criminal conspiracy because there was no evidence that she entered into an agreement with either Moore or Purvis.

[6] We have construed § 28-202 as adopting the unilateral approach to the agreement element of conspiracy as found in the Model Penal Code. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001). See, also, *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995); *State v. Knight*, 239 Neb. 958, 479 N.W.2d 792 (1992); *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982); Model Penal Code, § 5.03 (Tent. Draft No. 10, 1960). Under the unilateral approach, only the defendant need agree with another person; the second party can feign agreement. *Id.*

As noted above, our standard of review requires that we assess the sufficiency of the evidence to support a conviction by viewing it in a light most favorable to the State. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002). Moore testified that Tyma approached him in early 1999 and soon thereafter began stating in numerous conversations that she wanted Moore to kill Tim. Moore identified a number of notes given to him by Tyma which clearly indicated that she wanted and expected Moore to

commit the murder. Moore also testified that Tyma initially suggested that Moore run over Tim with his car and later suggested that Moore shoot Tim. Moore stated that Tyma tried to provide him with a gun on two separate occasions and that she did provide him with ammunition and eventually offered to pay him $5,000 and then $10,000 to kill Tim. Moore testified that Tyma stressed the importance of accomplishing the killing before her divorce became final. On cross-examination, the following relevant colloquy occurred between Tyma's counsel and Moore:

> Q You never reached any agreement with the defendant to hurt anybody, had you?
>
> A She wanted me to do it. I can't — I wasn't going to do it. She reached an agreement with me, wanting me to do it. I never reached an agreement with her because I — I never had an intention of doing it.

Moore also testified that he led Tyma to believe that he was proceeding with the plot to kill Tim so that she would not do so herself or find someone else to commit the crime.

The handwritten notes which Moore stated that he received from Tyma are consistent with Moore's testimony. The notes can reasonably be interpreted as complaints that Moore had not carried out the killing of Tim as agreed. One note states in part:

> You lied to me again - no show all weekend. You know this thing w/Tim needs to be taken care of tomorrow. Get w/me & get $. Get w/2 other guys & call friend & talk to those guys. They need to get to him now. 803 9th. St. Aurora. You've got pictures - need back. They need to go up to him & ask directions somewhere & get close enough to pull gun - slit throat. To be dead. Am I going to have to do this myself. I'm full w/kids. <u>Help</u>. You have time off work. This is a priority. I'll give you $ after. There'll be. Let's move. Can I trust you. Nothing works out & you do opposite of what you say.

Purvis testified that he became involved with Tyma between September and December 1999 and that during that timeframe, Tyma repeatedly asked him to kill Tim. Purvis testified that Tyma showed him pictures of Tim and gave Purvis a .25-caliber pistol because she "wanted her husband dead." Finally, Purvis testified that between September and December, he told Tyma that he

would kill Tim as she requested, although he had no intention of doing so. Purvis further testified that Tyma was periodically paying him small amounts of money to commit the murder.

Tyma argues that neither Moore nor Purvis entered into any "agreement" with her under traditional concepts of contract law because they admittedly had no intention of killing anyone. Thus, she contends, there was no meeting of the minds and no agreement. This argument ignores the unilateral approach to the agreement element of criminal conspiracy adopted by § 28-202, whereby the requisite agreement can be established by evidence that the defendant reached an agreement with another person to commit a criminal act, even if the agreement of the other person is feigned. For example, in *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001), we affirmed a conviction for conspiracy to commit first degree sexual assault on a child based upon evidence of an agreement reached through electronic correspondence between the defendant and a police officer posing as a 14-year-old girl. Viewing the evidence in the present case in a light most favorable to the State, as our standard of review requires, we conclude that it is sufficient to establish that Tyma entered into agreements with both Moore and Purvis to murder Tim, notwithstanding the fact that both Moore and Purvis feigned agreement. This assignment of error is therefore without merit.

Speedy Trial

In her fifth assignment of error, Tyma contends that the district court erred in denying her motion to dismiss on the ground that she was denied her right to a speedy trial conferred by Neb. Rev. Stat. § 29-1207 (Reissue 1995). We treat the motion as one for an absolute discharge pursuant to Neb. Rev. Stat. § 29-1208 (Reissue 1995).

[7] The State argues that we lack jurisdiction as to this issue because Tyma did not perfect a timely appeal from the order denying the motion. The order in the record was entered after trial contemporaneously with the finding of guilt, but prior to sentencing. 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. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002); *State v. McLemore*, 261 Neb.

452, 623 N.W.2d 315 (2001). We therefore initially address the jurisdictional issue raised by the State.

In *State v. Gibbs*, 253 Neb. 241, 245, 570 N.W.2d 326, 330 (1997), we held:

> Inasmuch as § 29-1207 confers a right to a speedy trial and § 29-1208 authorizes a special application to a court to enforce it, a ruling on a motion for absolute discharge based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated is a ruling affecting a substantial right made during a special proceeding and is therefore final and appealable.

In *Gibbs*, the motion for absolute discharge was denied prior to the scheduled commencement of trial and the defendant appealed the denial within 30 days. In concluding that the ruling affected a substantial right, we reasoned that the right to a speedy trial conferred by Nebraska statutes "would be significantly undermined if appellate review of nonfrivolous speedy trial claims were postponed until after conviction and sentence." *Id.*

In *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997), decided 1 week after *Gibbs*, we again considered a circumstance where a motion for absolute discharge was denied prior to the commencement of trial. In that case, however, the appeal was not perfected until after the trial was concluded and the defendant was convicted and sentenced. We affirmed the judgment of the Court of Appeals dismissing the appeal based upon a determination that the denial of the motion for an absolute discharge was a final, appealable order from which no timely appeal was perfected. Expanding upon our "substantial right" analysis in *Gibbs*, we reasoned that denial of a motion for discharge "effectively denies an appellant's speedy trial rights" and thus affects a substantial right. *Jacques*, 253 Neb. at 252, 570 N.W.2d at 335.

[8] In this case, the district court did not rule on the motion to dismiss on statutory speedy trial grounds until after the conclusion of trial. In *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999), we reasoned that a necessary concomitant to the right to immediately appeal from the denial of a motion to discharge, based upon an alleged violation of the right to a speedy trial, is the right to an appropriate pretrial disposition of the motion. We therefore held, prospectively, that

> where a motion to discharge on speedy trial grounds is submitted to a trial court, that motion is inferentially denied where the trial court proceeds to trial without expressly ruling on the motion. At that point, the denial of the defendant's motion is a final, appealable order, and the defendant must secure his or her rights to appellate review by filing a timely notice of appeal.

Id. at 384, 597 N.W.2d at 619. Because there was no pretrial ruling on Tyma's speedy trial motion, it was inferentially denied when trial commenced on August 1, 2001. Under our holding in *Ward*, the notice of appeal filed on September 25, 2001, was untimely as to the speedy trial issue, and we therefore lack jurisdiction to consider its merit.

Due Process

In her sixth assignment of error, Tyma contends that her right to due process was violated by the failure of the State to make pretrial disclosure of two matters: (1) the fact that Purvis had been granted immunity and (2) the fact that a tape containing a covertly recorded conversation between Purvis and Tyma had been lost by law enforcement authorities. Tyma argues that the dictates of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), required the prosecution to make such facts known to her prior to trial and that the failure to do so necessitated a mistrial or an order excluding certain evidence. Tyma concedes, however, that she did not raise these issues at trial by appropriate motion or objection.

[9,10] In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995); *State v. Rust*, 247 Neb. 503, 528 N.W.2d 320 (1995). Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001); *State v. Gutierrez*, 260 Neb. 1008, 620

N.W.2d 738 (2001); *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000). It is not evident from the record that the lost tape contained anything different from or additional to the transcript of the tape which was offered by Tyma and received without objection. The immunity granted to Purvis was brought out during his testimony and was therefore available to the finder of fact in assessing the credibility of his testimony. Under these circumstances, we find no basis for review of the claimed *Brady* violations under the plain error doctrine, and we decline to do so.

CONCLUSION

For the reasons discussed, we lack jurisdiction to consider Tyma's assignment of error concerning the denial of her speedy trial motion. We conclude that her other assignments of error are without merit and affirm her conviction and sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAVID K. HARRISON, APPELLANT.

651 N.W.2d 571

Filed October 4, 2002. No. S-01-1304.

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. **Jurors: Trial.** The retention or rejection of a juror is a matter of discretion for the trial court.
3. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
4. **Criminal Law: Jury Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.
5. **Criminal Law: Trial: Jurors: Presumptions: Proof.** In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome.
6. **Jury Misconduct: Proof.** Extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or

information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant.

7. **Constitutional Law: Effectiveness of Counsel: Proof.** In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
8. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Michael T. Levy and Kathy Pate Knickrehm for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

David K. Harrison appeals the order of the district court for Douglas County denying his motion for postconviction relief after an evidentiary hearing. In its order, the district court rejected Harrison's constitutional claims based on jury misconduct and ineffective assistance of counsel. We affirm.

II. STATEMENT OF FACTS

Harrison was convicted on January 11, 1985, of first degree murder for the shooting death of his wife, Maria F. Harrison. On February 1, he was sentenced to life imprisonment. Harrison appealed, and his conviction and sentence were affirmed. *State v. Harrison*, 221 Neb. 521, 378 N.W.2d 199 (1985).

On March 17, 1999, Harrison filed a motion for postconviction relief. In the motion, Harrison asserted that his constitutional rights had been violated due to jury misconduct at trial

and that he had received ineffective assistance of counsel at trial and on appeal. Harrison alleged three separate incidents of jury misconduct at the original trial. A postconviction evidentiary hearing was held July 20, 2000.

At the hearing, Harrison presented witnesses who testified regarding the three alleged incidents of jury misconduct. The first incident (referred to hereafter as the "January 9 elevator incident") involved a prospective juror who had been excused for cause but who had conversed about the case with, or in the presence of, two jurors and an alternate juror during the trial. At the evidentiary hearing in this postconviction action, Harrison entered into evidence an entry from the trial judge's minutes which was dated Thursday, January 10, 1985, and which stated as follows:

> The Court conferred in chambers with [counsel for the State] and [counsel for Harrison]. The Court advised both counsel that it had been advised by three of the jurors that the juror who had been excused for cause . . . had conversed briefly about this case with, or in the presence of, two of the jurors and the alternate juror yesterday in the Courthouse after lunch. The Court, by agreement of both counsel, talked individually and separately with jurors . . . . The Court then advised both counsel of its conversations with the three jurors. Both counsel agreed that the jury should commence their [sic] deliberations.

J.J., a juror in Harrison's underlying trial, testified at the postconviction evidentiary hearing. J.J. testified that following lunch on January 9, 1985, at a time when evidence was still being introduced, he and some other jurors rode in an elevator with an excused juror who stated her opinion that Harrison was guilty. J.J. discussed the incident with the other jurors, and they decided to report it to the judge. J.J. reported the incident to the judge at the end of the day.

The next day, the trial judge conferred with J.J., and they discussed the specifics of the incident. J.J. could not recall whether a court reporter, counsel, or anyone else was present during his discussion with the trial judge. J.J. testified without objection that the trial judge had asked him whether the excused juror's comments would influence his decision process. J.J. testified that

he had replied that they would not and that he told the trial judge that he would instead decide the case based on the evidence. After J.J. so testified, the district court in the present postconviction evidentiary hearing asked J.J., "[I]s that what happened? You based your decision on the evidence at the time . . . ." Harrison objected to the district court's question on the basis that Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 1995), prohibits a juror from testifying about deliberations, and J.J. did not answer the question. The district court then stated, "I'm not asking about the deliberations" and then restated its question, asking, "You stated that you told the judge, at the time, that you were going to base your decision on the evidence. Is that what happened in your . . . case?" J.J. replied, "Yes."

Depositions of the trial judge and Harrison's trial counsel were entered into evidence at the postconviction hearing. Trial counsel also served as counsel on appeal. Counsel testified that during the trial, he had heard from a relative of Harrison that someone had made comments about the case in the presence of jurors. Counsel brought the issue to the attention of the trial judge, and the trial judge informed him that jurors had reported the January 9 elevator incident and that the trial judge intended to speak individually with the affected jurors outside the presence of counsel and Harrison. The trial judge later informed Harrison's counsel and the State's counsel regarding his conversations with the jurors, and both counsel agreed that jury deliberations could proceed. Harrison's counsel testified, however, that the trial judge did not tell him either that the person making the comments was an excused juror or that the comments included expression of a belief that Harrison was guilty. Counsel testified that he had not moved for mistrial on the basis of the January 9 elevator incident because he believed that the incident, as he understood it, did not amount to jury misconduct or jury tampering and would not support a motion for mistrial. Counsel further testified that in his opinion, comments made by an excused juror concerning Harrison's guilt would be prejudicial to Harrison and could be grounds for mistrial. Counsel testified that at the time of trial, he informed Harrison of the January 9 elevator incident and the manner in which the trial judge had handled it.

The trial judge testified by deposition that he had no independent recollection of trial proceedings surrounding the January 9 elevator incident outside of that which was contained in the minute entry. He indicated that because he did not hold a hearing on the record, his discussions with the jurors must have satisfied him that no prejudice would result from the comments they had heard. The trial judge also testified that although he did not hold a hearing on the record in Harrison's case, his typical procedure in a similar situation would now be to hold a hearing on the record whether or not he thought there was prejudice.

Harrison alleged in his postconviction petition that after he learned of the January 9 elevator incident years after the trial, he hired an investigator who uncovered two other incidents of jury misconduct which were apparently not brought to the attention of the trial court.

Irene Nuno testified via affidavit attached to Harrison's motion and at the evidentiary hearing regarding one of the additional incidents (referred to hereafter as "the January 8 incident"). Nuno was related to the victim by marriage and had developed a close relationship with both the victim and Harrison. She attended portions of Harrison's trial. Following the January 8, 1985, trial session, Nuno was standing in the hallway outside the courtroom where an unidentified woman was loudly voicing her opinion that Harrison was "guilty as sin" and that she wished she was still on the jury. Shortly after the woman began voicing her opinion, three or four jurors, whom Nuno recognized from having attended the trial and who wore juror identification badges, exited the courtroom. The woman continued voicing her opinions in a manner that Nuno believed the jurors would have heard. Nuno further stated that when an elevator arrived, Nuno and her family, the woman, and the jurors got on the elevator. In the elevator, the woman told the occupants of the elevator that Harrison was guilty, "a nut case," and "crazy" and that a friend had told her that Harrison "was eventually going to kill someone because of his emotional condition." Nuno testified that on January 10, 1985, she telephoned Harrison's counsel to report the incident and that he told her that it had already been taken care of.

Joan Diane King testified in an affidavit and at the hearing regarding the other additional incident (referred to hereafter as "the January 9 hallway incident"). King is Nuno's sister. King stated that she attended the last day of Harrison's trial on January 9, 1985. King stated that during a morning recess, she joined a group of approximately five people smoking cigarettes. King recognized four of the five as jurors from having seen them in the jury box. King noted that all five were wearing juror badges. One woman was wearing a juror badge, but King did not recognize her as a juror. The woman was talking about the relationship between Harrison and the victim and stated that there had been a history of violence in their marriage and that each had been physically abusive toward the other. The woman told the jurors that she had learned this information from a friend who knew the victim. When a male juror expressed that he would never think by looking at Harrison that he could be a " 'cold killer,' " the woman responded that he "didn't know the half of the things [Harrison] had done to [the victim]" and that Harrison was "a first degree killer and murderer." King testified that she telephoned Harrison's attorney after the conclusion of trial that day and reported to him what she heard in the hallway during the morning recess. She testified that the attorney told her the woman had been excused from jury service and that the attorney "seemed otherwise unconcerned with the incident." Harrison's trial counsel testified in his deposition that although he recalled being advised by an unidentified person of the January 9 elevator incident, he did not recall that either Nuno or King had advised him of the additional incidents.

Harrison also offered his own deposition at the evidentiary hearing. Harrison testified that at the time of trial, he was not made aware of the January 9 elevator incident and was not aware of or present at the meetings between the trial judge and counsel and between the trial judge and jurors in regard to this incident. He testified that he did not become aware of the January 9 elevator incident until he reviewed the trial record in 1992 and that he did not become aware of the additional incidents reported by Nuno and King until he saw their affidavits in 1999. Harrison testified that if he had known of the January 9 elevator incident, he would have asked to be present

at a hearing regarding the incident and would have requested a mistrial. If he had been aware of the additional incidents reported by Nuno and King, he would have instructed counsel to report the incidents to the trial judge and would have asked counsel to move for a mistrial.

Following receipt of evidence in the instant case, the district court entered an order on November 2, 2001, denying Harrison's motion for postconviction relief. With reference to the three incidents described above, the district court rejected Harrison's 6th Amendment claims of a denial of his rights to trial by an impartial jury and to confrontation and his 5th and 14th Amendment claims of denial of due process. The district court further rejected Harrison's claim of ineffective assistance of counsel because it concluded that Harrison had not established any prejudice resulting from counsel's alleged deficient performance. Harrison appeals the district court's denial of his motion for postconviction relief.

III. ASSIGNMENTS OF ERROR

Harrison asserts, restated, that the district court erred in (1) failing to grant postconviction relief on the grounds asserted and (2) admitting J.J.'s testimony surrounding the nonjuror's comments during the January 9 elevator incident.

IV. 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. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

V. ANALYSIS

1. Admission of Juror Testimony

We first consider Harrison's second numbered assignment of error. Harrison asserts generally that the district court in this postconviction case erred under § 27-606(2) because the district court allowed J.J. to testify regarding the January 9 elevator incident. Harrison specifically claims that J.J. testified as to the influence upon him which resulted from the January 9 elevator incident and that such testimony is improper under § 27-606(2). As

explained below, the testimony at issue is neither the type of testimony covered nor prohibited by § 27-606(2), and Harrison's assignment of error is without merit.

Section 27-606(2) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

J.J. testified at the postconviction evidentiary hearing regarding the January 9 elevator incident in which he and other jurors heard an excused juror express her opinion that Harrison was guilty. J.J. also testified regarding his conversation with the trial judge about the incident. J.J. testified that during that conversation, the trial judge asked him whether the excused juror's comments would affect his decision and that he told the trial judge they would not. After J.J. gave this testimony at the postconviction evidentiary hearing, the district court in the postconviction evidentiary hearing asked J.J., "[I]s that what happened? You based your decision on the evidence at the time . . . ." Harrison objected to the district court's question on the basis that § 27-606(2) prohibits a juror from testifying about deliberations. J.J. did not answer the question. The district court indicated that it was "not asking about the deliberations" and then restated its question, and asked, "You stated that you told the judge, at the time, that you were going to base your decision on the evidence. Is that what happened in your . . . case?" J.J. replied, "Yes."

Referring to the above-quoted testimony, Harrison argues that J.J. was impermissibly allowed to testify in the postconviction hearing as to the influence the improper communication actually

had on the deliberations. The State responds that the district court in its reformulated question did not ask J.J. what the effect of the nonjuror's comments were on his decision, but, rather, the district court asked J.J. to reiterate whether or not he had told the trial judge at the time of the trial that he intended to base his decision on the evidence. We agree with the State's reading of the postconviction evidence.

A review of the testimony at issue shows that the substance of the testimony as a whole amounts to a recitation by J.J. stating, as a historical matter, what J.J. had told the trial judge, following which the district court in the postconviction evidentiary hearing asked J.J. to confirm, which he did, that J.J. had told the trial judge that he would base his decision on the evidence. The inquiry in the postconviction hearing referred to predeliberation matters in the trial court. In sum, the testimony by J.J. indicates that J.J. told the trial judge that he remained impartial, and the district court in the postconviction evidentiary hearing verified that J.J. had told the trial judge that he remained impartial prior to deliberations.

The testimony in question regarding J.J.'s predeliberation impartiality was not an inquiry into the validity of the verdict under § 27-606(2). Accordingly, the testimony was not prohibited by § 27-606(2). Instead, the testimony at issue reflects that the trial judge merely inquired as to whether the juror was able to render a fair and impartial verdict prior to deliberation, and recitation of the trial-level colloquy at the postconviction hearing neither implicated nor was prohibited by § 27-606(2).

[2] We have long observed that " 'The retention or rejection of a juror is a matter of discretion for the trial court.' " *State v. LeBron*, 217 Neb. 452, 458, 349 N.W.2d 918, 923 (1984) (quoting *State v. Robinson*, 198 Neb. 785, 255 N.W.2d 835 (1977)). We have approved of a trial court's action in which the trial court examined jurors with respect to their continued impartiality where the jurors have been exposed to a conversation relative to the criminal defendant. *Id.* Similarly, in the instant case, the testimony at the postconviction hearing reporting the trial court's inquiry into J.J.'s continued predeliberation impartiality was not error. Harrison's second assignment of error is without merit.

2. Denial of Postconviction Relief

[3] We next consider Harrison's first numbered assignment of error in which he asserts that the district court erred in denying postconviction relief on the grounds set forth by Harrison. In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001). In his motion for postconviction relief, Harrison alleged facts relating to the three incidents involving communications between a nonjuror and jurors during the course of his trial. Harrison also alleged that, with respect to the January 9 elevator incident, his trial counsel failed to preserve issues related to the incident for appeal and that the same counsel failed to raise the issues on appeal. Harrison essentially argues that these facts establish a denial or violation of his constitutional rights in two respects: (1) the three incidents involving nonjurors and jurors violated his due process and Sixth Amendment rights to trial by an impartial jury and to confrontation and (2) counsel's failures with respect to the January 9 elevator incident deprived him of effective assistance of counsel.

(a) Denial of Fair Trial: Jury Misconduct

Harrison asserts that each of the three incidents amounts to jury misconduct which denied him a fair trial. We note that in prior case law, this court has used the term "jury misconduct" to refer to at least two distinct types of misconduct: (1) misconduct involving an improper communication between a nonjuror and a juror and (2) misconduct by a member or members of the jury, including predeliberation discussions of the case. Different standards of proof apply to these distinct types of misconduct; therefore, we first note that we consider each of the three incidents in the present case to be misconduct involving an improper communication between a nonjuror and a juror and analyze them accordingly.

The January 8 incident and the January 9 elevator incident clearly fall under the category of nonjuror communications because they involved jurors' hearing the comments of a nonjuror

and there was no indication of a response by or discussion among the jurors. The January 9 hallway incident also involved comments by a nonjuror in the presence of jurors, but there was additional testimony that a juror responded to the nonjuror's comments by saying that he would never think by looking at Harrison that he could be a " 'cold killer.' " As we read the comment by the juror, it reflects that the juror had not decided the issue in the case; the nonjuror comments did not affect the juror and therefore did not amount to a predeliberation discussion or misconduct by the juror as asserted by Harrison. Accordingly, we analyze each of the three incidents as instances of misconduct involving an improper communication between a nonjuror and a juror.

[4] A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial. *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998). We review the district court's decision in this postconviction proceeding under a clearly erroneous standard. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

[5,6] In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome. *Jackson, supra*. Extraneous material or information considered by a jury may be deemed prejudicial without proof of actual prejudice if the material or information relates to an issue submitted to the jury and there is a reasonable possibility that the extraneous material or information affected the verdict to the detriment of a litigant. *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997). The question of whether prejudice resulted from jury misconduct must be resolved by the trial court's drawing reasonable inferences as to the effect of the extraneous information on an average juror. *Id*. The test to determine whether extraneous material was prejudicial looks to the possible effect of the extraneous material on an average juror's deliberative process. *Id*.

We review the district court's determinations regarding Harrison's claims of jury misconduct in light of the above standards. Regarding the factual question whether misconduct

occurred in each of the three incidents alleged by Harrison, it is apparent that the district court found that the three incidents of communication between a nonjuror and jurors occurred because the district court continued the analysis in its order and evaluated whether prejudice resulted from such communications. From our review of the evidence presented at the evidentiary hearing, we determine that the district court's findings that the three incidents occurred were not clearly erroneous.

We next review the district court's determination that the three incidents were not prejudicial to Harrison's defense. We determine that the district court's determination that no prejudice occurred was not clearly erroneous.

Under the standards recited above, once a defendant has established by a preponderance of the evidence that jury misconduct involving improper communications between a nonjuror and a juror has occurred, a rebuttable presumption of prejudice arises which the State has the burden to overcome. The question whether the misconduct was prejudicial to the extent that the defendant was denied a fair and impartial trial is ultimately a question for the trial court and is to be resolved upon the basis of an independent evaluation of all the circumstances in the case and consideration of the effect of the communication on an average juror. *Williams, supra.*

The proper analysis with regard to each incident in the present case is to make an evaluation of all the circumstances to determine whether there was a reasonable possibility that the improper communication affected the jury's verdict. A review of the evidence presented at the evidentiary hearing shows that under all the circumstances at the underlying trial, there was not a reasonable possibility that the nonjuror communications to the jurors affected the verdict and that, therefore, the district court's determination that the three incidents were not prejudicial was not clearly erroneous.

The record shows that the communications at issue consisted mainly of the nonjuror's assertions of her belief that Harrison was guilty and that he was "crazy." The three incidents were predeliberation occurrences, and evidence was received subsequent to the incidents. In addition, we observe that prior to the jury's beginning its deliberations, and subsequent to the three incidents,

the trial court instructed the jury that "[i]n determining any questions of fact presented in this case, you should be governed solely by the evidence introduced before you." See *State v. Anderson*, 252 Neb. 675, 564 N.W.2d 581 (1997). It is evident that the average juror would have heeded the trial court's instructions to base his or her decisions on the evidence rather than on a comment by the nonjuror.

In light of all the circumstances, the communications of the nonjuror would not have affected the average juror's decision and there was not a reasonable possibility that the communications by the nonjuror would have affected the jury's verdict. We therefore determine that the district court was not clearly erroneous in determining that no prejudice resulted from the three incidents. We reject Harrison's arguments with regard to jury misconduct and conclude that the district court did not err in dismissing Harrison's claims related to such misconduct.

(b) Ineffective Assistance of Counsel

[7,8] Harrison argues that his trial counsel, who also served as his direct appeal counsel, was ineffective for failing to properly raise and preserve issues related to the three incidents. In order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, a defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

As we have noted above, the district court was not clearly erroneous in determining that the three incidents did not result in prejudice to Harrison. Because the incidents themselves were not prejudicial, any claimed deficiencies of counsel due to purported failures on the part of counsel to raise, preserve, or

appeal issues related to the incidents did not prejudice Harrison's defense or impact the outcome. We therefore conclude the district court did not err in rejecting Harrison's claim of ineffective assistance of counsel.

VI. CONCLUSION

Juror J.J.'s testimony was not prohibited by § 27-606(2). The district court did not err in rejecting Harrison's motion for postconviction relief. The district court did not err in rejecting Harrison's claim of ineffective assistance of counsel. We therefore affirm the district court's denial of Harrison's motion for postconviction relief.

AFFIRMED.

IN RE COMPLAINT AGAINST LYN V. WHITE, COUNTY COURT JUDGE OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF NEBRASKA. STATE OF NEBRASKA EX REL. COMMISSION ON JUDICIAL QUALIFICATIONS, RELATOR, V. LYN V. WHITE, RESPONDENT.

651 N.W.2d 551

Filed October 4, 2002. No. S-35-010002.

1. **Judges.** The object of the Nebraska Code of Judicial Conduct is to delineate what conduct should be avoided for its prejudicial potential.
2. **Judges: Disciplinary Proceedings.** A clear violation of the Nebraska Code of Judicial Conduct constitutes, at a minimum, a violation of Neb. Rev. Stat. § 24-722(6) (Reissue 1995).
3. **Judges: Disciplinary Proceedings: Appeal and Error.** In a review of the findings and recommendations of the Commission on Judicial Qualifications, the Nebraska Supreme Court shall review the record de novo and file a written opinion and judgment directing action as it deems just and proper, and may reject or modify, in whole or in part, the recommendation of the commission. Upon its independent inquiry, the Nebraska Supreme Court must determine whether the charges against the respondent are supported by clear and convincing evidence and which, if any, canons of the Nebraska Code of Judicial Conduct and subsections of Neb. Rev. Stat. § 24-722 (Reissue 1995) have been violated. If violations are found, the Nebraska Supreme Court must then determine what discipline, if any, is appropriate under the circumstances.
4. **Appeal and Error.** As a general rule, a case is considered pending until the appellate process is complete.

5. **Judges: Disciplinary Proceedings: Appeal and Error.** Neb. Code of Jud. Cond., Canon 3B(7) (rev. 2000), still applies to a trial judge when a matter is pending on appeal.
6. **Judges.** A judge is acting in an official capacity, and not a personal capacity, when commenting on a case that the judge presided over in the course of his or her official duties.
7. ____. A judge's public statements shall be considered to be in an official capacity when the statements are part of an official duty, related to an official duty, or sought from or given by the judge because of his or her official position.
8. **Judges: Disciplinary Proceedings: Appeal and Error.** The limitations on public comments contained in Neb. Code of Jud. Cond., Canon 3B(9) (rev. 2000), apply where a trial judge comments on a matter that is before another trial judge or has been taken to an appellate court.
9. **Words and Phrases.** A matter is public if it is open and available to all, i.e., accessible to everybody.
10. **Judges: Appeal and Error.** A judge's defense of his or her own orders, prior to the resolution of appeal, may create the appearance of partiality.
11. **Judges: Disciplinary Proceedings.** While the disciplinary recommendation of the Commission on Judicial Qualifications is entitled to be given weight, it is incumbent upon the Nebraska Supreme Court to independently fashion an appropriate penalty.
12. ____: ____. The goals of disciplining a judge in response to inappropriate conduct are to preserve the integrity of the judicial system as a whole and to provide reassurance that judicial misconduct will not be tolerated.
13. ____: ____. The Nebraska Supreme Court disciplines a judge not for purposes of vengeance or retribution, but to instruct the public and all judges of the importance of the function performed by judges in a free society.
14. ____: ____. The discipline imposed on a judge must be designed to announce publicly the Nebraska Supreme Court's recognition that there has been misconduct. It must be sufficient to deter the respondent from engaging in such conduct again, and it must discourage others from engaging in similar conduct in the future.
15. ____: ____. The Nebraska Supreme Court weighs the nature of the offenses with the purpose of the sanctions and examines the totality of the evidence to determine the proper discipline for judicial misconduct.
16. ____: ____. The determination whether conduct is prejudicial to the administration of justice depends not so much on the judge's motives, but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers.
17. ____: ____. The misconduct of a judge in his or her official capacity is more culpable than extrajudicial misconduct.

Original action. Judgment of suspension without pay.

Susan Ann Koenig, of Law Office of Susan Ann Koenig, P.C., L.L.O., for respondent.

Anne E. Winner and Gary L. Young for relator.

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

PER CURIAM.

The respondent, Lyn V. White, a judge of the county court for Douglas County, has been charged with several violations of the Nebraska Code of Judicial Conduct (Code). The charges are based on Judge White's conduct after a sentence that she imposed, in a case involving a domestic protection order, was reversed on appeal by the district court. This case is not about domestic violence or whether the sentence imposed by Judge White was appropriate. Rather, the issue in this case is whether Judge White's quarrel with the district court's decision caused Judge White to abandon the impartiality required of a judge no matter what accusations are made against those who appear before the court. We conclude that Judge White's unethical conduct warrants a 120-day suspension from office without pay.

PROCEDURAL BACKGROUND

The Nebraska Commission on Judicial Qualifications (Commission) initiated this original action against the respondent in a complaint filed June 1, 2001. An amended complaint filed August 17, 2001, alleged that the respondent had engaged in conduct that had been in violation of Neb. Code. of Jud. Cond., Canons 1, 2, and 3B(7) and (9) (rev. 2000), and that such conduct was prejudicial to the administration of justice and brought the judicial office into disrepute. See Neb. Rev. Stat. § 24-722 (Reissue 1995). An evidentiary hearing was held on October 1 before a special master appointed by this court. Based upon the record made before the special master, the Commission concluded that the respondent's conduct deviated from the standards for ethical conduct mandated by Canons 1, 2A, and 3B(7) and (9) of the Code, and the Commission recommended that the respondent be suspended from office, without pay, for a period of 45 days.

The Commission filed its findings and recommendation in this matter on March 18, 2002. Pursuant to Neb. Comm. on Jud. Qual. R. of Proc. 17(a) (rev. 2001), a respondent may file, within 20 days of the filing of the recommendation of the Commission, a petition, accompanied by a brief, asking this court to modify

or reject the recommendation of the Commission. Failure to file such a petition and brief within the time provided may be deemed a consent to determination on the merits, based upon the record filed by the Commission. See rule 17(b).

Pursuant to a motion by the respondent, the respondent was granted an extension of time until May 23, 2002, to respond to the Commission's findings and recommendation. On that date, the respondent filed a consent to the discipline set forth in the findings and recommendation of the Commission, along with a notarized statement and a waiver of oral argument. On June 3, counsel for the Commission filed a responsive motion, asking this court to adopt the findings and recommendation of the Commission and impose the recommended discipline, and acceding to the respondent's waiver of oral argument. On June 7, the respondent filed a response renewing her consent to discipline and waiver of oral argument and making clear her understanding that this court would review the record de novo and could accept, reject, or modify the recommendation of the Commission.

Upon consent of the respondent, an order of reprimand, discipline, suspension, retirement, or removal may be entered by this court at any stage of the proceedings. See Neb. Comm. on Jud. Qual. R. of Proc. 15(c) (rev. 2001). The respondent filed such a consent and filed neither a petition to modify or reject the recommendation of the Commission nor a respondent's brief. Accordingly, this court ordered the matter submitted to this court on the record filed by the Commission. As briefs have not been filed, the matter was submitted without oral argument. See, rule 17(c); Neb. Ct. R. of Prac. 11E(4) (rev. 2000).

STANDARDS

[1,2] Pursuant to § 24-722(6), a judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed 6 months, or removed from office for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The object of the Code is to delineate what conduct should be avoided for its prejudicial potential. Therefore, a clear violation of the Code constitutes, at a minimum, a violation of § 24-722(6). *In re Complaint Against Jones*, 255 Neb. 1, 581 N.W.2d 876 (1998).

[3] In a review of the findings and recommendations of the Commission, this court shall review the record de novo and file a written opinion and judgment directing action as it deems just and proper, and may reject or modify, in whole or in part, the recommendation of the Commission. See, Neb. Const. art. V, § 30(2); Neb. Rev. Stat. § 24-723 (Reissue 1995); Neb. Comm. on Jud. Qual. R. of Proc. 18 (rev. 2001); *In re Complaint Against Krepela*, 262 Neb. 85, 628 N.W.2d 262 (2001). Upon our independent inquiry, this court must determine whether the charges against the respondent are supported by clear and convincing evidence and which, if any, canons of the Code adopted by this court and subsections of § 24-722 have been violated. *In re Complaint Against Krepela, supra*. If violations are found, this court must then determine what discipline, if any, is appropriate under the circumstances. *Id*.

FACTUAL FINDINGS

The factual findings of the Commission have not been challenged before this court. Having reviewed the record de novo, we conclude that the factual determinations set forth in the Commission's findings and recommendation are well supported by the record and have been proved by clear and convincing evidence. See *id*. The following statement of the underlying facts of this case has been substantially adopted from the recitation of facts set forth by the Commission.

The incidents relevant to this opinion stem from a criminal proceeding originating in the Douglas County Court, State v. Brink, No. CR99-9443, which will be referred to generally as "the *Brink* case." The respondent presided over the *Brink* case at the county court level. The specific details of the criminal proceeding are significant only as background for the conduct of the respondent. Dayne R. Brink was charged with the misdemeanor offenses of violating a protection order and stalking. Pursuant to a plea agreement, Brink pled guilty to one protection order violation and the remaining charges were dismissed. On July 15, 1999, the respondent placed Brink on probation for 1 year. Subsequently, Brink was charged with violating his probation, and on December 16, Brink entered a guilty plea to this charge, again before the respondent. The respondent revoked

Brink's probation and sentenced him to the maximum statutory penalty of 180 days' confinement and a $1,000 fine.

Brink appealed the sentence to the district court, alleging that the respondent had exhibited bias toward him at the time of his conviction and sentencing. The district court, on August 14, 2000, found that a reasonable person could question the respondent's impartiality, and the district court vacated Brink's sentence and remanded the case for resentencing by another county judge (August 14 order). The Commission noted, as does this court, that we are not concerned with whether the district court's decision in the *Brink* case was legally or factually correct. The issue in the instant case is not whether the district court acted correctly, but whether the respondent's response to the district court's decision violated the Code.

Tressa Alioth was employed by the Douglas County Attorney as a deputy county attorney and had been assigned the responsibility of representing the State in the *Brink* case. When the August 14 order was entered by the district court, Alioth was asked by a supervisor within her office to provide a copy of the August 14 order to the respondent to determine whether the respondent had any objections if the *Brink* case was appealed by the State to the Nebraska Court of Appeals. This contact with the respondent was apparently made because of a perception in the county attorney's office that the respondent might not want certain things "aired" that appeared on the record in the *Brink* case. Alioth gave the respondent a copy of the August 14 order while the respondent was on the bench handling unrelated matters. Alioth asked for the respondent's view on the possibility of a further appeal.

On the following day, the respondent encountered Alioth on the stairs; the respondent asked Alioth to come into the respondent's chambers. In chambers, the respondent engaged Alioth in a lengthy, detailed, and largely one-sided conversation during which the respondent itemized specific arguments as to why the August 14 order was erroneous, directed Alioth to take notes on the respondent's comments, and supplied Alioth with copies of cases to support the legal position supported by the respondent. Alioth's notes, and the cases provided to Alioth by the respondent, are present in the record. While the testimony of Alioth and

the respondent conflicts regarding when the conversation took place, the length of the conversation, and other details, there is no significant disagreement regarding the substance of the conversation. As the respondent later stated on the record:

> I read the opinion and had a conference with Miss Alioth, and this was within days of the rendering of the opinion by [the district court]. I gave her case law and statutes demonstrating that as a judge I had followed the law in all respects, that none of my actions were unlawful, that there was no basis in law or in fact for a finding of bias against this Defendant.
>
> I further pointed out to the County Attorney that in the event this matter was not appealed, that the criminal defense lawyers in this jurisdiction would be using it to have me recuse myself in other domestic violence cases. The County Attorney, Miss Alioth, acknowledged the Court's concerns and assured me that she would file an appeal.
>
> I went through the opinion with her pointing out appeal issues.

The county attorney's office later determined that it would appeal the *Brink* decision; however, the county attorney's office inadvertently failed to file a timely notice of appeal. Alioth had been out of the office for an extended period of time and did not learn of the failure to appeal until after her return, when Brink's name appeared on a list for resentencing.

Within a day or two of the release of the August 14 order, Kelly Steenbock, an assistant public defender and Brink's counsel on the probation violation, was in the respondent's courtroom in connection with an unrelated proceeding. The respondent initiated a conversation with Steenbock regarding the *Brink* case. In this conversation, the respondent told Steenbock about the respondent's displeasure with the district court's decision in the *Brink* case, and the respondent advised Steenbock that the *Brink* case would be appealed by the county attorney. According to Steenbock, the respondent stated that the respondent had "ordered" the county attorney to file an appeal. The respondent referred to her prior contact with Alioth, but did not reveal that the respondent had provided the county attorney with arguments and authority intended to aid in the prosecution of the appeal.

On or shortly before October 27, 2000, the respondent again met Alioth in the hallway and initiated a conversation, during which the respondent gave Alioth the name of a resource person with a national organization from whom, in the respondent's words, "[Alioth] might want to seek additional information" to assist in the preparation of the appellate brief that the respondent evidently believed would be filed. Alioth did not immediately respond, but returned to her office, and at the direction of her supervisor, Alioth telephoned the respondent later that day and advised the respondent that an appeal had not been filed and that Brink had been resentenced.

By October 27, 2000, the respondent was aware that no appeal had been taken from the August 14 order. That afternoon, the respondent conversed with Douglas County District Court Presiding Judge Mary G. Likes, who was both a personal and professional acquaintance of the respondent. The subject of the August 14 order was discussed, including the content of the August 14 order and the county attorney's failure to appeal from the order. Over the following weekend, Judge Likes attempted to inform the respondent, through a family member, that Judge Likes would consider appointing a special prosecutor in the *Brink* case.

On October 30, 2000, the respondent came to Judge Likes' chambers with a request that Judge Likes appoint a special prosecutor for the purpose of pursuing an appeal in the *Brink* case. By this time, Brink had been resentenced by another judge of the county court, and the respondent believed that the final day for filing an appeal from the resentencing was either October 30 or 31. The county attorney's office had deliberately chosen not to appeal from Brink's resentencing. Judge Likes commenced the proceeding as follows:

> We are here in a matter that is captioned the *State of Nebraska vs. Dayne R. Brink*. . . . It is an appeal from a County Court ruling . . . that was in the County Court of Douglas County.
>
> I have the District Court file in front of me. I have reviewed both that file as well as the pleadings, bill of exceptions, from the County Court. Present in court is Judge Lyn White, County Court Judge from Douglas County. And,

> Judge White, I will ask you to please recite for the record why you are here.

The record is clear that neither the State nor Brink was present or represented by counsel at the commencement of the October 30 district court proceeding, nor does the record indicate that either the State or Brink was notified personally or through counsel prior to the commencement of the hearing.

The respondent invoked Neb. Rev. Stat. § 23-1205 (Reissue 1997), which provides, in relevant part:

> In the absence, sickness or disability of the county attorney and his deputies, or upon request of the county attorney for good cause, the court may appoint an attorney to act as county attorney in any investigation, appearance, or trial, by an order to be entered upon the minutes of the court . . . .

The respondent moved the district court for a finding that

> the County Attorney for Douglas County is either disabled or disqualified to prosecute the appropriate appeals in the case of Dayne — State vs. Dayne R. Brink, with the same Appellate numbers as have already been recited by the Court into the record.
>
> . . . And I am asking you to appoint a Special Prosecutor to prosecute the appeals necessary in this case.

In support of this motion, the respondent explained several reasons why she believed that the August 14 order was in error.

The district court commented, at the conclusion of the October 30, 2000, proceeding, that a ruling would be reserved until the county attorney's position could be stated for the record. The hearing was resumed on October 31, and Alioth gave sworn testimony. Alioth said, on the record, "I'd like to note that I didn't have any notice of any kind of hearing . . . so I'm here kind of blind sided." The record reflects no attempt to notify Brink or his counsel about the October 31 hearing. The district court's disposition of the October 30 motion, if any, is not apparent from the record.

On December 21, 2000, the respondent, through personal counsel, filed a petition in the district court seeking the appointment of a special county attorney, pursuant to § 23-1205, "to review the content and law of the decision rendered by a judge

of this Court in State v. Brink, Doc. 149 No. 325, and render an advisory opinion" regarding that matter. The petition was served on both Alioth and Steenbock. Prior to hearing, this petition was voluntarily dismissed by the respondent.

ANALYSIS

Communications With County Attorney

We turn first to the respondent's contacts with Alioth. We determine that the respondent's contacts with Alioth, on the occasions set forth above, involved ex parte communications in violation of Canon 3B(7) of the Code, which provides, in relevant part:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. 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 . . . .

We first observe that the respondent's initial communications with Alioth regarding the August 14 order, when Alioth presented a copy of the district court's decision to the respondent, were ex parte communications for which the respondent is responsible, despite the fact that the communications were initiated by Alioth. Canon 3B(7) of the Code provides that a judge shall not "initiate, *permit*, or consider" ex parte communications. (Emphasis supplied.) While the contact was not initiated by the respondent, it was clearly permitted by her. The county attorney's lapse of judgment in initiating the communications did not excuse the respondent from her ethical responsibility to terminate the communications as soon as the nature of the communications became (or should have become) apparent to the respondent.

[4] We also determine that the respondent's communications with Alioth were impermissible ex parte communications despite the fact that the *Brink* case was not directly pending before the respondent. Although the district court ordered that the *Brink* case resentencing be performed by a different county court judge, the language of Canon 3B(7) simply proscribes ex parte communications concerning a "pending or impending" proceeding and does not limit that prohibition by reference to

the docket of a particular judge. As a general rule, a case is considered pending until the appellate process is complete. See, e.g., *Roberts v. Com'n on Judicial Performance*, 33 Cal. 3d 739, 661 P.2d 1064, 190 Cal. Rptr. 910 (1983) (rejecting contention that trial judge may participate personally in ex parte communications with real party regarding subsequent appellate proceedings reviewing judge's order), *disapproved on other grounds, Doan v. Commission on Judicial Performance*, 11 Cal. 4th 294, 902 P.2d 272, 45 Cal. Rptr. 2d 254 (1995); *Harrington v. State*, 584 N.E.2d 558, 561 (Ind. 1992) (trial court violated Canon 3, "forsaking his stance of neutrality" in writing letter to attorney general suggesting that attorney general file motion for rehearing of appellate decision reversing trial court). See, also, *In re White*, 53 Ala. App. 377, 300 So. 2d 420 (1974).

[5] The comments to Canon 3B(7) provide that "[i]f communications between the trial judge and the appellate court with respect to a proceeding appealed from that trial judge is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties." While the circumstances of the instant case do not involve communications between the trial judge and appellate court, the clear implication of the comment is that Canon 3B(7) still applies to a trial judge when a matter is pending on appeal.

Moreover, the stated purpose of the respondent's meetings with Alioth was to assist the county attorney in convincing a higher appellate court to reverse the judgment of the district court, thus reinstating the original sentence imposed by the respondent. If an appeal had been perfected and the State had prevailed, the case might have been remanded to the respondent for further proceedings. The potential that a case may be remanded to a trial judge provides an additional rationale for prohibiting ex parte communications between the trial judge and the parties even while the matter is on appeal.

We also conclude that the respondent's communications with Alioth represent clear violations of Canons 1 and 2A of the Code. We focus particularly on the second and third meetings between Alioth and the respondent, in which the respondent by her own admission provided Alioth with advice and authority intended to aid the county attorney in appealing the reversal of

Brink's sentence. In so doing, the respondent, figuratively speaking, stepped down from the bench and assumed the State's place at the prosecutor's table. See *In re White, supra*. See, also, e.g., *Disciplinary Proc. Against Aulik*, 146 Wis. 2d 57, 429 N.W.2d 759 (1988); *State v. Cash*, 867 S.W.2d 741 (Tenn. Crim. App. 1993).

Canon 1 is entitled "A Judge Shall Uphold the Integrity and Independence of the Judiciary" and provides, in relevant part, that "[a]n independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." Canon 2 is entitled "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities," and Canon 2A states that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

It is difficult to conceive of a more direct violation of these canons than the actions of the respondent in response to the August 14 order in the *Brink* case. The respondent injected herself into the proceeding as an advocate for one of the parties. "When a judge becomes embroiled in a controversy, the line between the judge and the controversy before the court becomes blurred, and the judge's impartiality or appearance of impartiality may become compromised." *In re Charge of Judicial Misconduct*, 47 F.3d 399, 400 (10th Cir. 1995). In this case, the respondent " 'abandoned the judicial role to become an advocate for [her] own ruling.' " See *Fletcher v. Com'n on Judicial Performance*, 19 Cal. 4th 865, 910, 968 P.2d 958, 983, 81 Cal. Rptr. 2d 58, 83 (1998). Such behavior by the respondent "discloses an unhealthy and wholly improper concern with the protection of [her] own rulings from appellate reversal." See *Roberts v. Com'n on Judicial Performance*, 33 Cal. 3d 739, 747, 661 P.2d 1064, 1068, 190 Cal. Rptr. 910, 914 (1983), *disapproved on other grounds, Doan v. Commission on Judicial Performance*, 11 Cal. 4th 294, 902 P.2d 272, 45 Cal. Rptr. 2d 254 (1995). Simply stated, the individual judge of the court whose order is being reviewed is not a proper party to the proceeding. *Id.*

The responsibility of a judge is to decide matters that have been submitted to the court by the parties. The judge may not, having decided a case, advocate for or, as in this case, materially assist one party at the expense of the other. Such advocacy creates the appearance, and perhaps the reality, of partiality on the part of the judge. This, in turn, erodes public confidence in the fairness of the judiciary and undermines the faith in the judicial process that is a necessary component of republican democracy.

In response to the August 14 order in the *Brink* case, the respondent engaged in ex parte communications with the county attorney regarding a pending criminal proceeding, in a manner calculated to prejudice the defendant. That conduct was unethical, prejudicial to the administration of justice, and has brought the judicial office into disrepute. See § 24-722.

Motion to Appoint Special Prosecutor

We next turn to the respondent's motion for the appointment of a special prosecutor to appeal from Brink's resentencing in the county court. We determine that the respondent's motion, made in a public record, violated Canon 3B(9) of the Code. That canon provides, in relevant part:

> A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to interfere substantially with a fair trial or hearing. . . . This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge is a litigant in a personal capacity.

The comment to Canon 3B(9) further states in part:

> The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly.

[6,7] The respondent's motion for appointment of a special prosecutor involved public comment on the merits of a matter that was, at the time, pending before the county court. Those comments were intended to force an appeal from Brink's resentencing on behalf of the State—a result which would undoubtedly represent a substantial interference with a fair trial or hearing. The comment to 3B(9) makes plain that a judge is acting in an official capacity, and not a personal capacity, when commenting on a case that the judge presided over in the course of his or her official duties. The Nebraska Code of Judicial Conduct is based in part on the American Bar Association's Model Code of Judicial Conduct (1999), which has been adopted in several jurisdictions; other courts considering provisions similar to Canon 3B(9) have similarly concluded that a judge's public statements shall be considered to be in an official capacity when the statements are part of an official duty, related to an official duty, or sought from or given by the judge because of his or her official position. See, e.g., *Matter of Hey*, 188 W. Va. 545, 425 S.E.2d 221 (1992) (citing cases).

Canon 3B(9) does provide an exception permitting judges to make "public statements in the course of their official duties." We note that there is a significant distinction between comments made in an official capacity and statements made in the course of official duties. For instance, courts are often required, in resolving matters submitted to them, to criticize the decisions or reasoning of other courts. Here, however, the *Brink* case was not pending before the respondent and she had no official duties with respect to the disposition of the case—much less official duties that required any public statements to be made. While the respondent became involved in the *Brink* case in her official capacity as a county court judge, it cannot reasonably be said that her motion to appoint a special prosecutor, made after the respondent's official responsibility for the *Brink* case had been terminated, was made in the discharge of any official duty with respect to the case.

[8] Canon 3B(9) also plainly states that a judge's public comments are restricted while a proceeding is pending or impending "in any court." Given this unambiguous language, we conclude that Canon 3B(9)'s limitations on public comments apply where

a trial judge comments on a matter that is before another trial judge or has been taken to an appellate court. See, e.g., *Broadman v. Commission*, 18 Cal. 4th 1079, 959 P.2d 715, 77 Cal. Rptr. 2d 408 (1998); *In re Inquiry of Broadbelt*, 146 N.J. 501, 683 A.2d 543 (1996); *Matter of Hey, supra*; *Ryan v. Com'n on Judicial Performance*, 45 Cal. 3d 518, 754 P.2d 724, 247 Cal. Rptr. 378 (1988). In limiting the scope of commentary regarding pending cases in any court, the rule precludes the possibility of undue influence on the judicial process and the threat to public confidence posed by a judge from one court or jurisdiction criticizing the rulings or technique of a judge from a different jurisdiction. See *In re Inquiry of Broadbelt, supra*. Such comments could affect the outcome of the case, appear to exert pressure on a judge to decide a certain way, and undermine public confidence in judicial decisions. See *id*.

[9] We also conclude that the respondent's motion, and the stated basis for that motion, was "public comment" within the meaning of Canon 3B(9). A matter is public if it is open and available to all, i.e., accessible to everybody. *Broadman, supra*. While the respondent's comments were not made in a context as public as, for instance, a press conference called for the purpose of criticizing the August 14 order, the respondent nevertheless was in open court, thus making her comments in a public forum and preserving them as part of the public record. Such comments are, therefore, "public" within the meaning of Canon 3B(9).

We observe that contrary to the respondent's suggestion, § 23-1205 offers no basis for the appointment of a special prosecutor under the circumstances of the *Brink* case. Section 23-1205 gives the district court the authority to appoint an acting county attorney in the event of absence, sickness, or disability of the county attorney. *Stewart v. McCauley*, 178 Neb. 412, 133 N.W.2d 921 (1965). The term "disability" has been interpreted to cover situations where the county attorney by reason of prior employment disqualified himself to act in the new case. See *id*.

However, the respondent made no allegations in the *Brink* case to support a finding of "disability" on the part of the county attorney, other than the county attorney's failure to follow the course of action favored by the respondent. The respondent's

personal dissatisfaction with the performance of the county attorney's office does not constitute "disability" within the meaning of § 23-1205. The purpose of § 23-1205 is the protection of the public by making certain that a county attorney's duties shall not be influenced by private interests. *Stewart, supra*. When the respondent asked the district court to appoint a special prosecutor in the *Brink* case, essentially for the purpose of personal vindication, the respondent sought relief contrary to both the language and intent of § 23-1205.

In short, the respondent's motion for the appointment of a special prosecutor was without legal foundation, was made in a public forum while the *Brink* case was pending before the county court, and could reasonably have been expected (and was, in fact, intended) to unfairly interfere with the disposition of the *Brink* case. The content of that motion represents "public comment" that is prohibited by Canon 3B(9).

We also conclude, as did the Commission, that the hearing held on October 30 and 31, 2000, involved ex parte communications within the meaning of Canon 3B(7). The record reflects only belatedly successful attempts to inform the county attorney regarding the interference by the respondent in the *Brink* case, and no involvement by Brink or his appointed counsel. The fact that the district court may bear some responsibility for the ex parte nature of the proceedings does not absolve the respondent of her ethical duty, under Canon 3B(7), to neither "initiate" nor "permit" ex parte communications. Based on this reasoning and the analysis of Canon 3B(7) previously set forth, we conclude that the respondent's involvement in the October 30 and 31 hearing violated Canon 3B(7) of the Code.

[10] We further determine that the respondent's motion to appoint a special prosecutor eroded the integrity and independence of the judiciary and fostered both impropriety and the appearance of impropriety, in violation of Canons 1 and 2A of the Code. A judge's defense of his or her own orders, prior to the resolution of appeal, may create the appearance of partiality. See *In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001). See, also, *J & J Industries v. Carpet Showcase*, 723 So. 2d 281 (Fla. App. 1998). In the *Brink* case, the August 14 order was not even on appeal; instead, the respondent sought to force an appeal in

order to vindicate her original sentence. The respondent defended her decision not only through public comment, but attempted legal intervention. The respondent's abortive intervention not only made the appearance of partiality more acute, but pushed the respondent past appearances and into the realm of actual partiality.

By making public comments in an attempt to justify and defend a decision, and in seeking intervention from the district court to force appellate review of her decision, the respondent adopted the role of an advocate. See *Broadman v. Commission*, 18 Cal. 4th 1079, 959 P.2d 715, 77 Cal. Rptr. 2d 408 (1998). The respondent's inappropriate and unethical foray into the prosecution of a matter for the purpose of vindicating her prior ruling shattered the appearance of an impartial magistrate, and was an evident attempt to intrude into the authority of another branch of government. See *Ryan v. Com'n on Judicial Performance*, 45 Cal. 3d 518, 754 P.2d 724, 247 Cal. Rptr. 378 (1988). Such actions are, to an objective observer, prejudicial to public confidence in the integrity and impartiality of the judiciary. See, *Broadman, supra*; Canon 2A.

As previously stated, the respondent's motion to appoint a special prosecutor violated Canons 1, 2A, and 3B(9) of the Code. The October 30 and 31, 2000, hearing on the motion involved ex parte contacts in violation of Canon 3B(7) of the Code. This conduct, and the respondent's conduct in meeting with Alioth, were in clear violation of the Code. We therefore proceed to consider the appropriate sanction for the respondent's unethical conduct.

DISCIPLINE

[11] Section 24-722 provides, in relevant part, that a "judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed six months, or removed from office for . . . (6) conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The Commission recommended that the respondent be suspended from office, without pay, for a period of 45 days. While the recommendation of the Commission is entitled to be given weight, it is incumbent upon this court to independently fashion

an appropriate penalty. *In re Complaint Against Jones*, 255 Neb. 1, 581 N.W.2d 876 (1998).

[12,13] The goals of disciplining a judge in response to inappropriate conduct are to preserve the integrity of the judicial system as a whole and to provide reassurance that judicial misconduct will not be tolerated. *In re Complaint Against Empson*, 252 Neb. 433, 562 N.W.2d 817 (1997). We discipline a judge not for purposes of vengeance or retribution, but to instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society. *Id.*

[14,15] The discipline imposed must be designed to announce publicly our recognition that there has been misconduct. *In re Complaint Against Jones, supra*. It must be sufficient to deter the respondent from engaging in such conduct again, and it must discourage others from engaging in similar conduct in the future. *Id.* We weigh the nature of the offenses with the purpose of the sanctions and examine the totality of the evidence to determine the proper discipline. *Id.*

[16] We again emphasize that the issue in the instant case is not whether the sentence the respondent imposed on Brink was appropriate or whether the district court was correct in reversing the respondent's original judgment. Our sole concern in this proceeding is the conduct of the respondent in response to the August 14 order reversing the respondent's judgment. We have concluded that the respondent's conduct after the August 14 order violated several provisions of the Code. Moreover, the ethical violations of the respondent are grave, striking fundamentally at the integrity of the judicial system. The determination whether conduct is prejudicial to the administration of justice depends not so much on the judge's motives, but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers. *In re Complaint Against Jones, supra*. To a knowledgeable observer, the respondent's actions in response to the August 14 order are unethical, intolerable, and nearly inconceivable.

[17] We also note that the respondent's conduct is all the more serious because it was directly related to the performance of her official duties. The misconduct of a judge in his or her official capacity is more culpable than extrajudicial misconduct.

In re Complaint Against Kneifl, 217 Neb. 472, 351 N.W.2d 693 (1984). The respondent engaged in acts which were not only unethical and unauthorized by law, but which the respondent should have known were beyond her judicial authority and the scope of Nebraska law. The respondent's patent misunderstanding of her judicial responsibility serves not to mitigate, but to aggravate the severity of her misconduct. See *McCullough v. Com'n on Jud. Performance*, 49 Cal. 3d 186, 776 P.2d 259, 260 Cal. Rptr. 557 (1989).

That having been said, we take note of the respondent's testimony that she thought her actions were permitted by the Code and that she did not intend to violate the Code. Although we have concluded that the respondent was profoundly mistaken, we have no reason to question the respondent's veracity in stating that she intended, and intends, to abide by the Code. The record also shows no other acts of misconduct attributed to the respondent, nor any previous imposition of discipline. Thus, the record before us leads us to conclude that the respondent's conduct is indicative of serious lapses in judgment, but that those lapses, related to a single case, are not symptomatic of a defect in character that would disqualify the respondent from holding judicial office. The record does not show that the conduct at issue in this case is likely to be repeated.

Accordingly, we determine that removal from office is unwarranted. Because the respondent's misconduct was in her official capacity, however, and because of its serious nature, we conclude that a heavy sanction is necessary. Given the limitations imposed by § 24-722, we determine that the appropriate discipline is a 120-day suspension from office without pay.

CONCLUSION

The record reflects the respondent's concerns about domestic violence, its victims, and its effect on society. However, domestic violence is not the issue presented in this proceeding, and the respondent is not being disciplined for her stance relative to domestic violence. Instead, the respondent is being disciplined because she abandoned her judicial impartiality to assist the State's prosecution of a criminal case, and later attempted to intervene in, and influence the outcome of, that case. The respondent's

concerns about domestic violence, however well founded, cannot excuse the respondent's unethical conduct. The respondent's conduct, in reaction to the August 14 order of the district court reversing the respondent's judgment in the *Brink* case, was plainly in violation of Canons 1, 2A, and 3B(7) and (9) of the Nebraska Code of Judicial Conduct. As discipline, we impose a 120-day suspension from office without pay, effective on the issuance of the mandate.

JUDGMENT OF SUSPENSION WITHOUT PAY.

HENDRY, C.J., and MCCORMACK, J., not participating.

DARYL E. MALENA AND AUDREY A. MALENA, HUSBAND AND WIFE, APPELLEES, V. MARRIOTT INTERNATIONAL, INC., A DELAWARE CORPORATION, APPELLANT.

651 N.W.2d 850

Filed October 11, 2002. No. S-00-1285.

1. **Negligence: Actions: States: Appeal and Error.** In a personal injury action, the question of whether to apply the law of the state where the injury occurred or the law of another state is a question of law.
2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a trial court's refusal to give a requested instruction, an appellant must prove 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.
3. **Judgments: Appeal and Error.** An appellate court decides a question of law independently of the conclusion reached by the trial court.
4. **Negligence: Damages: Mental Distress: Words and Phrases.** Parasitic damages are damages occasioned by anxiety specifically from a reasonable fear of a future harm attributable to a physical injury caused by the defendant's negligence.
5. **Negligence: Damages: Mental Distress: Proof.** Under Nebraska law, a plaintiff may adduce proof and potentially recover damages for the mental anguish of reasonably fearing acquired immunodeficiency syndrome resulting from a physical injury when the plaintiff may have been exposed, via a medically sufficient channel of transmission, to the tissue, blood, or body fluid of another in circumstances where the identity of the patient upon whom the contaminated needle or instrument was used is unknown, and when it is impossible or impracticable to ascertain whether any such tissue, blood, or body fluid may be tested positive for human immunodeficiency virus.
6. **Torts: Negligence: States.** In virtually all instances where the conduct and the injury occur in the same state, that state has the dominant interest in regulating that

> conduct and in determining whether it is tortious in character and whether the interest affected is entitled to legal protection.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded for a new trial.

Melvin C. Hansen, Judith A. Wolf, and William Gilner for appellant.

James S. Mitchell, Kathryn J. Derr, and Clifford T. Lee, of Rasmussen & Mitchell, for appellees.

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

PER CURIAM.

Marriott International, Inc. (Marriott), appeals from a jury verdict in favor of the appellees, Daryl E. Malena and Audrey A. Malena, husband and wife, for damages sustained when Audrey was stuck by a needle in a California hotel room. Marriott contends that the district court erred in refusing to instruct the jury on California law concerning Audrey's damages for fear of testing positive for human immunodeficiency virus (HIV) and contracting acquired immunodeficiency syndrome (AIDS). We agree that there is a difference between Nebraska and California law and that California law should have been applied. Accordingly, we reverse, and remand for a new trial.

BACKGROUND

On September 22, 1994, the Malenas, who are residents of Nebraska, stayed at the San Francisco Marriott Hotel in California. While in the hotel room, Audrey placed the cap of a lotion bottle on the nightstand and it rolled off. Audrey reached under the nightstand, attempting to retrieve the cap, and felt a sharp jab in her hand. Audrey pulled her hand out from under the nightstand and saw a hypodermic needle and syringe stuck in her hand. The needle was through her skin and into the muscle. She also felt a cold tingling sensation moving up her arm.

Immediately after the incident, Daryl called several AIDS hotline numbers. Because of the information he received, Audrey went the next morning to a medical center in San Francisco,

where she was treated. The Malenas then returned to Nebraska, and Audrey saw her personal physician and an infectious disease specialist. Between September 1994 and February 1996, she underwent a series of blood tests to determine the presence of HIV, hepatitis antibodies, and syphilis. The results of the tests were negative. The needle and syringe were not tested.

At the time of the incident, the Malenas' daughter Rachel was ill with myelofibrosis, a disease of the bone marrow, and had previously received a bone marrow transplant from her sister to treat the illness. Because of the transplant, Rachel required blood platelet donations, which were more effective if she received them from her immediate family. From January 1994 until the incident in September, Audrey had donated platelets at least seven times. After the incident, Audrey was unable to donate platelets because of her potential exposure to HIV and other diseases. Rachel died in December 1994 from complications related to her disease. Before Audrey was stuck by the needle, she had been treated for depression and anxiety related to Rachel's illness.

The Malenas filed suit against Marriott alleging that Marriott was negligent in failing to protect them from dangerous conditions on the hotel premises caused by its failure to discover and remove the hypodermic needle and syringe. They alleged special damages in the amount of $641.30 for Audrey's medical expenses. They further sought damages for Audrey's mental suffering because of her fear of contracting AIDS or hepatitis and for emotional distress for her inability to donate blood platelets. They also sought damages for Daryl's loss of companionship and consortium.

Marriott generally denied the allegations. Marriott moved for summary judgment alleging that the case was governed by the substantive law of California and that under California law, the Malenas were precluded from recovery. The motion was denied.

At trial, the district court determined that any damages attributable to Audrey's fear of contracting AIDS were controlled by Nebraska law. Marriott's requests for jury instructions on California law were denied. The jury found for the Malenas and awarded Audrey $200,000 in damages. Daryl was awarded $17,500 in damages. Marriott appeals.

ASSIGNMENTS OF ERROR

Marriott assigns, rephrased, that the district court erred in (1) failing to instruct the jury on the substantive law of California regarding fear of AIDS and parasitic damages, (2) refusing a requested instruction about whether Audrey's fear of infection was reasonable and genuine under Nebraska law, and (3) admitting certain exhibits into evidence.

STANDARD OF REVIEW

[1] In a personal injury action, the question of whether to apply the law of the state where the injury occurred or the law of another state is a question of law. See *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999).

[2] To establish reversible error from a trial court's refusal to give a requested instruction, an appellant must prove 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. *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001). Whether a jury instruction given by a trial court is correct is a question of law. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001).

[3] An appellate court decides a question of law independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

Marriott contends that the jury should have been instructed on California law concerning parasitic damages for fear of contracting a disease. Marriott argues that under California law, Audrey cannot recover for fear of contracting a disease unless it is more likely than not that she will contract AIDS from her exposure to a substance in the needle. The Malenas contend that California and Nebraska laws do not conflict. In the alternative, they contend that Nebraska law should apply.

Difference Between Nebraska and California Law

[4] We first address the difference between Nebraska law and California law on the proof necessary to recover parasitic damages for fear of developing a future disease. "[B]efore entangling itself in messy issues of conflict of laws a court ought to

satisfy itself that there actually is a difference between the relevant laws of the different states." *Barron v. Ford Motor Co. of Canada Ltd.*, 965 F.2d 195, 197 (7th Cir. 1992). Parasitic damages are damages occasioned by anxiety specifically from a reasonable fear of a future harm attributable to a physical injury caused by the defendant's negligence. *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998).

In *Hartwig*, we addressed whether a plaintiff who sustains an injury such as a needle stick can recover parasitic damages for anxiety and mental suffering caused by fear of contracting AIDS without showing actual exposure to infected body fluids. In addressing the issue, we cited and discussed cases from other jurisdictions, including California, that require proof of actual exposure to infected body fluids before parasitic damages can be recovered. In particular, we noted that under California law:

> [A]n ordinary needle stick does not give rise to parasitic damages for emotional distress and mental suffering unless a hazardous foreign substance is introduced into the body through the needle and causes detrimental changes to the body. Absent such detrimental change, in order to recover damages for a fear of contracting an illness, the plaintiff's fear must result from knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop such illness in the future due to the exposure.

Id. at 786, 580 N.W.2d at 92, citing *Macy's Cal., Inc. v. Superior Court*, 41 Cal. App. 4th 744, 48 Cal. Rptr. 2d 496 (1995).

[5] Noting that modern medicine treats a potential exposure the same as an actual exposure, we disagreed with the rule adopted by jurisdictions such as California. We adopted a different rule. Instead of requiring proof of actual exposure, we held:

> [A] plaintiff may adduce proof and potentially recover damages for the mental anguish of reasonably fearing AIDS resulting from a physical injury when the plaintiff may have been exposed, via a medically sufficient channel of transmission, to the tissue, blood, or body fluid of another in circumstances where the identity of the patient upon whom the contaminated needle or instrument was used is unknown, and when it is impossible or impracticable to

> ascertain whether any such tissue, blood, or body fluid may be HIV positive.

Hartwig, 254 Neb. at 790-91, 580 N.W.2d at 94.

We then held that when the elements are met, a plaintiff may adduce proof of, and potentially recover, parasitic damages for the " 'window of anxiety' " during which the plaintiff's fear of HIV infection and contraction of AIDS was reasonable and genuine and resulted in mental suffering occasioned by a physical injury for which he or she could receive compensation. *Id*. at 791, 580 N.W.2d at 94.

California has specifically rejected the test that we adopted in *Hartwig*. In *Potter v. Firestone Tire and Rubber Co*., 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993), a case involving exposure to toxic substances and fear of developing cancer, the California Supreme Court discussed concerns about the speculative nature of damages for fear of developing an illness based merely on exposure or a significant increase of the risk that the illness would develop. The court was particularly concerned about the possibility of an increase in unreasonable claims and the effect on society of an increase in the number of lawsuits. As a result, the court limited the availability of a plaintiff to recover. The court held that where there is an absence of present physical injury or illness, parasitic damages for fear of developing cancer may be recovered only if the plaintiff pleads and proves that

> (1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens [illness]; *and* (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the [illness] in the future due to the toxic exposure.

Id. at 997, 863 P.2d at 816, 25 Cal. Rptr. 2d at 571. The court stated that the rule required more than knowledge of exposure or a significant increase in risk.

The "more likely than not test" set out in *Potter* was first applied to a case involving fear of AIDS in *Kerins v. Hartley*, 27 Cal. App. 4th 1062, 33 Cal. Rptr. 2d 172 (1994). The Court of Appeal in *Kerins* had initially adopted a "window of anxiety" test like the test followed in Nebraska, but on petition for review,

the California Supreme Court transferred the matter back with directions to vacate and reconsider in light of *Potter, supra*. The Court of Appeal then applied the "more likely than not" rule from *Potter*.

The *Potter* test was applied again in *Herbert v. Regents of Univ. of Cal.*, 26 Cal. App. 4th 782, 31 Cal. Rptr. 2d 709 (1994). In *Herbert*, a child was stuck or scratched by a needle while waiting in an examination room at a medical center. The child's mother brought suit and sought damages for fear that her child would contract AIDS, and the trial court granted the medical center's motion for summary judgment. On appeal, the mother argued that the "more likely than not" test from *Potter, supra*, should not be applied to a fear of AIDS case. For purposes of its discussion, the court assumed that the mother could establish direct victim or bystander liability, applied the more likely than not test from *Potter* to the case, and affirmed.

In *Macy's Cal., Inc. v. Superior Court*, 41 Cal. App. 4th 744, 48 Cal. Rptr. 2d 496 (1995), another division of the California Court of Appeal agreed that in the absence of a physical injury, the plaintiff was required to plead and prove that it was "more likely than not" that he or she would develop an illness. The plaintiff in *Macy's Cal., Inc.* was stuck by a needle that was left in the pocket of a jacket she was trying on in a department store.

The *Macy's Cal., Inc.* court discussed the definition of physical injury and whether the plaintiff was required to show that it was more likely than not that she would develop a disease. The court determined that the plaintiff was required to have "actual harm," *id.* at 756, 48 Cal. Rptr. 2d at 504, in order to escape the "more likely than not" test. The court stated:

> The question before us is whether a routine needle stick constitutes harm for purposes of parasitic damages. We conclude it does not. In a routine needle stick, harm, if it occurs, takes place when a hazardous foreign substance, introduced to the body through the needle, causes detrimental change to the body. Only if the plaintiff proves detrimental change to the body may he or she recover parasitic emotional distress damages. Without such proof, the plaintiff must satisfy *Potter's* more likely than not test.

Id. at 756, 48 Cal. Rptr. 2d at 504.

The decision in *Macy's Cal., Inc.* illustrates that under California law, physical injury for purposes of parasitic damages does not occur when the needle punctures the skin or causes some form of injury not related to the feared disease. Instead, in order to escape from the "more likely than not" test, the plaintiff has to prove that a substance entered the body and caused a detrimental change to the body. Thus, as we recognized in *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998), the law of California is stricter than the rule in Nebraska. Nebraska does not require actual exposure to infected body fluids and allows recovery for a reasonable window of anxiety. California, however, requires an actual exposure under its definition of physical injury or harm in an incident where a needle punctures the skin. In the absence of actual exposure, California requires the plaintiff to prove that it is more likely than not that he or she will develop the feared illness. We recognized this distinction when we decided *Hartwig*. We determine that California law applies a different rule than the window of anxiety test we adopted in *Hartwig*. Accordingly, we next address which state law applies.

Choice of Law

Marriott contends that California law applies and that the district court erred in failing to instruct the jury on California's "more likely than not test." In choice-of-law determinations for personal injury claims, we have adopted Restatement (Second) of Conflict of Laws § 146 (1971). See *Harper v. Silva*, 224 Neb. 645, 399 N.W.2d 826 (1987). Section 146 is the starting point for any choice-of-law analysis in personal injury claims and provides:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Id. at 430. Under § 146, the presumption is that California law applies unless Nebraska has a more significant relationship to the parties and the occurrence with respect to a particular issue.

Although § 146 is the starting point, the Restatement, *supra*, § 158, comment *a*. at 485, specifically deals with "the circumstances under which there may be recovery for emotional distress . . . or that the distress be accompanied by some physical impact." The Restatement provides that "the applicable law will usually be the local law of the state where the injury occurred," § 158(2) at 484, and directs a court to apply the Restatement, *supra*, § 145, to select the law that determines whether "the interest affected is entitled to legal protection." § 158(1) at 484.

Section 145 at 414 is the "most significant relationship" test used for determining the applicable law for specific tort claim issues. See Restatement, *supra*, §§ 156 to 174. Section 145(2) provides the contacts that a court should consider when determining which state has the most significant relationship to the parties and the occurrence under the general conflict of law principles stated in § 6(2) of the Restatement. The contacts under § 145(2) are as follows:

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

Under § 145(2), Audrey's injury and the conduct causing the injury occurred in California. To the extent the parties had a relationship, it is centered in California. The Malenas did not allege that Marriott induced them to spend their vacation at their hotel through advertising or other contacts in Nebraska. Thus, the only contact with Nebraska is the Malenas' domicile. These contacts must be balanced in accordance with their significance to the general principles under § 6(2) at 10, which are as follows:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,

> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

But the more relevant principles under the Restatement (Second) of Conflict of Laws § 6 (1971) when dealing with tort claims are

> the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states *and particularly of the state with the dominant interest in the determination of the particular issue*, and ease in the determination and application of the law to be applied.

(Emphasis supplied.) Restatement, *supra*, § 145, comment *b*. at 416.

The underlying policy considerations of the conflicting recovery rules for Nebraska and California are important in deciding which state's policy has the most significant relationship. Nebraska has a policy interest in recognizing and placing a value on the injuries suffered by its domiciliaries. But California has counter policy reasons for its limitation on claims entitled to legal protection.

The California Supreme Court in *Potter v. Firestone Tire and Rubber Co.*, 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993), stated a concern that unreasonable lawsuits would occur if plaintiffs were able to offer proof of parasitic damages without proof of either actual exposure or that it was more likely than not that an illness would occur. One of the policy reasons for California's "more likely than not" standard is the protection of plaintiffs who actually contract an illness or develop a disease. California courts have feared that a proliferation of claims would result in the reduced ability of defendants and insurers to provide adequate compensation to victims suffering from permanent and serious physical injuries. See, *Potter, supra*; *Kerins v. Hartley*, 27 Cal. App. 4th 1062, 33 Cal. Rptr. 2d 172 (1994). California courts have also expressed concern that unrestricted claims would adversely affect the availability and affordability of liability insurance. *Potter, supra.* See *Kerins, supra*.

Thus, California has stated strong policy interests in protecting its plaintiffs that have a serious illness or injury, encouraging local insurance availability, and reliably defining the scope of liability for defendants within its borders. Those policy interests should be considered the dominant interests when the conduct and injury have occurred in California.

[6] In *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 30, 251 N.W.2d 383, 386 (1977), we cited the Restatement, *supra*, § 146, comment *d.*, and stated that "in virtually all instances where the conduct and the injury occur in the same state, that state has the dominant interest in regulating that conduct and in determining whether it is tortious in character, and whether the interest affected is entitled to legal protection." Other courts hold that a foreign state has the dominant interest in having its tort rules applied when the forum state's only interest in the litigation is compensating its residents. See, e.g., *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999); *Blakesley v. Wolford*, 789 F.2d 236 (3d Cir. 1986); *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970).

When a person travels to a destination in another state, the visitor should ordinarily anticipate that the foreign state's law will govern any tort which results from conduct and injury occurring there. See *Spinozzi, supra*. "Inhabitants of a state should not be put in jeopardy of liability exceeding that created by their state's laws just because a visitor from a state offering higher protection decides to visit there." *Cipolla*, 439 Pa. at 567, 267 A.2d at 856-57.

Every state has an interest in compensating its domiciliaries for their injuries. But tort rules which limit liability are entitled to the same consideration when determining choice-of-law issues as rules that impose liability. See, *Crossley, supra*; Restatement (Second) of Conflict of Laws § 145, comment *c*. (1971).

A state's choice-of-law rules should recognize a foreign state's dominant interests in a fairly predictable manner. Otherwise, the rules will neither encourage harmonious, interstate relations nor ease the determination of which law to apply. Although we may disagree with California's policy statements and underlying reasons for the "more likely than not" test, choice-of-law principles

also require us to respect California's laws when it has the dominant interest in applying its law.

We conclude that the law of California applies to this case. Thus, the trial court erred when it refused Marriott's requested jury instructions based on California law. We reverse, and remand for a new trial. Because we reverse on the issue of Marriott's requested jury instructions on California law, we do not address Marriott's remaining assignments of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

MILLER-LERMAN, J., concurring.

I concur. I write separately to state that I am puzzled as to how the principles enunciated in *Potter v. Firestone Tire and Rubber Co.*, 6 Cal. 4th 965, 863 P.2d 795, 25 Cal. Rptr. 2d 550 (1993), driven by fear of cancer-related issues, became grafted in toto into the California jurisprudence regarding fear of AIDS. The course and profiles of cancer and AIDS are markedly different, and the fear of cancer due to generalized exposure and fear of AIDS due to a discrete event are not fungible. See, generally, *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 580 N.W.2d 86 (1998). I also observe that in the instant case, there is expert testimony that Audrey suffered a "puncture wound," unlike the "prick" in *Macy's Cal., Inc. v. Superior Court*, 41 Cal. App. 4th 744, 48 Cal. Rptr. 2d 496 (1995), which could serve as the physical injury forming the basis for parasitic damages under the jurisprudence of both California and Nebraska. Nevertheless, we are confronted with the pronouncements in *Macy's Cal., Inc.* which, although they may or may not foreshadow what the California Supreme Court would say under the facts of the instant case, we are bound to respect.

BERNARD HRADECKY, APPELLANT, V. STATE OF NEBRASKA, APPELLEE. LAURA HRADECKY, APPELLANT, V. STATE OF NEBRASKA, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE AND CROSS-APPELLEE, AND BERNARD HRADECKY, THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLANT.

652 N.W.2d 277

Filed October 18, 2002. Nos. S-01-582, S-01-583.

1. **Tort Claims Act: Appeal and Error.** A district court's findings of fact in a proceeding under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996 & Cum. Supp. 1998), will not be set aside unless such findings are clearly erroneous.
2. **Tort Claims Act: Damages: Appeal and Error.** The amount of damages awarded in a case pursuant to the State Tort Claims Act is a matter solely for the finder of fact, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved at trial.
3. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court.
4. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.
5. **Actions: Parties: Standing.** The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
6. **Actions: Pleadings: Parties.** Under Neb. Rev. Stat. § 25-331 (Reissue 1995), a third-party claim can be asserted by a defendant only if the trial court determines that the proposed third-party defendant is or may be liable to the defendant for all or part of the plaintiff's claim.
7. **Actions: Parties.** The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff.
8. **Pleadings: Parties: Appeal and Error.** A motion to sever a third-party claim pursuant to Neb. Rev. Stat. § 25-331 (Reissue 1995) is addressed to the discretion of the trial court, and an order granting or denying such motion is reviewed by an appellate court for abuse of discretion.
9. **Appeal and Error.** Errors assigned but not argued will not be addressed on appeal.
10. **Negligence: Words and Phrases.** Gross negligence is great or excessive negligence or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.

Appeals from the District Court for Kimball County: KRISTINE R. CECAVA, Judge. Affirmed.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellants.

Jay L. Welch, of Locher, Cellilli, Pavelka & Dostal, L.L.C., and, on brief, Thomas D. Wulff, of Welch, White & Wulff, for appellee State of Nebraska.

Mary M. Schott and Edward F. Noethe, of Sodoro, Daly & Sodoro, for appellee Bernard Hradecky (case No. S-01-583).

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

STEPHAN, J.

Bernard Hradecky and Laura Hradecky, husband and wife, were injured on February 25, 1998, when a snowplow operated by an employee of the State of Nebraska struck a motor vehicle operated by Bernard in which Laura was a passenger. The Hradeckys filed separate personal injury actions against the State in the district court for Kimball County. In Laura's case, the State filed a third-party petition seeking contribution from Bernard. The cases were consolidated for trial, with fact issues in the third-party claim decided by a jury and all other issues decided by the court. Laura recovered damages on her claim, but Bernard did not. The State prevailed in its third-party claim against Bernard for contribution. The Hradeckys, as plaintiffs below, perfected timely separate appeals. Bernard, as the third-party defendant in Laura's case, cross-appealed. We moved the appeals to our docket and granted the Hradeckys' motions to consolidate the actions on appeal. We conclude that all assignments of error are without merit and affirm the judgments entered by the district court.

FACTS

PROCEDURAL HISTORY

After their claims were denied by the State Claims Board, the Hradeckys filed separate actions for negligence against the State pursuant to the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996 & Cum. Supp. 1998). Both alleged that they were injured when their vehicle, operated by Bernard, was struck from behind by a snowplow negligently operated by an employee of the State. The district court granted the Hradeckys'

partial motions for summary judgment in each case, finding the State negligent as a matter of law. The court denied the State's motions for summary judgment in both cases, but granted the State leave to file a third-party petition against Bernard in Laura's case.

The State's operative third-party petition alleged that the collision was proximately caused by Bernard's gross negligence and that the State was entitled to "be recompensed" for any amount for which it was held liable to Laura. The third-party petition also alleged that the State was entitled to an apportionment of fault between it and Bernard pursuant to Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995).

Laura filed a motion requesting the severance of the third-party claim for purposes of trial. In her motion, she alleged that the issues raised by the State in its third-party action were "functionally identical" to the issues raised by the State in its answer to the petition in Bernard's case, which was consolidated with Laura's case for the purpose of trial. She further alleged that she and Bernard would be prejudiced by a failure to sever the third-party claim because a jury would be confused if, at trial, Bernard were represented by one attorney on his primary claim and another on the third-party claim. The district court ruled that the State was entitled to a jury trial on the third-party claim and denied the motion for severance.

The consolidated cases proceeded to trial, with the Hradeckys' claims tried to the court and issues of fact in the State's third-party claim against Bernard tried to a jury. The Hradeckys, as plaintiffs, were represented by the same attorney, and a different attorney represented Bernard as the third-party defendant.

TRIAL

Trial commenced on December 13, 2000. Bernard testified that on the morning of February 25, 1998, he and Laura traveled from their home in Sterling, Colorado, to Kimball, Nebraska, in order to obtain title to a used vehicle. In ordinary weather and road conditions, the distance can be driven in approximately 1 hour 15 minutes. The Hradeckys left Sterling at 7 a.m., and at that time, the weather was clear but very windy and the roads were dry. Bernard drove.

The Hradeckys concluded their business in Kimball at approximately 9:10 a.m. Bernard testified that at that time, the wind was blowing and it was beginning to snow. Bernard decided to drive home via Interstate 80 rather than on Highway 71 due to the weather conditions. Bernard testified that he entered I-80 at the Kimball exchange at approximately 9:30 a.m. and that at that time, the gate to I-80 was open. Laura also testified that the gate was open at that time.

According to Bernard, weather conditions deteriorated as he drove east. He decreased his speed and began looking for an exit. Although Laura was helping him navigate and locate the exit, they missed the first available exit and continued driving east on I-80. Bernard testified that he was traveling at 25 to 30 miles per hour in the right lane when he heard a sudden rumble and was struck from behind by the snowplow. On cross-examination, he admitted that he saw no other traffic on I-80 prior to the accident.

Steve Sterling, an employee of the Nebraska Department of Roads and the road maintenance supervisor in Kimball, was called as a witness for the State. Sterling testified that he closed both the eastbound and westbound gates to I-80 at the Kimball exchange at 8:30 a.m. When the gates are closed, a "Road Closed" sign is displayed in the center of the gate and flashing lights on a nearby sign indicate the road is closed. The gates cover the entire access ramp, and when they are closed, it is impossible for a vehicle to enter I-80 without driving off the access road and around the closed gates. After closing the gates, Sterling made a sweep east on I-80 and encountered no traffic. He testified that by shortly after 9 a.m., the wind in Kimball was blowing 30 to 40 miles per hour and visibility was getting bad.

The February 25, 1998, entry from Sterling's work diary was admitted as an exhibit at trial. The diary includes an entry that Sterling closed the eastbound I-80 entrance at Kimball at 8:30 a.m., although the "8" is written very boldly and there appears to be text underneath it. Both parties offered expert testimony on the issue of whether the ink used to make the "8" was consistent with other ink on the page and what the text underlying the "8" was. The Hradeckys' expert testified that different ink was used to make the "8" and that the underlying text was the number 10. The State's expert agreed that different ink was used on the "8"

but found that different ink was also used on other entries in the diary on the same day. The State's expert disagreed that the underlying text was a 10 and opined that she could not determine what the text represented.

POSTTRIAL

At the conclusion of the testimony, the issues of whether Bernard was grossly negligent and whether any such negligence was a proximate cause of the accident were submitted to the jury. Utilizing a special verdict form returned on December 15, 2000, the jury answered both questions in the affirmative.

In an order entered in Laura's case on April 3, 2001, the district court determined that the verdict of the jury finding that Bernard was grossly negligent overcame the limitations of the Nebraska guest statute and permitted Bernard to be held liable for contribution with respect to Laura's claim. The court then apportioned 20 percent of the liability for Laura's injuries to the State and 80 percent to Bernard. The court assessed Laura's total damages at $35,000 and entered judgment against the State and Bernard accordingly. The damage award included special damages proved by Laura in the amount of $19,294.71, consisting entirely of medical expenses reasonably incurred as a result of her injuries. In assessing damages, the court found that Laura's injuries necessitated surgery and restricted her mobility.

In a separate order, also dated April 3, 2001, the court entered written findings on Bernard's action against the State. The court noted that Bernard was aware of the weather and road conditions at the time he entered I-80. The court specifically relied upon the testimony of Sterling and found that the I-80 gate was closed at 8:30 a.m. and that Bernard entered I-80 in spite of clear notice that it was closed. The court found Bernard negligent in entering a road that was closed, continuing on a closed road in zero visibility conditions, failing to exit the closed road when he had an opportunity to do so, failing to pull over when he could no longer maintain proper control, and stopping on I-80 in the left lane of traffic. The court held that Bernard's negligence was greater than that of the State and that he was thus barred from recovery on the basis of comparative negligence. See Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995).

The Hradeckys, as plaintiffs, filed motions for new trial. Bernard also filed a motion for new trial in his capacity as third-party defendant. Pursuant to a stipulation of the parties, the court modified its judgment on the third-party claim to apportion economic and noneconomic damages between the parties pursuant to § 25-21,185.10. The motions for new trial were overruled in all other respects.

ASSIGNMENTS OF ERROR

The separate appellate briefs filed by the Hradeckys set forth identical assignments of error. Each contends that the district court erred in (1) allowing the State to try its third-party action to a jury; (2) refusing to bifurcate and/or sever the trial of the State's third-party action from the trials of the Hradeckys' cases; (3) treating the jury in the third-party action as an advisory jury; (4) accepting the jury verdict when it was not supported by sufficient evidence; (5) committing multiple and cumulative errors that resulted in the denial of a fair trial which included (a) allowing the State to try the third-party claim to a jury, (b) denying the Hradeckys the right to participate in jury-related activities, (c) denying the Hradeckys the first and last argument during final argument, (d) presenting the jury with two cases wherein the same party was represented by two different attorneys which raised the issues of insurance and collateral sources, (e) allowing improper impeachment of Bernard, (f) allowing improper character evidence concerning the work habits of a State witness, and (g) refusing to permit the Hradeckys to cross-examine a State expert on her adherence to the discipline of graphology; and (6) denying their motions for new trial.

On cross-appeal, Bernard as the third-party defendant, assigns that the court erred in submitting the case to the jury because he was not grossly negligent as a matter of law.

STANDARD OF REVIEW

[1] A district court's findings of fact in a proceeding under the State Tort Claims Act, § 81-8,209 et seq., will not be set aside unless such findings are clearly erroneous. *Meyer v. State, ante* p. 545, 650 N.W.2d 459 (2002); *Goodenow v. State*, 259 Neb. 375, 610 N.W.2d 19 (2000).

[2] The amount of damages awarded in a case pursuant to the State Tort Claims Act is a matter solely for the finder of fact, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved at trial. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999).

ANALYSIS

Although these cases were consolidated for purposes of trial and appeal, we are asked to review two independent judgments. We do so separately, notwithstanding the fact that the Hradeckys' assignments of error in each case are identical.

Case No. S-01-583, Laura's Personal Injury Claim

In her first assignment of error, Laura contends that the district court erred in permitting a jury to decide issues of fact pertaining to the State's third-party claim against Bernard. Her position is based upon a provision in § 81-8,214 of the State Tort Claims Act which provides that "[t]he district court, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim." Laura argues that the third-party claim against Bernard was related to and dependent upon her claim against the State and that by virtue of the exclusive jurisdiction conferred by § 81-8,214, the State "had no right to a jury trial of its third-party action" against Bernard. Brief for appellant in case No. S-01-583 at 14.

[3-5] We do not reach the merits of this assignment of error because we conclude that Laura lacks standing to assert it. Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court. *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001). The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *In re Estate of Dickie*, 261 Neb. 533, 623 N.W.2d 666 (2001).

Although we have characterized standing as a "jurisdictional component of a party's case," *Chambers v. Lautenbaugh*, 263 Neb. 920, 925, 644 N.W.2d 540, 546 (2002), we have also applied principles of standing to determine whether a party may assert specific issues in an action over which a court has subject matter jurisdiction. For example, in *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000), an action brought by a former city employee against the City of Omaha and the City of Omaha Employees' Retirement System to recover pension benefits, we held that the employee did not have standing to seek disqualification of a city attorney from representing both the city and the retirement system. Similarly, in *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998), a medical malpractice action against two physicians, we held that the plaintiff lacked standing to seek disqualification of an attorney representing one of the defendants on the ground that he had previously represented the other defendant. In *In re Adoption of Baby Girl H., supra*, this court determined that a putative father who had not complied with statutory requirements for the assertion of parental rights lacked standing to assert judicial error in the entry of an adoption decree.

[6,7] It is true that the State's third-party claim is related to Laura's tort claim against the State in that the State sought contribution from the third-party defendant with respect to any liability it had to Laura. Under Neb. Rev. Stat. § 25-331 (Reissue 1995), a third-party claim can be asserted by a defendant only if the trial court determines that the proposed third-party defendant is or may be liable to the defendant for all or part of the plaintiff's claim. See *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000). However, none of the legal or factual issues presented in Laura's claim against the State were at issue in the third-party claim. The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff. *Id.*; *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 338 N.W.2d 601 (1983). Here, the district court, sitting without a jury pursuant to § 81-8,214, determined that Laura was entitled to recover damages in the amount of $35,000, thereby completely resolving her claim. The jury's findings were utilized by the court only to determine whether the State would be responsible for all of

Laura's damages or whether it was entitled to contribution from Bernard based upon his conduct. The third-party claim thus involved the rights and interests of only the State and Bernard, not those of Laura. Thus, we conclude that she has no standing to raise the issue of whether the State had a right to a jury trial of its third-party claim.

In her second assignment of error, Laura contends that having resolved that the third-party claim could be tried to a jury, the district court erred in failing to bifurcate or sever the third-party claim for separate trials. Laura clearly does have standing to assert this issue. Section 25-331 provides in part:

> The court on its own motion, *or motion of any party*, may move to strike the third-party claim, or for its severance or separate trial if the third-party claim should delay trial, might tend to confuse a jury, *or in any way jeopardize the rights of the plaintiff.*

(Emphasis supplied.) Laura could and did file a motion to sever the third-party claim for separate trials on the ground of potential jury confusion prejudicial to her interests as plaintiff. Although this motion does not recite that it was filed pursuant to § 25-331, we treat it as such.

[8] We have not previously identified the standard by which we review a trial court's ruling on a motion to sever a third-party claim. However, we have held that the matter of granting leave to file a third-party complaint pursuant to § 25-331 is within the discretion of the trial court. *Employers Reins. Corp. v. Santee Pub. Sch. Dist. No. C-5*, 231 Neb. 744, 438 N.W.2d 124 (1989); *Life Investors Ins. Co. v. Citizens Nat. Bank*, 223 Neb. 663, 392 N.W.2d 771 (1986). We therefore conclude that a motion to sever a third-party claim pursuant to § 25-331 is addressed to the discretion of the trial court, and an order granting or denying such motion is reviewed by an appellate court for abuse of discretion. See, *Swenson v. Suhl*, 19 F.R.D. 517, 519 (D. Neb. 1956) (holding that "motion for the vacation of an order allowing third-party procedure, as also a motion in the first instance for its allowance, is addressed to the mature and informed discretion of the court"); *Beach v. Smith*, 298 S.C. 424, 380 S.E.2d 869 (S.C. App. 1989) (holding whether to grant motion to strike third-party claim is addressed to sound discretion of trial court).

Implicit in the trial court's denial of the motion to sever was a belief that it could conduct a bench trial on the Hradeckys' consolidated personal injury claims and a jury trial on the State's third-party claim simultaneously without confusing the jury or otherwise prejudicing the rights of the Hradeckys. From our review of the entire record, we conclude that the trial court accomplished that objective. Throughout the trial, the court drew a clear line of distinction between fact issues which would be submitted to the jury and those to be decided by the court. In its opening remarks to the jury, the trial court stated that it would decide some issues of fact and the jury would decide other issues. The jury was excused during portions of the trial that pertained solely to the issue of the Hradeckys' damages. Prior to deliberations, the jury was specifically instructed: "The Court not you the jury will decide the issues involved in Laura Hradecky's claim against the State of Nebraska." The verdict form returned by the jury related solely to disputed issues of fact in the State's third-party claim against Bernard, with no reference to Laura's claim. The court made separate findings of fact with respect to Laura's entitlement to damages and the amount thereof.

Laura argues that because Bernard had separate counsel with respect to the third-party claim, "the common sense explanation for the presence of two attorneys for [Bernard] was that one was hired by an insurer while the other was hired by [Bernard] and [Laura]." Brief for appellant in case No. S-01-583 at 23. The record contains no reference to the subject of liability insurance. Whether the jury may have made the suggested inference from the fact that Bernard was represented by two lawyers is entirely speculative and, in any event, would have no bearing on Laura's case, which was decided by the court, not by the jury. We conclude that the district court did not abuse its discretion in denying Laura's motion to sever the third-party claim.

In her third assignment of error, Laura contends that the trial court erred in treating the jury that decided the State's third-party action against Bernard in Laura's case as an advisory jury in Bernard's case, where all parties did not consent to an advisory jury and where counsel for Bernard was not allowed to voir dire, select, propose instructions, or argue to the jury. On its face, this assignment of error has no relationship to Laura's case. Moreover,

we find nothing in the record to suggest that the court utilized the jury in any "advisory" capacity. As discussed above, the record is clear that the jury decided two disputed issues of fact with respect to the third-party claim and had no other role in the trial. This assignment of error is without merit. Likewise, there is no merit to Laura's fourth assignment of error in which she contends that the district court erred in "accepting the jury's verdict as her own in the face of insufficient evidence to support the verdict." The record clearly reflects that the court made its own independent findings that Laura sustained and was entitled to recover damages in the amount of $35,000.

[9] In her fifth assignment of error, Laura alleges that "[m]ultiple and cumulative errors" combined to deprive her of a fair trial. We have recognized the doctrine of cumulative error in the context of a criminal jury trial, stating that while one or more trial errors might not, standing alone, constitute prejudicial error, "their cumulative effect was to deprive the defendant of his constitutional right to a public trial by an impartial jury." *Wamsley v. State*, 171 Neb. 197, 209, 106 N.W.2d 22, 29 (1960). We have not applied this doctrine in a civil case. Assuming without deciding the general proposition that the doctrine could be applied in a civil case, there is no basis for its application in this case. The first three "cumulative errors" alleged by Laura are simply a restatement of her contention that the jury was improperly utilized in this case. We have found those arguments to be without merit. Other "cumulative errors" alleged by Laura include improper cross-examination of Bernard, improper admission of character evidence with respect to one of the State's witnesses, a ruling made during the cross-examination of an expert witness called by the State, and the sequence in which closing arguments were presented by counsel. Although Laura includes these in what she characterizes as a "laundry list of errors," brief for appellant in case No. S-01-583 at 30, she does not otherwise discuss or argue them. Errors assigned but not argued will not be addressed on appeal. *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001).

In her final assignment of error, Laura contends that the district court erred in denying her motion for new trial based upon an alleged inadequacy of her damage award. The district court

awarded $19,294.71 in economic damages, which represented all medical bills proved to have been necessitated by Laura's injuries, and $15,705.29 in noneconomic damages. Laura argues that the latter amount was inadequate compensation for her pain and suffering and the permanency of her injuries.

There was conflicting evidence on the issue of noneconomic damages. Laura testified that she continued to experience pain, numbness, and limitation of motion in her left arm and shoulder and in her neck and that she sometimes awoke during the night due to pain. She testified that she is left handed but is learning to use her right hand to brush her teeth and wash and comb her hair because using her left hand causes pain. Laura further testified that she is unable to do laundry or vacuum due to the pain. There was evidence that Laura was energetic and involved in family activities prior to the accident, but is less energetic and more moody since the accident due to her pain.

However, the record also establishes that Laura was disabled prior to the accident due to severe type I lupus. She first sought medical attention for neck and back pain approximately 1 month following the accident. Her physician diagnosed a ruptured cervical disk for which she underwent surgery on June 1, 1998. Laura saw her surgeon for postoperative examinations in July and October. At the time of the last visit, the surgeon noted that she was " 'doing just perfect' " and " 'really has no symptoms.' " Laura's physician did not place any physical restrictions on her activities.

As noted above, the amount of damages awarded in an action under the State Tort Claims Act is a matter solely for the factfinder, whose action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of damages proved at trial. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). Based upon our review of the record, we conclude that the damage award of $35,000 meets this test and was therefore not inadequate. Accordingly, the district court did not err in denying Laura's motion for a new trial.

Cross-Appeal

Bernard's sole argument on cross-appeal is that the district court erred in submitting the issue of gross negligence to the

jury because, as a matter of law, he was not grossly negligent in the operation of his vehicle. The jury was instructed that Bernard was grossly negligent in (1) leaving a place of safety in Kimball and choosing to drive in blizzard conditions with near zero visibility, (2) driving around the closed and locked gate at the Kimball entrance ramp, (3) continuing to attempt to drive on I-80 when it was not safe to do so and he had opportunities to exit or pull off to the side, and (4) failing to maintain a reasonable lookout for snow removal vehicles or other road maintenance vehicles while traveling on a closed highway. There is evidence in the record to support each of these specifications of negligence, although there is also evidence to the contrary.

[10] Gross negligence is " 'great or excessive negligence, or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.' " *Youngs v. Potter*, 237 Neb. 583, 588, 467 N.W.2d 49, 52 (1991), quoting *Carlson v. Waddle*, 223 Neb. 671, 392 N.W.2d 777 (1986). We understand Bernard to argue that even if the jury found he had committed all of the acts of negligence enumerated in the instruction, it could not have found that he was grossly negligent because such acts do not establish the absence of "slight care." He points to evidence offered at trial that was favorable to him on this issue, including evidence that he slowed his speed due to the weather conditions and that his headlights and taillights were on. However, we agree with the district court that there was sufficient evidence which, if believed by the factfinder, would amount to gross negligence. One who intentionally and deliberately enters a closed roadway and continues to drive on such roadway in near zero visibility can reasonably be found to be exhibiting the absence of even slight care, even if the person drives slowly and with his or her headlights on. We find no error in the submission of this issue to the jury.

Case No. S-01-582, Bernard's Personal Injury Claim

As noted above, Bernard's assignments of error in this case are identical to those of Laura in her separate case. The first four assignments of error pertain to the use of a jury to determine issues of fact with respect to the State's third-party claim against Bernard. That claim was asserted in Laura's personal injury case, which is before us as case No. S-01-583 and discussed

above. There is no indication in the record that the jury considered or decided any issue with respect to Bernard's personal injury claim against the State, case No. S-01-582. To the extent that Bernard argues that the district court accepted or in some way utilized the jury's verdict in resolving Bernard's separate claim, his argument finds no support in the record. The court's judgment in this case makes no reference to the jury verdict. It includes specific findings of fact which support the court's conclusion that Bernard was negligent to a degree which barred his recovery, including a finding that "the gate was closed as of 8:30 a.m. and that Mr. Hradecky had entered the main lanes of I-80 in spite of the clear notice that I-80 was closed." Bernard's first four assignments of error are without merit.

Bernard raises the same "cumulative errors" issues assigned by Laura and discussed above. They are without merit. Finally, Bernard contends that the district court erred in denying his motion for new trial. His brief identifies no specific reasons or arguments in support of this assignment, other than the arguments on his other assignments of error. We conclude that the district court did not err in denying Bernard's motion for new trial.

CONCLUSION

For the reasons discussed above, we find no reversible error in either of these consolidated appeals, and therefore affirm both judgments.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, NEBRASKA EQUAL OPPORTUNITY COMMISSION, ON BEHALF OF RAYMOND SERRANO ET AL., APPELLANT, V. LANNY BELLAMY, APPELLEE.

652 N.W.2d 86

Filed October 18, 2002. No. S-01-727.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.

3. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **Jurisdiction: Final Orders: Motions for New Trial: Time: Notice: Appeal and Error.** In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial.
5. **Motions for New Trial: Pleadings: Judgments: Time: Notice: Appeal and Error.** The running of the time for filing a notice of appeal may be terminated by the filing of certain motions, including a motion for new trial under Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2000), a motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2000), or a motion to set aside a verdict or judgment under Neb. Rev. Stat. § 25-1315.02 (Cum. Supp. 2000).
6. **Jurisdiction: Pleadings: Time: Notice: Appeal and Error.** When a motion terminating the 30-day appeal period is filed, a notice of appeal filed before the court announces its decision upon the terminating motion has no effect and an appellate court acquires no jurisdiction.
7. **Pleadings: Judgments.** A determination as to whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title.
8. **Pleadings: Judgments: Time.** In order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2000), and must seek substantive alteration of the judgment.
9. **Pleadings: Judgments: Time: Notice: Appeal and Error.** A motion which merely seeks to correct clerical errors or one seeking relief that is wholly collateral to the judgment is not a motion to alter or amend a judgment, and the time for filing a notice of appeal runs from the date of the judgment.

Appeal from the District Court for Dawson County: DONALD E. ROWLANDS II, Judge. Appeal dismissed.

Don Stenberg, Attorney General, and Delores N. Coe-Barbee for appellant.

Melodie Turner Bellamy for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The Nebraska Equal Opportunity Commission appeals from a decision of the district court for Dawson County awarding attorney fees to Lanny Bellamy. The district court determined that Bellamy was a "prevailing party" under Neb. Rev. Stat. § 20-341

(Reissue 1997) when the commission dismissed, without prejudice, the petition filed against him.

BACKGROUND

On September 12, 2000, the commission instituted a civil action against Bellamy under Neb. Rev. Stat. § 20-340 (Reissue 1997) alleging a violation of the Nebraska Fair Housing Act, Neb. Rev. Stat. § 20-301 et seq. (Reissue 1997 & Cum. Supp. 2000). In his answer, Bellamy requested attorney fees.

On March 19, 2001, the case was dismissed without prejudice on the motion of the commission. Bellamy later filed a motion for attorney fees pursuant to § 20-341 or, in the alternative, under Neb. Rev. Stat. § 25-824 (Reissue 1995) as a defendant to a frivolous suit.

On May 23, 2001, the district court found that Bellamy was a "prevailing party" within the meaning of § 20-341 and awarded Bellamy $3,525 in attorney fees. The district court declined to award attorney fees under § 25-824 because there was insufficient evidence to show that the lawsuit was frivolous or brought in bad faith by the commission.

On May 31, 2001, the commission filed a motion entitled "Motion for Reconsideration." The motion reads in full as follows:

> Comes now the plaintiff, in the above captioned case and requests that the Court reconsider its decision in the above captioned case, due to the attached case, noted as Exhibit A, whose decision was rendered on May 29, 200[1] by the Supreme Court of the United States as to the definition of a prevailing party.

Exhibit A is the U.S. Supreme Court's ruling in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001), which was decided on May 29, 2001.

On June 22, 2001, with its motion for reconsideration still pending, the commission filed its notice of appeal in district court, appealing the May 23, 2001, order awarding attorney fees. In a July 13, 2001, journal entry, the district court found that it had no jurisdiction to decide the commission's motion for reconsideration because of the commission's appeal. We moved

the case to our own docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

ASSIGNMENT OF ERROR

The sole assignment of error raised by the commission is that the district court erred in finding that Bellamy was a prevailing party entitled to attorney fees under § 20-341.

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. *Lopez v. IBP, inc., ante* p. 273, 646 N.W.2d 628 (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. *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 642 N.W.2d 816 (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.*

[4-6] In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial. *Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2000). The running of the time for filing a notice of appeal may be terminated by the filing of certain motions, including a motion for new trial under Neb. Rev. Stat. § 25-1144.01 (Cum. Supp. 2000), a motion to alter or amend a judgment under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2000), or a motion to set aside a verdict or judgment under Neb. Rev. Stat. § 25-1315.02 (Cum. Supp. 2000). See § 25-1912(3). When a motion terminating the 30-day appeal period is filed, a notice of appeal filed before the court announces its decision upon the terminating motion has no effect and an appellate court acquires no jurisdiction. See, *Reutzel v. Reutzel*, 252 Neb. 354, 562 N.W.2d 351 (1997); § 25-1912(3).

In this case, the district court entered an order awarding attorney fees to Bellamy on May 23, 2001. The commission filed its notice of appeal 30 days later, on June 22. However, the effect of the notice of appeal is now in question because of the

commission's "Motion for Reconsideration," filed on May 31 and still pending at the time the commission filed its notice of appeal. Nebraska statutes do not recognize motions for reconsideration, and this court has recognized the confusion created by the labeling of pleadings as motions for reconsideration. *Breeden, supra*. Once again, we are required to decipher a motion for reconsideration and determine its effect on the running of the appeal period. If the commission's motion for reconsideration is of the type which terminates the 30-day appeal period, then the commission's notice of appeal was ineffective and this court has no jurisdiction over the commission's purported appeal. If not, the commission's appeal is properly before us for consideration.

We have previously held that a motion for reconsideration does not act as a motion for new trial so as to terminate the appeal period. See, *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2000); *Breeden, supra*; *Bechtold v. Gomez*, 254 Neb. 282, 576 N.W.2d 185 (1998). However, in 2000, § 25-1912(3) was amended to provide that the running of the time for filing a notice of appeal shall be terminated not only by a timely motion for new trial or by a timely motion to set aside a verdict or judgment, but also by "a timely motion to alter or amend a judgment under section 25-1329." 2000 Neb. Laws, L.B. 921. Thus, we now consider whether to treat the commission's motion for reconsideration as a motion to alter or amend a judgment.

Federal courts have adopted a bright-line rule and hold that a motion for reconsideration, if filed within 10 days of the entry of judgment, is the functional equivalent of a motion to alter or amend a judgment brought pursuant to Fed. R. Civ. P. 59(e). *Cockrel v. Shelby County School Dist.*, 270 F.3d 1036 (6th Cir. 2001); *American Ironworks v. North American Const.*, 248 F.3d 892 (9th Cir. 2001); *COMSAT Corp. v. St. Paul Fire and Marine Ins. Co.*, 246 F.3d 1101 (8th Cir. 2001); *Adams v. Reliance Standard Life Ins. Co.*, 225 F.3d 1179 (10th Cir. 2000); *Amatangelo v. Borough of Donora*, 212 F.3d 776 (3d Cir. 2000); *St. Paul Mercury Ins. Co. v. Fair Grounds Corp.*, 123 F.3d 336 (5th Cir. 1997); *Aybar v. Crispin-Reyes*, 118 F.3d 10 (1st Cir. 1997); *Square D Co. v. Fastrak Softworks, Inc.*, 107 F.3d 448 (7th Cir. 1997); *Ass'n for Retarded Citizens v. Thorne*, 68 F.3d

547 (2d Cir. 1995); *In re Burnley*, 988 F.2d 1 (4th Cir. 1992); *Wright v. Preferred Research, Inc.*, 891 F.2d 886 (11th Cir. 1990); *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881 (D.C. Cir. 1987); *Tylo Sauna, S.A. v. Amerec Corp.*, 826 F.2d 7 (Fed. Cir. 1987). Several state courts likewise construe motions for reconsideration as motions to alter or amend a judgment. *Malone v. Gainey*, 726 So. 2d 725 (Ala. Civ. App. 1999); *Soderlund v. Admin. Director of Courts*, 96 Haw. 114, 26 P.3d 1214 (2001); *In re Adoption of A.P.*, 26 Kan. App. 2d 210, 982 P.2d 985 (1999); *Smith v. Johnson*, 125 N.C. App. 603, 481 S.E.2d 415 (1997); *Woodworth v. Chillemi*, 590 N.W.2d 446 (N.D. 1999); *Wentworth v. Fletcher Allen Health Care*, 171 Vt. 614, 765 A.2d 456 (2000); *Law v. Monongahela Power Co.*, 210 W. Va. 549, 558 S.E.2d 349 (2001).

[7-9] However, courts have not blindly treated all motions entitled "Motion for Reconsideration" as a motion to alter or amend a judgment. A determination as to whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title. See *Sherman v. Rose*, 943 P.2d 719 (Wyo. 1997). See, also, *Kerr v. Clary*, 37 P.3d 841 (Okla. 2001); *Tennessee Farmers Mut. Ins. Co. v. Farmer*, 970 S.W.2d 453 (Tenn. 1998). To provide guidance to the lower courts and practicing bar, we hold that in order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under § 25-1329, and must seek substantive alteration of the judgment. See *U.S. v. Deutsch*, 981 F.2d 299 (7th Cir. 1992). A motion which merely seeks to correct clerical errors or one seeking relief that is wholly collateral to the judgment is not a motion to alter or amend a judgment, and the time for filing a notice of appeal runs from the date of the judgment. *Id.*

Applying these rules to the present case leads us to construe the commission's motion for reconsideration as a motion to alter or amend a judgment under § 25-1329. The commission's motion asked the district court to reconsider its decision in light of the U.S. Supreme Court's opinion in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855

(2001). The commission claims that under *Buckhannon Board & Care Home, Inc.*, which was decided 6 days after the district court granted Bellamy's motion for attorney fees, Bellamy is not a "prevailing party" entitled to attorney fees, as the Court interpreted that term under various sections of federal law. The commission's motion seeks substantive alteration of the judgment and was filed within 10 days of the entry of the order awarding attorney fees to Bellamy. Thus, the commission's motion for reconsideration is a motion to alter or amend a judgment under § 25-1329, which terminated the appeal period under § 25-1912(3). As a result, the commission's notice of appeal was prematurely filed and this court does not have jurisdiction over the commission's purported appeal.

CONCLUSION

A motion seeking substantive alteration of a judgment and filed within 10 days of the entry of judgment is the functional equivalent of a motion to alter or amend a judgment under § 25-1329. A motion to alter or amend a judgment terminates the appeal period, and a notice of appeal filed before disposition of the terminating motion is ineffective and does not convey jurisdiction upon an appellate court. Thus, this court does not have jurisdiction over the commission's appeal when the commission filed its notice of appeal while its motion for reconsideration was still pending.

APPEAL DISMISSED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. THOMAS M. PETERSEN, RESPONDENT.

652 N.W.2d 91

Filed October 18, 2002. No. S-01-741.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.

2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
4. **Disciplinary Proceedings.** Only those matters which are specifically charged in the complaint in disciplinary proceedings can be considered.

Original action. Judgment of dismissal.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Jeffrey A. Silver for respondent.

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

PER CURIAM.

NATURE OF CASE

This is an original action brought by the Counsel for Discipline of the Nebraska Supreme Court seeking the imposition of discipline against Thomas M. Petersen, a member of the Nebraska State Bar Association. Petersen was formally charged with violating disciplinary rules and his oath of office as an attorney in connection with his representation of Jennifer Davis, also known as Jennifer Weeks (Weeks). A hearing was held, and the referee found that Petersen engaged in conduct involving dishonesty, fraud, and deceit. The referee recommended that Petersen be suspended from the practice of law for 1 year. Petersen filed exceptions to the referee's report. We reject the referee's determination and dismiss the action.

BACKGROUND

Petersen was admitted to the practice of law in the State of Nebraska on April 14, 1995. He has been engaged in the private practice of law in Omaha, Nebraska, since that date and at all times relevant to this proceeding. Petersen practices law as the Petersen Law Office and employs attorneys, paralegals, secretaries, and an office manager to assist him in his practice. On February 20, 1998, Weeks retained the Petersen Law Office to represent her in a personal injury claim arising out of an automobile accident. She signed a contingency fee agreement

whereby the Petersen Law Office would receive one-third of all amounts recovered.

Petersen had previously defended Weeks, and she was pleased with his representation. While the personal injury claim was pending, Weeks and her husband, Ray Davis, consulted Petersen about a possible bankruptcy filing. They decided against filing the bankruptcy, and Petersen did not bill them for the consultation.

Weeks' personal injury claim was handled by several different attorneys in the Petersen Law Office. The case was transferred to Tracy Zitnik in early 2000. Zitnik began working for Petersen in December 1999.

On January 28, 2000, the Petersen Law Office received a letter from the insurance company with whom it was negotiating on Weeks' behalf containing a final offer to settle for no more than $7,600. Weeks gave Zitnik the authority to settle for that amount. On March 8, the insurance company sent a memorandum to Zitnik stating that Weeks was responsible for all medical liens. Zitnik had no further contact with Weeks or her claim until March 30 or 31.

According to Weeks, Petersen called her and asked her to come to his office to go over the settlement statement and to sign the necessary release papers. Weeks went to see Petersen on March 25, 2000.

Weeks testified that Petersen showed her a photocopy of the settlement check and had her sign the copy. Petersen went over the settlement statement with her. She did not receive her money that day, as the banks were closed, but was told to come back the following Monday. Petersen told Weeks that he was writing checks for the medical bills, including a check for a bill to the chiropractor at the Natural Health Center, P.C. He told her that he had obtained a reduction of this bill from $3,807.09 to $3,000 and that he was going to try to reduce it even more.

On Monday, March 27, 2000, the settlement check was deposited into the firm's trust account. Also on March 27, the Petersen Law Office issued checks for all disbursements on Weeks' settlement statement except for the disbursement to the Natural Health Center. Five checks were written that day. The checks for attorney fees and costs were deposited into the firm's business account. The checks to the University of Nebraska

Medical Center and to University Medical Associates were retained in Weeks' file.

On Tuesday, March 28, 2000, Petersen further negotiated with the Natural Health Center, which resulted in a reduction of Weeks' bill from $3,000 to $2,500. He instructed the office manager, Matthew R. Samp, to write a check to the Natural Health Center in that amount. Samp wrote check No. 12666 to the Natural Health Center on March 29. Samp thought Weeks owed the firm money for past representation on a driving under the influence (DUI) charge. He asked Petersen about it, and Petersen told him to find the documentation. On March 29, Samp drafted check No. 12665, referencing "Weeks, Jennifer - DWI," payable to the firm for $500. Samp signed the check, copying Petersen's signature, and deposited it into the firm's business account. Samp, however, did not find the necessary documentation to support the issuance of the check.

Lisa M. Samuelson was an employee at the Petersen Law Office during the relevant time period. While she was closing Weeks' file and preparing to send out the medical payments, she noticed that the Natural Health Center bill was $500 less than the corresponding charge stated on the settlement statement. She also observed check No. 12665, or the stub to that check, in the file. She was not aware of the firm's representing Weeks on a DUI charge and took the file to another employee, who stated that there was no DUI file for Weeks. Samuelson then gave the file to Zitnik and notified Zitnik of her concerns.

Zitnik could find no documentation verifying that the Petersen Law Office represented Weeks on a DUI charge. She called Weeks to ask her if the Petersen Law Office had ever represented her on such a charge, and Weeks said no. Despite her awareness of the discrepancies in the file, Zitnik gave the file back to Samuelson to close. Samuelson mailed checks to medical providers and a letter to Weeks, closing the file.

By the time the discrepancy in Weeks' file was brought to Zitnik's attention, Zitnik had decided to leave the Petersen Law Office. She did not give notice that she was going to leave. On April 4, 2000, after Zitnik cashed her paycheck, she went to the Douglas County courthouse and gave her resignation letter to Petersen while he was engaged in a court proceeding.

Before going to the courthouse, Zitnik made a photocopy of Weeks' settlement statement, the check stubs, and the memorandum from Petersen to Samp directing Samp to pay $2,500 to the Natural Health Center. She made notations on the settlement statement and circled the concerns she had. She called Weeks and informed her that she was going to send some documents for Weeks to review. She gave Weeks the name and telephone number for the Assistant Counsel for Discipline. Zitnik encouraged Weeks to file a complaint and indicated that she intended to file a complaint as well.

On April 5, 2000, Weeks received the documents Zitnik sent to her. That same day, Petersen went to Zitnik's new office to discuss why she left. Zitnik told Petersen about how the firm took money for a DUI case that it had not handled. Petersen asked where he could find such information, and she told him to look in Weeks' file. Zitnik had copies of the pertinent documents with her when Petersen was in her office, but did not inform Petersen of that fact.

Petersen then called Samp on his cellular telephone and asked what was happening with Weeks' file. Samp told Petersen about the existence of the $500 check for "Weeks, Jennifer - DWI" in the file. Samp confirmed that he wrote check No. 12665 without documentation. Petersen called Weeks and asked her if the firm had done any other work for her or if she owed the firm any money. She responded no to both questions. He then asked Weeks to come to his office and met with her the same day. After Weeks had arrived at Petersen's office, Petersen again asked her if the firm had performed any other work for her or for Davis. She told him no. Petersen informed Weeks that the Natural Health Center bill had been reduced and that she was owed more money.

Petersen testified that he apologized for the mistake and gave Weeks a check for $760.81, representing the $500 owed and extra money to ensure that she personally recovered more than her attorneys. According to Petersen, it was the policy of the firm to never take more than the client was receiving. On July 5, 2000, the Council for Discipline received a complaint from Weeks regarding Petersen.

A hearing was held in front of a referee, and on October 19, 2001, the report of the referee was released. The referee found

that Petersen had violated Canon 1, DR-102(A)(1) and (4), and his oath of office as an attorney. He recommended that Petersen be suspended from the practice of law for 1 year.

ASSIGNMENTS OF ERROR

Petersen claims, rephrased, (1) that there is not clear and convincing evidence that he violated DR 1-102(A)(1) and (4) and his oath of office; (2) that his motion to dismiss, based upon the violation of the sequestration order and the changed testimony of Davis, should have been sustained; (3) that the referee erred in his evidentiary rulings; and (4) that the referee erred in recommending a 1-year suspension.

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. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001).

[2,3] Disciplinary charges against an attorney must be established by clear and convincing evidence. *Id.* Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000).

ANALYSIS

The referee found that Petersen had violated DR 1-102(A)(1) and (4), and his oath of office. DR 1-102(A) states in pertinent part: "DR 1-102 Misconduct. (A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Counsel for Discipline did not file exceptions to the referee's report.

We disagree with the findings of the referee and find that the Counsel for Discipline did not prove by clear and convincing evidence that Petersen engaged in dishonest, fraudulent, or deceitful conduct. See *In re Interest of Michael B. et al., supra.*

We find that the relevant time period is March 24 to April 5, 2000. It is within this period of time that the crucial events of the case occurred.

Petersen told Weeks that he reduced the Natural Health Center bill from $3,807.09 to $3,000 and that he was going to try to reduce it even further. On March 28, 2000, Petersen was successful in reducing the bill to $2,500. Petersen did not try to keep the reduction a secret from anyone in his office. In fact, Weeks' case file contained both the settlement statement and the check to the Natural Health Center.

Petersen did not attempt to cover up the issuance of check No. 12665, and its issuance did not amount to dishonest, fraudulent, or deceitful conduct on the part of Petersen. The corresponding check stub which listed "Weeks, Jennifer - DWI" was placed in Weeks' case file for anyone who had access to see it. Additionally, the evidence is not sufficient to find that Petersen was aware Samp had even written check No. 12665. Petersen's instruction was clear that Samp was to find the supporting documents and confirm the outstanding balance before issuing a check for payment owed on a possible past representation. At no time did Petersen authorize Samp to issue a $500 check without first locating the documentation to support the claim.

Samp admits that he did not review any of the records before issuing check No. 12665 to the Petersen Law Office, despite the clear directive of Petersen. Petersen did not learn that Samp had issued the check until his conversation with Zitnik on April 5, 2000.

Once Petersen was made aware of what had happened, he took immediate steps to correct the situation. He paid Weeks the money that was owed to her, he relieved Samp of his primary duties as office manager, and he revoked Samp's authority to sign Petersen's name to trust account checks. These actions occurred several months before Weeks filed a complaint with the Counsel for Discipline.

[4] We recognize the record suggests that Petersen failed to properly supervise and control his employees and that his office management was sloppy. But, Petersen was not charged for this conduct. Only those matters which are specifically charged in the complaint in disciplinary proceedings can be considered.

See *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989).

We find that the relator has failed to prove by clear and convincing evidence that Petersen violated DR 1-102(A)(1) and (4), and his oath of office.

CONCLUSION

Because the relator failed to prove by clear and convincing evidence that Petersen engaged in conduct involving dishonesty, fraud, or deceit, we reject the contentions of the Counsel for Discipline and findings of the referee and find that the charges against Petersen should be dismissed.

JUDGMENT OF DISMISSAL.

GERRARD, J., concurring in the result.

I have a markedly different view of what the record establishes about the respondent's conduct, but given the discrepancy between what was charged and what was proved, I reluctantly concur. The operative formal charges in the instant case charged Petersen with violations of Canon 1, DR 1-102(A)(1) (violation of disciplinary rule); DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit, or misrepresentation); and Canon 7, DR 7-102(A)(5) (knowingly making false statement of law or fact). Petersen's failure to supervise and control the activities of his employees, amply established by the evidence, was negligent and bordered on incompetent, but does not fall within the scope of the allegations or disciplinary rules set forth in the formal charges.

Only those matters which are specifically charged in the complaint in a disciplinary proceeding can be considered. See *State ex rel. Nebraska State Bar Assn. v. Leonard*, 212 Neb. 379, 322 N.W.2d 794 (1982). See, also, *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989) (referee's finding that respondent should be disciplined for failing to supervise employees was error where attorney was not charged with such failure). Had the formal charges specifically accused Petersen, by virtue of his failure to supervise his employees, of engaging in conduct adversely reflecting on his fitness to practice law, see DR 1-102(A)(6), then the result of this proceeding might have been different.

Petersen's poor management of his office and inadequate supervision of Samp, his office manager, could, potentially, subject him to discipline. That Petersen should escape discipline in this proceeding is due solely to the fact that the operative formal charges against him did not raise the issue of Petersen's failure to supervise the conduct of his employees, or charge Petersen with violation of a disciplinary rule pursuant to which such conduct could be punishable.

In his analysis, the referee found that "[Petersen]'s violations arose from disregard for the sanctity of client funds and unprofessional and sloppy office procedures. [Petersen] encouraged office practices which showed no respect for the meaning of a signature, whether it was his or [others]." I agree with the referee's view of the evidence.

The record establishes, beyond reasonable dispute, that Petersen's office management practices were inappropriate for a member of the bar. The record shows that Petersen's signature was routinely " 'replicated' " by his employees on letters and court filings and that Petersen was aware of this practice. Samp also routinely signed Petersen's name to checks drawn on the firm's trust account without Petersen's specific authorization for each transaction. The referee specifically noted that Petersen's office procedures included the "forgery" of Petersen's signature on letters and legal documents, "[w]itnessing" and notarization of clients' signatures by individuals who were not actually present to observe the clients' signatures, and "[f]orgery" of Petersen's signature on checks drawn on the trust account. It was precisely these practices which permitted the issuance of the $500 check to the Petersen Law Office in this case, without verification that the firm was actually entitled to the money.

We have stated that a lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds. *Kirshen, supra*. An attorney has a duty to supervise the conduct of his or her office and may not escape responsibility to clients by blithely contending that any shortcomings are solely the fault of an employee. See *id*. We have held that a lawyer is ultimately responsible for the conduct of his or her employees and associates in the course of the professional representation of the client. *Id*.

While Petersen in the instant case may have directed Samp to "find the paperwork" relating to the check at issue, Samp's issuance of that check without finding the paperwork was a direct result of established office procedures of which Petersen was aware and which Petersen permitted and even encouraged.

I am convinced, based on the record presented, that Petersen's behavior was inexcusable and may have been unethical. I concede, however, that Petersen's failure to supervise the unacceptable behavior of his employees does not prove, by clear and convincing evidence, any of the disciplinary rule violations that were alleged in the formal charges against him. Thus, I reluctantly concur in the result.

MILLER-LERMAN, J., joins in this concurrence.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. BRIEN P. O'BRIEN, RESPONDENT.

652 N.W.2d 97

Filed October 18, 2002. No. S-02-1094.

Original action. Judgment of disbarment.

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

PER CURIAM.

Brien P. O'Brien, respondent, was admitted to the practice of law in the State of Nebraska on March 4, 1991. On April 25, 2002, a grievance was filed with the Office of the Counsel for Discipline against respondent. Respondent's alleged misconduct involved mishandling of client funds.

On September 25, 2002, respondent filed with this court a voluntary surrender of his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent admitted the essential facts of the grievance and that he had violated Canon 1, DR 1-102(A)(1) and (4), and Canon 9, DR 9-102(A) and (B)(4), of the Code of Professional Responsibility and his oath of office. Respondent "freely, voluntarily and knowingly"

waived his right to notice, appearance, or hearing prior to the entry of an order.

Neb. Ct. R. of Discipline 15 (rev. 2001) provides:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.
>
> (2) A voluntary surrender of license shall not terminate such Grievance, Complaint, or Formal Charge unless an appropriate order shall be entered by the Court.

Pursuant to rule 15, this court finds that respondent has voluntarily surrendered his license to practice law, admitted in writing that he has engaged in the conduct that violated his oath of office as well as DR 1-102(A)(1) and (4) and DR 9-102(A) and (B)(4) of the Code of Professional Responsibility, consented to the entry of an order of disbarment, and waived all proceedings against him.

Upon due consideration of the pleadings in this matter, the court finds that respondent's admission and waiver are knowingly made. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, he shall be subject to punishment for contempt of this court. Costs to be taxed against respondent.

JUDGMENT OF DISBARMENT.

IVORIE PEARL NEWMAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN HENRY M. CHAMBERLIN, DECEASED, APPELLEE, V. ALFRED THOMAS, APPELLANT.

652 N.W.2d 565

Filed October 25, 2002. No. S-01-939.

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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. ____: ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Decedents' Estates: Statutes: States.** The provisions of article 27 of the Nebraska Probate Code should be construed so as to effectuate their general purpose to make uniform the law of those states which enact them. Neb. Rev. Stat. § 30-2746 (Reissue 1995).
5. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
7. **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.
8. **Decedents' Estates: Statutes.** Article 27 of the Nebraska Probate Code is designed to provide simple nonprobate alternatives for the disposition of assets upon death of a party to a multiparty or pay-on-death account.
9. **Decedents' Estates: Banks and Banking: Statutes: Words and Phrases.** The use of the word "may" in Neb. Stat. Rev. § 30-2724(a) (Reissue 1995) grants a party the right to alter the type of account the party owns. To exercise that right, however, a party must give his or her financial institution signed written notice.
10. **Decedents' Estates: Banks and Banking: Statutes.** Neb. Rev. Stat. § 30-2724 (Reissue 1995) applies to a financial institution account if Neb. Rev. Stat. § 30-2723 (Reissue 1995) sets out what rights at death accompany that type of account.
11. ____: ____: ____. Neb. Rev. Stat. §§ 30-2716 through 30-2726 (Reissue 1995) are meant to comprehensively cover the problems of financial institution accounts in which one or more persons have an interest.

12. ____: ____: ____. Under the current version of article 27 of the Nebraska Probate Code, signed written notice is required for transforming a non-pay-on-death, single-party account into a multiparty or pay-on-death account. Neb. Rev. Stat. § 30-2724 (Reissue 1995).
13. **Summary Judgment: Evidence: Proof.** 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.
14. **Summary Judgment: Motions for Continuance: Appeal and Error.** A continuance authorized by Neb. Rev. Stat. § 25-1335 (Reissue 1995) is within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Robert C. McGowan, Jr., of McGowan & McGowan, for appellant.

Michael D. McClellan, of Nelson McClellan, for appellee.

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

CONNOLLY, J.

In this case, we must decide whether the Nebraska Probate Code requires the owner of a non-pay-on-death, single-party account to give his or her financial institution signed written notice to add a pay-on-death (POD) beneficiary to the account. Before his death, John Henry M. Chamberlin opened a single-party certificate of deposit account (CD) with no POD beneficiary at American National Bank (American National). Although there is some evidence that Chamberlin attempted to add the appellant, Alfred Thomas, as a POD beneficiary, it is undisputed that Chamberlin did not give American National signed written notice. The district court ruled that Chamberlin's signed written notice was required and entered summary judgment for Ivorie Pearl Newman, the personal representative of Chamberlin's estate. We affirm.

I. BACKGROUND

In May 1997, Chamberlin opened a non-POD, single-party CD with American National. A standard form was used to open

the CD. Consistent with its normal practice, American National gave Chamberlin the original form and retained two copies for its records.

Chamberlin died on April 16, 1999. His will named his sister, Newman, as the personal representative. On August 31, Newman requested American National to deposit the proceeds of the CD into an estate checking account at American National. American National then deposited about $50,000, the proceeds of the CD, into the estate checking account. At the time the funds were deposited, Newman was not aware of any other claims on the CD.

Thomas had been Chamberlin's friend and had helped Chamberlin with errands and household chores. After Chamberlin's death, Thomas arrived at an American National branch and claimed that before Chamberlin's death, he had made Thomas a POD beneficiary to the CD. When Thomas arrived at American National, he presented the original form issued to Chamberlin when he opened the CD. On the area of the form designated for the names of POD beneficiaries, someone had typed "POD ALFORD THOMAS [sic]." Someone had also placed a handwritten "x" in the box labeled "Single Party Account with Pay on Death." Notably, next to this box is a space for the owner's initials. This space is blank.

As noted above, American National retained two copies of the form used when Chamberlin opened the CD. "POD ALFORD THOMAS" and the handwritten "x" do not appear on either of these copies. No one at American National knows who made the changes. In addition, American National has no other document or record indicating that Chamberlin requested that Thomas be made a POD beneficiary to the CD.

Thomas claims that an American National employee, Patrice Smith, was responsible for making the handwritten "x" and typing "POD ALFORD THOMAS." According to Thomas' deposition testimony, in January or February 1998, he drove Chamberlin to an American National branch so that Chamberlin could withdraw interest from the CD. While there, Chamberlin met with Smith. Thomas claims he was present throughout this meeting and that during the meeting, Chamberlin orally requested that Thomas be added as the POD beneficiary to the CD. Thomas stated that Chamberlin then handed Smith the original form used

to open the CD and that she "typed something" on it. Thomas also claimed that Chamberlin signed at least one and perhaps two documents during the meeting. Thomas admitted, however, that he did not notice what Chamberlin was signing.

Chamberlin's signature appears three times on the original form used to open the CD. Two of these signatures were clearly made when the account was opened. The third signature is under a notation made on the second page. The notation refers to a withdrawal of interest made on January 7, 1998. The notation contains no reference to the addition of Thomas as a POD beneficiary.

In her deposition, Smith said that she does not remember the January 1998 meeting with Chamberlin. She also testified that she does not know if she made the handwritten "x" or typed "POD ALFORD THOMAS."

After Thomas attempted to claim the CD, American National froze the estate checking account into which it had previously deposited the proceeds from the CD. Newman then filed this declaratory judgment action against American National and Thomas. American National filed a motion seeking leave to deposit the disputed funds into court. The court granted the motion and dismissed American National.

Newman moved for summary judgment. At the summary judgment hearing, Thomas filed an affidavit under Neb. Rev. Stat. § 25-1335 (Reissue 1995) seeking a continuance so that Thomas could have an expert analyze whether Smith's typewriter had been used to type "POD ALFORD THOMAS." The court treated the affidavit as a motion to resist summary judgment.

The court entered summary judgment for Newman. It held that to change Chamberlin's CD to a POD account, the Nebraska Probate Code required him to give signed written notice to American National requesting that the bank add Thomas as a POD beneficiary. Because there was no evidence that Chamberlin had given signed written notice to American National, the court granted Newman summary judgment. Thomas appealed.

II. ASSIGNMENTS OF ERROR

Thomas assigns, rephrased and reordered, that the district court erred in (1) interpreting and applying the applicable provisions of the Nebraska Probate Code, (2) granting Newman's

motion for summary judgment, and (3) failing to order a continuance of the summary judgment hearing.

III. STANDARD 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. *American Fam. Mut. Ins. Co. v. Hadley, ante* p. 435, 648 N.W.2d 769 (2002).

[2] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *American Bus. Info. v. Egr, ante* p. 574, 650 N.W.2d 251 (2002); *A-1 Metro Movers v. Egr, ante* p. 291, 647 N.W.2d 593 (2002).

IV. ANALYSIS

1. Interpretation of Applicable Provisions of Nebraska Probate Code

Article 27 of the Nebraska Probate Code governs nonprobate transfers, including POD accounts. See Neb. Rev. Stat. §§ 30-2715 through 30-2746 (Reissue 1995). In 1993, the Legislature repealed the previous version of article 27 and replaced it with a version based on the revised article VI of the Uniform Probate Code. The revised version of article 27 governs this case.

Under the revised article 27, when the owner of a POD, single-party account dies, the sums on deposit belong to the surviving beneficiary or beneficiaries. § 30-2723(b)(2). A non-POD, single-party account, however, is not affected by the death of the owner. Instead, the amount the owner was beneficially entitled to immediately before death is transferred to the estate. § 30-2723(c). If Chamberlin's CD was a POD, single-party account with Thomas as the beneficiary, Thomas is entitled to the proceeds from the CD. But, if Chamberlin never successfully added Thomas as the CD's POD beneficiary, then Chamberlin's estate is entitled to the proceeds.

The district court determined that § 30-2724 governs changing a non-POD, single-party account into a POD account. Section 30-2724 provides:

> (a) Rights at death under section 30-2723 are determined by the type of account at the death of a party. *The type of account may be altered by written notice given by a party to the financial institution to change the type of account or to stop or vary payment under the terms of the account. The notice must be signed by a party and received by the financial institution during the party's lifetime.*

(Emphasis supplied.) The court interpreted the emphasized language as making the signed written notice of a party to the account a mandatory requirement for changing the type of account.

Thomas claims that the court made two errors in interpreting § 30-2724. First, he claims that the language sets out a permissive rather than a mandatory method for changing the type of account. Second, he argues that even if the language of § 30-2724 is mandatory, the section applies only to the modification of an existing multiparty or POD account and not to the creation of a multiparty or POD account. We disagree with both of these arguments.

(a) Is Language of § 30-2724 Mandatory?

Thomas argues that the use of the word "may" in § 30-2724 sets out a permissive rather than a mandatory method for altering the type of account. See Neb. Rev. Stat. § 49-802(1) (Reissue 1998) ("[w]hen the word may appears, permissive or discretionary action is presumed"). Newman counters that "may" in § 30-2724 refers only to the ability of a party to alter the form of his or her account. She argues that § 30-2724 is permissive in the sense that a party may choose to change his or her account from one form to another. But, to put the change into effect, the party must give his or her financial institution signed written notice.

[3] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Capital City Telephone v. Nebraska Dept. of Rev., ante* p. 515, 650 N.W.2d 467 (2002). Neither Thomas' nor Newman's

construction of § 30-2724 is facially unreasonable. We note that other courts are split on whether similar statutory language is permissive or mandatory. Compare *Linehan v. First Nat. Bank of Gordon*, 7 Neb. App. 54, 579 N.W.2d 157 (1998) (construing predecessor to § 30-2724 as mandatory), *Conservatorship of Milbrath*, 508 N.W.2d 360 (N.D. 1993), and *Estate of Wolfinger v. Wolfinger*, 793 P.2d 393 (Utah App. 1990), with *Jampol v. Farmer*, 259 Va. 53, 524 S.E.2d 436 (2000). We thus resort to statutory interpretation.

[4] Initially, we note that the Legislature has instructed us to construe the provisions of article 27 so as "to effectuate their general purpose to make uniform the law of those states which enact them." § 30-2746. Section 30-2724 corresponds to § 6-213 of the revised article VI of the Uniform Probate Code. (We note that there has been a technical amendment to § 6-213, which Nebraska has not adopted.) Nine other jurisdictions have adopted § 6-213. Unif. Multiple-Person Accounts Act, Table of Jurisdictions Wherein Act Has Been Adopted, 8B U.L.A. 1 (Supp. 2002) (listing jurisdictions which have enacted Multiple-Person Accounts Act portion of revised article VI). None of these jurisdictions appear to have addressed whether the method set out for altering the type of account in § 6-213 is mandatory.

However, § 6-105 of the prerevision version of article VI, the predecessor of § 6-213, contained the same "may be altered" language that appears in §§ 6-213 and 30-2724:

> [The form of the account] *may be altered* by written order given by a party to the financial institution to change the form of the account . . . . The order or request must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by other written order of the same party during his lifetime.

(Emphasis supplied.) Unif. Probate Code § 6-105, 8 U.L.A. 474 (1998). Because of the similarity between §§ 6-105 and 6-213, the manner in which courts have interpreted § 6-105 is persuasive in predicting how courts will interpret § 6-213. The majority of courts interpreting provisions based on § 6-105, including the Nebraska Court of Appeals, have determined that the language in § 6-105 sets out a mandatory method for altering the form of an account. *Linehan v. First Nat. Bank of Gordon,*

supra; *Conservatorship of Milbrath, supra*; *Estate of Wolfinger v. Wolfinger, supra*. But see *Jampol v. Farmer, supra* (language is permissive).

[5-7] Moreover, construing § 30-2724 as setting out a mandatory notice requirement is more consistent with our standards of statutory construction and with the policies underlying article 27. In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Capitol City Telephone v. Nebraska Dept. of Rev., supra*. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002). 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. *Id.*; *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb. 129, 629 N.W.2d 534 (2001).

To construe § 30-2724 as permissive would be to render the statute meaningless. It would neither create new rights nor limit existing ones. Any other method for modifying a contract would remain available to alter the form of an account. Signed written notice would simply be a nonbinding legislative suggestion.

[8] By contrast, to read § 30-2724 as setting out a mandatory method for altering the type of an account gives the statute a purpose consistent with the rest of article 27. Article 27 is designed to provide simple nonprobate alternatives for the disposition of assets upon death of a party to a multiparty or POD account. Accord *Conservatorship of Milbrath*, 508 N.W.2d 360 (N.D. 1993). Requiring signed written notice to alter the type of account furthers this purpose by ensuring clear evidence of the account owner's intent, thus preventing fraud and adding certainty to nonprobate transfers.

[9] We conclude that the use of the word "may" in § 30-2724(a) grants a party the right to alter the type of account the party owns. To exercise that right, however, a party must give his or her financial institution signed written notice.

(b) Does § 30-2724 Apply to Transforming Non-POD, Single-Party Account Into POD Account?

Thomas argues that even if § 30-2724 sets out a mandatory method for altering the type of account, it applies only to altering an existing multiparty or POD account, not to transforming a non-POD, single-party account into a POD account.

[10] The scope of § 30-2724 is set out in the statute's first sentence: "*Rights at death under section 30-2723* are determined by the type of account at the death of a party." (Emphasis supplied.) This language means that § 30-2724 applies to an account if § 30-2723 sets out what rights at death accompany that type of account. Section 30-2723(c) sets out what rights at death a non-POD, single-party account carries: "Sums on deposit in a single-party account without a POD designation . . . are not affected by death of a party, but the amount to which the decedent, immediately before death, was beneficially entitled under section 30-2722 is transferred as part of the decedent's estate." Thus, § 30-2724 includes within its scope non-POD, single-party accounts.

[11] Thomas' interpretation of § 30-2724 is inconsistent with the purpose underlying the revised article 27. As noted, article 27 was substantially based on the revised article VI of the Uniform Probate Code. The revised article VI has three separate parts, each of which is designed to be a free-standing uniform act. The Uniform Multiple-Person Accounts Act is the second part of the Uniform Nonprobate Transfers on Death Act, which in turn corresponds to §§ 30-2716 through 30-2726 of article 27. The prefatory note to the Uniform Multiple-Person Accounts Act does not draw a distinction between single and multiparty accounts. Instead, it states that the purpose of the act is to "*comprehensively* [cover] the problems of financial institution accounts in which *one* or more persons have an interest." (Emphasis supplied.) Unif. Multiple-Person Accounts Act, Prefatory Note, 8B U.L.A. 4 (2001). Under Thomas' interpretation of § 30-2724, however, article 27 is not comprehensive. Rather, it leaves a potentially problematic issue—the proper method for adding a POD beneficiary to a non-POD, single-party account—completely outside the scope of article 27.

Thomas relies on *Linehan v. First Nat. Bank of Gordon*, 7 Neb. App. 54, 579 N.W.2d 157 (1998). In *Linehan*, a husband and wife opened a joint bank account. Later, the wife orally requested that the bank add her daughter to the account. The bank permitted the daughter to sign the original signature card. After the wife died, the husband attempted to withdraw the funds from the account and the daughter objected. The Court of Appeals ruled that to change the form of an *existing joint* account, the owner must give the bank a signed written order. The *Linehan* court went on to state that "[t]here is no statutory restriction in the Nebraska Probate Code which prohibits a party from orally instructing his or her bank to change the party's *individual* account into a joint account." (Emphasis in original.) 7 Neb. App. at 59, 579 N.W.2d at 160. See, also, *Estate of Wolfinger v. Wolfinger*, 793 P.2d 393 (Utah App. 1990).

[12] *Linehan*, however, was governed by the pre-1993 version of article 27. See Neb. Rev. Stat. §§ 30-2701 through 30-2714 (Reissue 1989). The section of the previous article 27 that corresponds to § 30-2724 is § 30-2705. It provided in part: "*The provisions of section 30-2704 as to rights of survivorship* are determined by the form of the account at the death of a party." (Emphasis supplied.) § 30-2705. So, just as § 30-2724 refers to § 30-2723 to define its scope, the scope of § 30-2705 was set by reference to another section, § 30-2704. Unlike § 30-2723, § 30-2704 did not speak to what rights at death a non-POD, single-party account carried. Instead, it only addressed what survivorship rights accompany POD and multiparty accounts. Given this, the *Linehan* court logically concluded that the scope of § 30-2705 did not include changing a non-POD, single-party account into a multiparty or POD account. However, the inclusion of non-POD, single-party accounts in § 30-2723 expands the scope of § 30-2724 beyond that of its § 30-2705 predecessor and means that signed written notice is now required for transforming a non-POD, single party account into a multiparty or POD account.

2. Summary Judgment

[13] 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. *Richmond v. Case, ante* p. 319, 647 N.W.2d 90 (2002).

In this case, it is undisputed that Chamberlin opened the CD as a single-party account with no POD beneficiary. As we have set out above, to add Thomas as a POD beneficiary, § 30-2724 required Chamberlin to give American National signed written notice of the desired change. To meet her burden on summary judgment, Newman, as the moving party, was required to present evidence that no such notice was given. She met this burden in the form of deposition and affidavit testimony from American National officers stating they had no record of signed written notice from Chamberlin requesting American National to add Thomas as the CD's POD beneficiary. The burden then switched to Thomas to present evidence that signed written notice was given. But, the record contains no evidence—and Thomas does not even attempt to argue—that Chamberlin gave the notice required by § 30-2724. Thus, Thomas failed to meet his burden and the district court properly entered summary judgment for Newman.

3. Continuance of Summary Judgment Hearing

[14] Finally, Thomas assigns as error the district court's failure to continue the summary judgment hearing. A continuance authorized by § 25-1335 is within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Eastroads, Inc. v. City of Omaha*, 237 Neb. 837, 467 N.W.2d 888 (1991). Thomas sought the continuance so that he could have an expert inspect Smith's typewriter to see if it had been used in typing "POD ALFORD THOMAS" on the original form used to open the CD. But, whether Smith typed "POD ALFORD THOMAS" is irrelevant. Even if she did type it, it would not change the answer to the determinative issue whether Chamberlin gave American National the signed written notice required by § 30-2724. As a result, this assignment of error is without merit.

V. CONCLUSION

We determine that to add a POD beneficiary to a non-POD, single-party account, the owner of the account must give signed written notice to his or her financial institution. Because Thomas has failed to present any evidence showing that Chamberlin gave signed written notice to American National requesting the bank to add Thomas as a POD beneficiary to Chamberlin's CD, Newman was entitled to summary judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
CLIFFORD L. JONES, APPELLEE.

652 N.W.2d 288

Filed October 25, 2002. No. S-01-990.

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. **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. ____: ____. An appellate court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law.
4. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
5. ____: ____: ____: ____. To the extent the State is authorized to appeal an adverse ruling in a criminal case, the appeal is to be taken in accordance with, and is constrained by, the terms of the statute authorizing the appeal.
6. **Statutes: Ordinances: Prosecuting Attorneys: Appeal and Error.** The authority to take error proceedings pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995) is limited to county attorneys, and such authority does not extend to city attorneys or to prosecutions involving the violation of city ordinances.
7. **Statutes.** It is not for the courts to supply missing words or sentences to a statute to supply that which is not there.
8. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** There is no statutory authorization for a city attorney representing the State to appeal a decision of a district court which reverses the decision of a county court upon appeal by a criminal defendant.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County

Court for Lancaster County, LAURIE J. YARDLEY, Judge. Appeal dismissed.

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

Robert Wm. Chapin, Jr., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

In this criminal case, the Lincoln City Attorney's office, on behalf of the State, challenges the Lancaster County district court's decision of July 26, 2001, which reversed the county court's order convicting Clifford L. Jones of violating Lincoln Mun. Code § 9.16.240(e) (2000). The jurisdictional issue presented in this case is whether the city attorney representing the State is authorized to appeal an order of the district court where the order of the district court, in an appeal brought by the criminal defendant, reverses the county court's conviction. Because there is no statutory provision which authorizes the city attorney to appeal a reversal entered by the district court in a criminal case, we dismiss the appeal for lack of jurisdiction.

STATEMENT OF FACTS

On August 11, 2000, an undercover Lincoln police officer conducted a surveillance operation at Mataya's Babydolls juice bar. Jones, the manager and co-owner of Mataya's Babydolls, was functioning as a D.J. and providing security at the establishment on August 11. The officer observed activities in the juice bar which he believed amounted to sexual contact by the dancers and patrons.

On August 30, 2000, the Lincoln City Attorney's office, representing the State, filed a complaint in county court alleging that Jones "[d]id knowingly allow any person on the premises to engage in sexual contact in violation of LMC §9.16.240(e) on August 11, 2000." A bench trial was held on October 13. On November 20, the county court found Jones guilty beyond a

reasonable doubt. On December 15, the county court sentenced Jones to pay a fine of $200 and costs.

Jones appealed to the district court, assigning as error, inter alia, that there was not sufficient evidence to support the conviction. A hearing on Jones' appeal was held on May 16, 2001. On July 26, the district court entered an order in which it determined that there was not sufficient evidence to support Jones' conviction. The district court reversed the conviction and sentence and remanded the case to the county court with directions to dismiss the complaint against Jones.

On August 23, 2001, the Lincoln City Attorney's office, representing the State, filed a "Notice of Intention to Prosecute Appeal Pursuant to Neb.Rev.Stat. § 25-1912," stating its intention to appeal the July 26 order of the district court reversing the judgment of the county court. Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2000) is the general appeal statute which contains, inter alia, provisions relating generally to matters such as docket fees and timing for filing appeals. The matter was docketed in the Nebraska Court of Appeals. On January 24, 2002, the Court of Appeals ordered the parties "to address in their briefs the jurisdictional question of appellant's (State of Nebraska) right to appeal under Neb. Rev. Stat. Sec. 25-1912." The appeal was subsequently moved to this court's docket.

ASSIGNMENT OF ERROR

The Lincoln City Attorney, on behalf of the State, asserts that this court has jurisdiction to hear the appeal and that the district court erred in various particulars. Because we dismiss the appeal, we do not reach the merits of the assignments of error.

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. Harms*, 263 Neb. 814, 643 N.W.2d 359 (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. *Harms, supra*. An appellate

court may not consider a case as within its jurisdiction unless its authority to act is invoked in the manner prescribed by law. *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000).

[4,5] In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *Id*. To the extent the State is authorized to appeal an adverse ruling in a criminal case, the appeal is to be taken in accordance with, and is constrained by, the terms of the statute authorizing the appeal. See *State v. Baird*, 238 Neb. 724, 472 N.W.2d 203 (1991). In this criminal case, we must determine whether the State, represented by the city attorney, is authorized to appeal from the district court's order which reversed the county court's conviction where the appeal to district court was taken by Jones, the criminal defendant. We conclude that the State, represented by the city attorney, cannot appeal the district court's order.

In *Baird, supra*, the State was represented by the Lancaster County Attorney's office, and we noted that the specific statutory authorization for the State to appeal the adverse ruling of the district court in that case was pursuant to the error proceeding statute, Neb. Rev. Stat. § 29-2315.01 (Reissue 1989). Because the county attorney on behalf of the State in *Baird* had ignored the provisions of § 29-2315.01 and had instead filed the appeal under the provisions of the general appeal statute, § 25-1912, we determined that this court lacked jurisdiction over the case. In a manner consistent with the reasoning in *Baird*, we examine the statutory framework which authorizes a city attorney to take an appeal in a criminal case to determine, based on a plain statutory reading, whether an appeal is authorized in the present case.

[6] In its argument in support of its assertion that this court has jurisdiction over the instant case, the State refers us to *State v. Linn*, 192 Neb. 798, 224 N.W.2d 539 (1974), and Neb. Rev. Stat. §§ 29-2317 to 29-2319 (Reissue 1995). In *Linn*, this court held that the authority to take error proceedings pursuant to § 29-2315.01 (Reissue 1964) is limited to county attorneys and that such authority does not extend to city attorneys or to prosecutions involving the violation of city ordinances. Subsequent to *Linn*, in 1975, the Legislature enacted §§ 29-2317 to 29-2319 which primarily pertain to appeals by prosecutors from county

court to district court. Sections 29-2317 to 29-2319(1) provide procedures by which a county attorney, city attorney, or designated assistant may appeal a ruling or decision of a county court to a district court, the appointment of counsel, and the impact of such appeals relative to double jeopardy. Section 29-2319(2) relates to the trial court's authority to rearrest a defendant.

Section 29-2317(1) provides:

> A prosecuting attorney, including any county attorney, *city attorney*, or designated assistant, may take exception to *any ruling or decision* of the county court made during the prosecution of a cause by presenting to the court a notice of intent to take an appeal to the district court with reference to the rulings or decisions of which complaint is made.

(Emphasis supplied.)

Section 29-2319(3) provides, "When the district court *affirms* the final order of the trial court, the prosecuting attorney may take exception to the decision of the district court in the manner provided by sections 29-2315.01 to 29-2316." (Emphasis supplied.) By its terms, § 29-2319 refers to district court orders which were entered in an appeal to the district court brought by a prosecutor rather than by a criminal defendant, such as in the instant case.

The State argues that the enactment of §§ 29-2317 to 29-2319 was a response to this court's decision in *Linn, supra.* The State further claims that §§ 29-2317 to 29-2319 were intended to give city attorneys the same authority as that provided to county attorneys in Neb. Rev. Stat. §§ 29-2315.01 to 29-2316 (Reissue 1995) to appeal adverse rulings of district courts. In the alternative, the State claims that if the appeal in this case was not authorized under §§ 29-2317 to 29-2319, the city attorney could, nevertheless, proceed under the general appeal statute, § 25-1912. We reject these arguments.

[7] Section 29-2317(1) explicitly gives a city attorney the authority in a criminal case to appeal "*any* ruling or decision" of a county court to the district court. In contrast to the language of § 29-2317(1), § 29-2319(3) gives a city attorney the authority to appeal the decision of the district court only "[w]hen the district court *affirms* the final order of the trial court . . . ." Even if we were to ignore the context in which § 29-2319(3) appears and to

conclude that § 29-2319(3) applied to a district court order which was occasioned by the appeal of a criminal defendant from county court to district court, there is nothing in the plain language of § 29-2319(3) or elsewhere which authorizes a city attorney in a criminal case to appeal the decision of the district court where the district court reverses the trial court. With respect to the statutory silence regarding the city attorney's potential authority to appeal a reversal by a district court in a criminal case, we note that it is not for the courts to supply missing words or sentences to a statute to supply that which is not there. See *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001).

[8] The language of §§ 29-2317 to 29-2319 contains no provision giving city attorneys the same scope of authority given to county attorneys pursuant to § 29-2315.01, nor has the Legislature amended §§ 29-2315.01 to 29-2316 to provide that city attorneys are authorized to undertake error proceedings under these statutes. We conclude that there is no statutory authorization for the city attorney representing the State to appeal a decision of a district court which reverses the decision of a county court upon appeal by a criminal defendant. In the absence of specific statutory authorization, the State has no right to appeal the adverse ruling in this criminal case. See *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000). Because there is no such statutory authority, this court lacks jurisdiction over this case, and the general appeal statute, § 25-1912, "does not come into play," see *State v. Baird*, 238 Neb. 724, 726, 472 N.W.2d 203, 205 (1991), and does not by itself authorize this court to exercise jurisdiction. We must therefore dismiss this appeal.

CONCLUSION

In this criminal case, we conclude that the city attorney, prosecuting on behalf of the State, had no statutory right to appeal the order of the district court which reversed the decision of the county court in an appeal brought to the district court by a criminal defendant and that this court lacks jurisdiction. We therefore dismiss this appeal.

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.

652 N.W.2d 574

Filed November 1, 2002. Nos. S-00-808 through S-00-812.

SUPPLEMENTAL OPINION

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts: Appeal and Error.** The meaning 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. **Trial: Waiver.** A party who fails to insist upon a ruling to a proffered objection waives that objection.
5. **Trial: Evidence: Waiver.** If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon a ruling on an objection to the introduction of the evidence, and otherwise fails to raise the question as to its admissibility, that party is considered to have waived whatever objection the party may have had thereto, and the evidence is in the record for consideration the same as other evidence.
6. **Insurance: Contracts.** 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: Intent.** 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. **Words and Phrases.** In determining whether a particular act is of a professional nature or a professional service, a court must look not to the title or character of the party performing the act, but to the act itself.
10. **Malpractice: Physician and Patient: Liability.** 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.

Appeals from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Supplemental opinion: Motions for rehearing sustained. Former opinion modified.

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.

PER CURIAM.

NATURE OF CASE

Appellants in this case were, as children, patients of Daniel B. Schrein, M.D., an Omaha pediatrician. As adults, appellants brought actions against Schrein to recover damages for sexual abuse alleged to have been perpetrated by Schrein during the course of medical treatment. Appellants obtained default judgments against Schrein and commenced garnishment proceedings against Schrein's professional liability insurer, The Medical Protective Company of Fort Wayne, Indiana (Medical Protective). The district court concluded that appellants' claims were not covered by Schrein's insurance policy and entered summary judgment for Medical Protective. In *R.W. v. Schrein*, 263 Neb. 708, 642 N.W.2d 505 (2002) (*R.W. I*), we affirmed the district court's judgment. Appellants filed a motion for rehearing, which we granted. We again affirm the judgment of the district court.

ISSUES ON REHEARING

In our first opinion, we affirmed the judgment of the district court, relying in part on the affidavit of Harlan C. Schriner, Jr., M.D., a pediatrician who opined that Schrein's actions did not constitute or arise out of professional services and that Schrein's actions thus did not breach any applicable standard of care. Appellants filed timely motions for rehearing, arguing in part that this court erred in relying on Schriner's affidavit because

the affidavit, although present in the record on appeal, had not been received into evidence by the district court. We granted appellants' motions for rehearing. We ordered that the issues on rehearing include all the issues originally briefed and offered the parties leave to file supplemental briefs addressing the following additional issues:

(1) Did the district court rule on appellants' objections to the affidavits of Schriner offered in each of these cases at the time the objections were made?

(2) If there were no rulings at the time of the objections, did appellants insist upon rulings prior to submission of the motions for summary judgment? If not, were the objections waived?

(3) Were the objections and/or the grounds upon which they were based addressed and resolved by the district court in its order of July 28, 2000, and if so, how were the issues resolved?

(4) Did the district court rule on appellants' alternative requests for a continuance pursuant to Neb. Rev. Stat. § 25-1335 (Reissue 1995) at the time the requests were made?

(5) If not, did appellants insist upon such rulings prior to submission of the motions for summary judgment? If not, were the requests for continuance waived?

STANDARD OF REVIEW

[1,2] Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Pinkard v. Confederation Life Ins. Co., ante* p. 312, 647 N.W.2d 85 (2002). 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 meaning 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. See *American Fam. Mut. Ins. Co. v. Hadley, ante* p. 435, 648 N.W.2d 769 (2002).

ANALYSIS

Schriner Affidavit

We turn first to the issues presented by the motion for rehearing. As set forth above, we granted rehearing on the issue whether Schriner's affidavit, on which our opinion relied, was properly received into evidence by the district court. We conclude that we are unable to resolve this issue on the record presented. The record does not show that the district court either explicitly ruled on appellants' objections to the affidavit or received the affidavit into evidence. This ambiguity in the record precludes us from relying on the affidavit or resolving any issues to which the affidavit might be relevant on appeal.

[4,5] We note that the presentation of an adequate record for appellate review is primarily the responsibility of the parties. It is well established that a party who fails to insist upon a ruling to a proffered objection waives that objection. See, e.g., *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002); *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000). We have also stated:

> " 'If when inadmissible evidence is offered the party against whom such evidence is offered consents to its introduction, or fails to object, *or to insist upon a ruling on an objection to the introduction of the evidence*, and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, *and the evidence is in the record for consideration the same as other evidence*.' "

(Emphasis in original.) *State v. Nowicki*, 239 Neb. 130, 134, 474 N.W.2d 478, 483 (1991) (quoting *In re Estate of Kaiser*, 150 Neb. 295, 34 N.W.2d 366 (1948)). See, also, *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991). That we have chosen, in this case, not to consider the disputed affidavit should not be taken to mean that we will not, in other cases, consider disputed evidence where an objection thereto has not been properly preserved by insistence upon a ruling on that objection. It is the responsibility of trial courts to rule on the objections presented to them. However, parties and counsel are cautioned that they

must insist on such rulings in order to preserve those objections; they fail to do so at their own peril.

The fact that Schriner's affidavit is not available for our review, however, does not change our ultimate conclusion from *R.W. I*. There is no factual controversy regarding Schrein's underlying conduct, which for purposes of this proceeding is assumed to have been as alleged in appellants' petitions. Similarly, the interpretation of a contract is a question of law. See *Hadley, supra*. Thus, we are presented with an integrated question of law—whether the allegations in the petitions set forth a claim for damages based on "professional services" within the meaning of the insurance policy. See, *Cluett v. Medical Protective Co.*, 829 S.W.2d 822 (Tex. App. 1992); *Hirst v. St. Paul Fire & Marine Ins. Co.*, 106 Idaho 792, 683 P.2d 440 (Idaho App. 1984).

A medical professional such as Schriner can opine regarding a breach of the applicable standard of medical care, but cannot advise this court on a question of law, i.e., the meaning of a term in a contract. Our previous opinion erred in relying on Schriner's affidavit because the evidence was not relevant to the question presented to this court. After further consideration, we conclude that the dispositive question in this appeal is a question of law, on which expert testimony has no bearing. Therefore, we withdraw the section of *R.W. I* under the subheading "2. RENDERING OF 'PROFESSIONAL SERVICES,' " *id*. at 716, 642 N.W.2d at 512, and ends prior to the subheading "3. PUBLIC POLICY," *id*. at 721, 642 N.W.2d at 515. In its place, we substitute the following discussion of the issue:

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. *American Fam. Mut. Ins. Co. v. Hadley, ante* p. 435, 648 N.W.2d 769 (2002). 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. *Id.* 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. *Id.* We conclude that the language of the insuring agreement is unambiguous. The determinative question, then, is whether Schrein's actionable conduct constituted "professional services" within the meaning of the policy.

[9] This court has previously defined the term "professional services" in the context of a liability policy for professional negligence. *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.

In *Marx, supra*, the determinative question was whether the act performed was "professional" as distinguished from the act of a layperson. In this case, however, the critical issue is whether the act performed is "professional" as opposed to unprofessional. In other words, the fact that the actions occurred between a doctor and patient is pertinent only if the act itself is of a professional nature. See *St. Paul Ins. Co. of Illinois v. Cromeans*, 771 F. Supp. 349 (N.D. Ala. 1991).

[10] 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 v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968), 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.

Relying on our decision in *Marx, supra*, and consistent with our decision in *Iwanski, supra*, the clear majority rule among other jurisdictions is that outside the unique circumstance of mishandling the transference phenomenon in psychiatric counseling, sexual conduct is not a professional act or service for which medical malpractice insurance coverage is provided. See, e.g., *Snyder v. Major*, 789 F. Supp. 646 (S.D.N.Y. 1992), *modified* 818 F. Supp. 68 (S.D.N.Y. 1993); *St. Paul Ins. Co. of Illinois v. Cromeans*, 771 F. Supp. 349 (N.D. Ala. 1991); *Physicians Ins.*

Co. v. Pistone, 555 Pa. 616, 726 A.2d 339 (1999); *D.D. v. Insurance Co. of North America*, 905 P.2d 1365 (Alaska 1995); *N.M. Physicians Mut. Liability v. LaMure*, 116 N.M. 92, 860 P.2d 734 (1993); *Roe v. Federal Ins. Co.*, 412 Mass. 43, 587 N.E.2d 214 (1992); *Niedzielski v. St. Paul Fire & Marine Ins. Co.*, 134 N.H. 141, 589 A.2d 130 (1991); *S. C. Med. Malpractice Liab. Ins. v. Ferry*, 291 S.C. 460, 354 S.E.2d 378 (1987); *Smith v. St. Paul Fire & Marine Ins. Co.*, 353 N.W.2d 130 (Minn. 1984); *American Casualty Co. v. Corum*, 131 Or. App. 445, 885 P.2d 726 (1994), *vacated on other grounds* 321 Or. 135, 894 P.2d 461 (1995); *Lindheimer v. St. Paul Fire & Marine Ins.*, 643 So. 2d 636 (Fla. App. 1994); *Steven G. v. Herget*, 178 Wis. 2d 674, 505 N.W.2d 422 (Wis. App. 1993); *Cluett v. Medical Protective Co.*, 829 S.W.2d 822 (Tex. App. 1992); *Standard Fire Ins. v. Blakeslee*, 54 Wash. App. 1, 771 P.2d 1172 (1989); *St Paul Fire Ins v Quintana*, 165 Mich. App. 719, 419 N.W.2d 60 (1988); *Hirst v. St. Paul Fire & Marine Ins. Co.*, 106 Idaho 792, 683 P.2d 440 (Idaho App. 1984). See, generally, Annot., 60 A.L.R.5th 239 et seq. (1998 & Supp. 2002).

There is no dispute among appellate courts, even in those cases that find insurers to be liable for sexual contact, about the applicability of the holding in *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968). Generally, cases that find sexual contact to be "professional services" do so by either (1) expanding the scope of the "act" to include the sexual contact or (2) lowering the requirement for causation between the act and the damages. There is no dispute that when a court is determining the coverage of a professional liability insurance policy, it must examine the nature of the act performed, rather than the title or professional character of the actor. *Niedzielski, supra*.

Based on these standards, courts have generally refused to require insurers to provide coverage for sexual acts, based on professional liability insurance policies with medical care providers, because sexual activity with a patient is not a part of the delivery of professional services or part of medical treatment. See *Snyder, supra*. When the physician's sexual contact with his or her patient is not necessitated by the particular course of medical treatment, then the malpractice insurance policy does not provide coverage for the damages sustained by the victim. *Blakeslee, supra*.

The most well-known statement of the minority rule is *St. Paul Fire & Marine Ins. Co. v. Asbury*, 149 Ariz. 565, 720 P.2d 540 (Ariz. App. 1986). In that case, the Court of Appeals of Arizona articulated the following rationale for concluding that sexual assault was a "professional service":

> The claims of Dr. Asbury's patients that he manipulated their clitorises while performing routine gynecological examinations, if true, was tortious conduct committed while providing professional services and covered by his insurance policy. Most of the cases cited to us by St. Paul are distinguishable because the tortious sexual abuse of the patient was not intertwined with and inseparable from the services provided.

Id. at 567, 720 P.2d at 542. Accord, *St. Paul Fire & Marine Ins. v. Torpoco*, 879 S.W.2d 831 (Tenn. 1994); *St. Paul Fire and Marine Ins. Co. v. Shernow*, 222 Conn. 823, 610 A.2d 1281 (1992). The *Asbury* court adopted the rationale of the trial court in that case, quoting the trial court's opinion:

> "The question of insurance coverage does not turn on whether the conduct was negligent or intentional, or whether or not there was an assault and battery. Regardless of the category in which the underlying complaints are placed, they clearly allege tortious conduct while treating the patients, and seek damages resulting from the providing of professional services. Furthermore, the tortious conduct, if it occurred, took place in the course of and as an inseparable part of the providing of professional services. Consequently, any damages would be those resulting from the providing of professional services by the insured."

Asbury, 149 Ariz. at 566, 720 P.2d at 541. Accord, *Torpoco, supra*; *Shernow, supra*. See, also, *Princeton Ins. Co. v. Chunmuang*, 151 N.J. 80, 698 A.2d 9 (1997). But see, e.g., *St. Paul Ins. Co. of Illinois v. Cromeans*, 771 F. Supp. 349, 353 (N.D. Ala. 1991) (rejecting *Asbury* as "illogical"); *Physicians Ins. Co. v. Pistone*, 555 Pa. 616, 623, 726 A.2d 339, 343 (1999) (stating *Asbury* "has no basis in logic"); *N.M. Physicians Mut. Liability v. LaMure*, 116 N.M. 92, 97, 860 P.2d 734, 739 (1993) (uncertain of *Asbury* test's "workability or its support in public policy").

However, the *Asbury* rule has received significant criticism. First, it has been noted that in determining the scope of a liability insurance policy, the issue "is not whether the conduct in question is negligence, but whether a particular contract was intended to cover this conduct." *Snyder v. Major*, 789 F. Supp. 646, 650 (S.D.N.Y. 1992), *modified* 818 F. Supp. 68 (S.D.N.Y. 1993). See *Volquardson v. Hartford Ins. Co., ante* p. 337, 647 N.W.2d 599 (2002). The minority rule would be more logical if presented in the context of a tort action, i.e., expanding the set of wrongs from which tort victims should be protected. See *Snyder, supra*. However, where the issue is the scope of coverage under an insurance policy, expanding the meaning of "professional services" is inconsistent with our responsibility to give effect to the intent of the parties at the time the contract was written. See *Volquardson, supra*. In light of the case law set out above supporting the majority rule, along with our own decisions in *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968), and *Iwanski v. Gomes*, 259 Neb. 632, 611 N.W.2d 607 (2000), it is unlikely that parties entering into medical malpractice insurance contracts are operating under the assumption that the sexual misconduct of physicians may be covered by the malpractice insurance. It would decrease the likelihood of capturing the parties' intent to hold otherwise. See *Snyder, supra*.

Furthermore, the minority rule erodes the concept of legal causation until the requirement of proximate cause is essentially meaningless. As stated by one commentator:

> The decisions that find coverage for allegations of sexual abuse or molestation against physicians and dentists do so only through flawed reasoning. They appear to apply what amounts to a simple "but for" test: Because the assault occurred during an otherwise proper and necessary medical procedure, the injury arose out of the performance of that professional service. Of course, the "but for" test is virtually boundless, as almost no subsequent event would take place were it not for some antecedent event, and as all events are, at some level, interrelated. It is simply unreasonable to conclude that conduct such as sexual molestation of a patient, which must be known to be only harmful and not beneficial, and which also must be known by the

> doctor to further no preventive or corrective interest of the patient, is part of a professional medical procedure. It cannot, therefore, be part of the professional service that the doctor contracts with the patient to provide.

David S. Florig, *Insurance Coverage for Sexual Abuse or Molestation*, 30 Tort & Ins. L.J. 699, 727 (1995). This analysis, with which we agree, echoes some of the most basic and familiar concepts of tort causation.

> "Proximate cause" . . . is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation." As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.
>
> This limitation is to some extent associated with the nature and degree of the connection in fact between the defendant's acts and the events of which the plaintiff complains.

W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 41 at 264 (5th ed. 1984 & Supp. 1988).

The majority rule, then, expresses a difficult truth: that appellants' injuries, in the instant case and most others, are not caused by any act of medical treatment that would normally be associated with the provision of a "professional service." The common thread running throughout the majority rule cases is the necessity for, and lack of, a direct causal link between appellants' damages and any legitimate medical treatment. "[T]here must be a causal relationship between the alleged harm and the complained-of professional act or service, that is, it must be a medical . . . act or service that causes the harm, not an act or service that requires no professional skill." *Roe v. Federal Ins. Co.*, 412 Mass. 43, 49,

587 N.E.2d 214, 217 (1992). Accord, *Lindheimer v. St. Paul Fire & Marine Ins.*, 643 So. 2d 636 (Fla. App. 1994); *Steven G. v. Herget*, 178 Wis. 2d 674, 505 N.W.2d 422 (Wis. App. 1993). "[T]here must be a causal relationship between the treatment (*i.e.*, professional services) and the harm alleged by the victim." *Standard Fire Ins. v. Blakeslee*, 54 Wash. App. 1, 10, 771 P.2d 1172, 1177 (1989) (citing *Hirst v. St. Paul Fire & Marine Ins. Co.*, 106 Idaho 792, 683 P.2d 440 (Idaho App. 1984)).

As most clearly stated by the Supreme Court of New Hampshire, "[t]he specified source out of which damages must arise, according to the terms of the insurance policy, is professional services rendered, or which should have been rendered." *Niedzielski v. St. Paul Fire & Marine Ins. Co.*, 134 N.H. 141, 146-47, 589 A.2d 130, 133 (1991). The minority rule abrogates this principle.

The court in *St. Paul Fire & Marine Ins. Co. v. Asbury*, 149 Ariz. 565, 720 P.2d 540 (Ariz. App. 1986), attempts to connect the plaintiffs' damages to professional services by asserting that the professional service "is intertwined with and inseparable from" the tortious conduct which was the actual direct cause of the plaintiffs' damages. However, the *Asbury* approach rests on the assertion that it is impossible to separate legitimate medical treatment from sexual assault. There may, in some cases, be a fact question presented as to whether the medical professional's conduct was, in fact, legitimate medical treatment. This does not mean, however, that we can conclude it is not possible for the trier of fact to separate legitimate medicine from a sexual assault, to determine which acts of the care provider were professional treatment and which were not, and then assess by which acts the plaintiffs' damages were caused. In any event, there is no fact question presented in the instant case as to which acts of Schrein caused appellants' damages, and none of those acts are within the scope of coverage of Schrein's liability insurance policy.

For the foregoing reasons, we reject appellants' contention that this court should follow the minority rule. Instead, we continue to adhere to the majority rule as indicated by our decisions in *Marx v. Hartford Acc. Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968), and *Iwanski v. Gomes*, 259 Neb. 632, 611 N.W.2d 607 (2000). In

the instant case, the substance of appellants' allegations is that Schrein's behavior went beyond the scope of legitimate medical treatment and that their damages result entirely from actions that were not legitimated by any appropriate medical purpose. Appellants did not establish any harm attributable to any failure to properly diagnose or treat a medical condition. Rather, their injuries and damages resulted solely from the affirmative acts of abuse and molestation committed by Schrein under the guise of medical examination and treatment. Consequently, the "act" that caused each of appellants' damages was not medical treatment and not a "professional service" within the meaning of the policy.

CONCLUSION

As previously indicated, the foregoing discussion is substituted for that section of our opinion in *R.W. I* in which we erred and which has been withdrawn. In all other respects, we continue to adhere to the reasoning and conclusions of *R.W. I*, as they pertain to appellants' remaining assignments of error on appeal and rehearing. For the reasons stated in *R.W. I* and this supplemental opinion, we affirm the judgment of the district court.

MOTIONS FOR REHEARING SUSTAINED.
FORMER OPINION MODIFIED.

WRIGHT and MCCORMACK, JJ., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. GARY G. THOMPSON, RESPONDENT.

652 N.W.2d 593

Filed November 1, 2002. No. S-01-489.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____: ____. In a proceeding to discipline an attorney, the Nebraska Supreme Court is limited in its review to examining only those items to which the parties have taken exception.
3. **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.

4. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors.
5. **Disciplinary Proceedings: Proof.** To establish depression as a mitigating factor in a proceeding to discipline an attorney, the respondent must show (1) medical evidence that he or she is affected by depression, (2) that the depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further misconduct.
6. **Disciplinary Proceedings.** 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. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
8. ____. For the purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
9. ____. The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.

Original action. Judgment of suspension and probation.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Carole McMahon-Boies, of Pepperl & McMahon-Boies Law Offices, for respondent.

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

PER CURIAM.

The Counsel for Discipline of the Nebraska Supreme Court filed formal charges against Gary G. Thompson, respondent, alleging various ethical violations. Later, amended formal charges were filed. In a stipulation filed with the referee, Thompson admitted the allegations in the amended formal charges; admitted he violated his oath of office, Neb. Rev. Stat. § 7-104 (Reissue 1997); and admitted he violated various provisions of the Code of Professional Responsibility. The referee recommended a sanction of a 120-day mandatory suspension, followed by at least 2 years' probation. The only issue presented in this proceeding is the appropriate sanction for Thompson's unethical conduct.

FACTS

Thompson was admitted to the practice of law on June 23, 1967, and, since 1971, has been engaged in the practice of law in Beatrice, Gage County, Nebraska. In April 1997, Thompson formed a partnership with Paul W. Korslund.

The Korslund and Thompson partnership apparently flourished, and in May 1997, they hired another attorney as an associate. In October 1998, Korslund was appointed as a district court judge and left the partnership. Thompson then formed a new partnership with the associate, and they hired another attorney.

When Korslund left the partnership, his caseload was transferred to Thompson. Thompson attributes much of his problems to his increased caseload. But, as noted by the referee, a careful examination of the timeline indicates that Thompson's neglect and misrepresentations began before Korslund left the partnership. It does appear, however, that Thompson's unethical behavior became more severe following Korslund's departure, and the three counts of misconduct largely stem from this time period.

COUNT I

In October 1997, Thompson agreed to represent William J. Decker on a claim against Decker's disability insurance carrier, The Equitable Life Assurance Society (Equitable). On April 14, 1998, Thompson filed a petition in Gage County District Court. Equitable then removed the case to federal court on June 3. Thompson admitted that he lacked federal civil court experience and that when the case was removed, he did nothing to refresh or educate himself on federal civil procedure.

On August 29, 1998, the magistrate entered a case progression order setting a deadline for the completion of mandatory disclosures. Thompson and Equitable's counsel then agreed to extend the deadline. On November 18, Equitable served its initial disclosures and also filed a request for production of documents.

Thompson failed to comply with the deadline for mandatory disclosures and did not respond to the request for production of documents. On March 23, 1999, Equitable moved the court to compel Decker to provide initial disclosures and to respond to Equitable's request for production of documents. Thompson did not reply, and on April 16, the magistrate granted Equitable's

motion, ordered Decker to provide initial disclosures and respond to discovery by May 10, extended the progression schedule, and approved sanctions.

Thompson, however, again failed to respond, and Equitable moved for dismissal on May 24, 1999. Although Thompson served initial disclosures on June 17, he did not respond to Equitable's request for production of documents. Because of Thompson's failure to comply with discovery requirements and the order of the court, Decker's case was dismissed on July 19 and another sanction was imposed. Thompson personally paid all sanctions.

Thompson actively misrepresented the status of the case to Decker. He never voluntarily told Decker about his failure to provide discovery, about the sanctions, or about the dismissal of the case. Instead, he continued to assure Decker that the case was progressing normally.

In April 2000, Decker became suspicious about the status of the case and contacted another attorney. That attorney quickly determined that the case had been dismissed. On April 11, Decker and his wife went to see Thompson, ostensibly to find out the status of the case. Thompson initially told the Deckers that things were fine. When the Deckers confronted Thompson with the information they had obtained, Thompson admitted that the case had been dismissed, but represented that he had refiled the case in October 1999. In fact, Thompson did not attempt to reinstate the case until April 11, 2000. The district court denied that motion on April 26. It should be noted, however, that after Thompson withdrew, Decker was allowed to refile.

The referee determined that on Thompson's representation of Decker, the Counsel for Discipline had established by clear and convincing evidence that Thompson had violated his oath of office and the following provisions of Canons 1, 6, and 7 of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice. . . .

. . . .

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

(1) Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him or her.

. . . .

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

. . . .

(2) Fail to carry out a contract of employment entered into with a client for professional services . . . .

. . . .

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.

COUNT II

Thompson became the attorney in fact for Gary Dickey on October 24, 1997. There was conflicting evidence about the nature of the representation. Dickey was incarcerated in an out-of-state correctional institution, and according to Dickey, he retained Thompson to recover some personal property in the possession of Spencer Fentress. Thompson claimed that he told Dickey that the property or proceeds from the sale of property could not be recovered until after Dickey was released from confinement. Thompson admitted, however, that he told Dickey that he had commenced a civil action against Fentress for the recovery of Dickey's personal property, when, in fact, he had filed no such action. The referee also concluded that Thompson had been

neglectful in failing to answer several letters and telephone calls from Dickey.

Thompson continued to represent Dickey after Dickey filed his complaint with the Counsel for Discipline. After Dickey's release, Thompson successfully prosecuted a replevin action against Fentress.

The referee determined that the Counsel for Discipline had established by clear and convincing evidence that Thompson had violated his oath of office and the following provisions of Canons 1, 6, and 7 of the Code of Professional Responsibility:

> DR 1-102 Misconduct:
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> . . . .
>
> DR 6-101 Failing to Act Competently.
>
> (A) A lawyer shall not:
>
> . . . .
>
> (3) Neglect a legal matter entrusted to him or her.
>
> . . . .
>
> 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.

COUNT III

In 1996, Deward Cummings filed a pro se discrimination suit against his former employer, the U.S. Postal Service, in federal court. In March 1997, Thompson entered his appearance on behalf of Cummings. Thompson filed an amended complaint, but missed the deadline for making initial mandatory disclosures. He then moved the court for leave to file a brief in opposition to the defendant's motion to dismiss. The court granted leave, but Thompson failed to file a brief. Instead, Cummings, through another attorney, filed bankruptcy. Thompson testified

that he did some research on the brief, but, because Cummings anticipated bankruptcy would stay the proceedings, he did not file the brief.

In August 1998, Cummings' case was returned to the active trial docket. The magistrate set January 19, 1999, as the date for the pretrial conference. Thompson failed to inform Cummings of the date and did not appear at the conference. Thompson testified that although he received notice of the conference, he failed to note the date on his calendar. Thompson also failed to properly follow the federal rules of civil procedure for two motions to produce. Both motions were considered abandoned by the magistrate because of Thompson's errors and omissions.

Finally, Thompson failed to file a brief in opposition to the defendant's motion for summary judgment. Although the court entered summary judgment for the defendant, the referee concluded that the failure to file the brief did not prejudice Cummings. The referee reasoned that the court's ruling was based on lack of jurisdiction and that the order showed that no evidence or point of law would have changed the court's ruling.

The referee determined that the Counsel for Discipline had established by clear and convincing evidence that Thompson had violated his oath of office and the following provisions of Canons 1 and 6 of the Code of Professional Responsibility:

> DR 1-102 Misconduct:
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> . . . .
> DR 6-101 Failing to Act Competently.
> (A) A lawyer shall not:
> (1) Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it.
> . . . .
> (3) Neglect a legal matter entrusted to him or her.

Thompson's Depression

For each count, Thompson affirmatively alleged depression as a mitigating factor. Thompson had long suspected that depression played a role in his life, and even engaged in self-treatment with

St. John's Wort, but he failed to associate his unethical behavior with depression. In November 2001, Thompson sought a psychiatric evaluation from Walter J. Duffy, M.D. Duffy referred Thompson to his partner, Robert G. Arias, Ph.D., a psychotherapist and neuropsychologist. Arias diagnosed Thompson as suffering from "major depressive disorder, recurrent, moderate." Arias testified that Thompson's symptoms included decreased motivation, increased procrastination, sleep disturbance, concentration problems, and a high level of guilt. Thompson testified that these symptoms became predominate when Korslund left the partnership and transferred his caseload to Thompson.

Arias testified that the primary emotion underlying Thompson's depression was a feeling of being ashamed of himself, which resulted in an inclination on Thompson's part to construct an external view of himself that belies how he actually feels. This leads to difficulty in setting limits. For Thompson, this was reflected in the large number of community projects in which he took part and in his willingness to accept all clients regardless of their ability to pay. According to Arias, the result is a cycle of " 'learned helplessness.' " In other words, people like Thompson take on more than they can do to combat feelings of inadequacy, but, because they can never complete all the tasks assumed, their sense of inadequacy gets worse.

Arias also testified that depression would not cloud a person's ability to distinguish right from wrong, but that a major depressive disorder can compromise a person's motivation to such an extent that the person cannot do what he or she knows should be done.

When asked about the possibility of Thompson's experiencing a reoccurrence of depression, Arias testified that the greater the number of past episodes, the more likely one will be to suffer an episode in the future. Arias also testified that treatment significantly diminished the prospects of relapse and that one goal of Thompson's treatment would be to improve his ability to recognize that something was wrong before things got out of hand.

At the time of the hearing, Thompson was receiving treatment for his depression from both Arias and Duffy, including medication and psychotherapy. Arias testified that Thompson

was making significant progress and that he was "fairly optimistic" about Thompson's prognosis.

Referee's Recommended Sanction

The referee concluded that Thompson's conduct, particularly in his representation of Decker, would ordinarily result in a severe sanction. But the referee found the evidence of Thompson's depression and its effect on his professional behavior to be "very persuasive" and used it as a mitigating factor. The referee recommended that Thompson be suspended from the practice of law for at least 120 days and that upon reinstatement, he be subject to probation for not less than 2 years. As a condition for reinstatement, the referee recommended that Thompson be required to continue his therapy. For the terms of probation, the referee recommended (1) continuing treatment, to be monitored by the Counsel for Discipline or the Nebraska Lawyers Assistance Program; (2) limiting Thompson's practice to those matters where he was experienced and felt comfortable and not allowing Thompson to go outside those areas unless he associates with a lawyer experienced in the relevant area of law; and (3) requiring a calendar control system to be monitored by the Counsel for Discipline.

ASSIGNMENTS OF ERROR

Neither Thompson nor the Counsel for Discipline takes exception to the factual findings of the referee. The Counsel for Discipline takes exception to (1) the length of the recommended period of suspension and (2) the terms of probation.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002); *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001).

ANALYSIS

[2,3] Under existing case law, we are limited in our review to examining only those items to which the parties have taken exception. *State ex rel. Counsel for Dis. v. Apker, supra*. Under Neb. Ct. R. of Discipline 10(L) (rev. 2001), we may, in our discretion, consider the referee's findings as final and conclusive. Accordingly,

we find, on our de novo examination of the record, clear and convincing evidence that Thompson's conduct, set forth above, violated his oath of office and the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1), (4), and (5); Canon 6, DR 6-101(A)(1) through (3); and Canon 7, DR 7-101(A)(2).

The facts we have set out above establish that Thompson committed serious ethical breaches that would ordinarily result in a severe sanction. Over a period of almost 3 years, Thompson engaged in a pattern of neglect which severely frustrated his clients' attempts to seek redress through the judicial process. Particularly distressing is Thompson's handling of the Decker case. Not only did his neglect result in the dismissal of the case and the imposition of sanctions, but he repeatedly misrepresented to Decker and his wife the status of the case.

> A lawyer's integrity and the client's right to rely upon the lawyer's word form the bedrock of an attorney-client relationship. A knowingly false statement made by a lawyer to a client not only constitutes a breach of trust but also taints the reputation of the bar as a whole and requires firm disciplinary action in order to protect the public, as well as deter others from engaging in such conduct.

State ex rel. NSBA v. Aupperle, 256 Neb. 953, 962, 594 N.W.2d 602, 608 (1999).

[4] However, "[t]he determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors." *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. at 749, 642 N.W.2d at 169. In this case, Thompson asserts his depression as a mitigating factor. Depression is a serious mental illness, and lawyers are not immune to its debilitating effects. In fact, a growing body of literature suggests lawyers are especially susceptible to experiencing depression. Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & Health 1 (1995-96); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand. L. Rev. 871 (1999). In a recent disciplinary case that, much like this one, involved attorney neglect and misrepresentations, the Iowa Supreme Court described

the interaction of depression and attorney misconduct and how depression affects the disciplinary process:

> Clearly, misrepresentation is the most serious violation in this case. The concept of such conduct is repulsive to our system of justice and its very presence within our profession supports serious discipline, justified by the need to deter the offender and others, protect the public, and maintain the reputation of the profession. . . . Yet, against the backdrop of depression, misrepresentation can take on added meanings, as can neglect. This backdrop complicates the imposition of discipline and requires us to fully examine the impact of depression.
>
> The evidence in this case reveals that serious depression often results from chemical imbalances in the brain that cause those afflicted to be plagued by growing and overwhelming feelings of hopelessness and despair. It also reveals that depression can take hold of a person without his or her knowledge or understanding of the need for treatment. . . . With the state of mind brought on by depression, it is understandable how neglect, and even excuses for nonperformance, can become part of the disease. . . . Thus, unethical professional conduct can double as a symptom of depression. . . . Moreover, these symptoms too often appear before the disease is diagnosed and treatment is sought.

(Citations omitted.) *Sup. Ct. Bd. of Prof. Ethics v. Grotewold*, 642 N.W.2d 288, 294-95 (Iowa 2002).

[5] We have recognized that "[t]he nature of depression and the psychiatrist-assisted potential for cure are mitigating factors" in determining an appropriate sanction. *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 1008, 540 N.W.2d 359, 363 (1995). To establish depression as a mitigating factor, the respondent must show (1) medical evidence that he or she is affected by depression, (2) that the depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further misconduct. Accord ABA Standards for Imposing Lawyer Sanctions § 9.32(i) (Supp. 1992). These are factual questions.

Here, the referee concluded that "[t]he testimony and evidence established that [Thompson] indeed suffered from a major

depressive episode during much of the period at issue, and that [Thompson's] depression symptoms played a major role in his conduct." The referee also determined that treatment would reduce the risk of further misconduct. The Counsel for Discipline did not take exceptions to the referee's factual findings, and under rule 10(L), we find the referee's conclusions concerning Thompson's depression to be final and conclusive. See *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 635 N.W.2d 427 (2001). As a result, we must decide how Thompson's depression should impact his sanction.

[6-8] To determine whether and to what extent discipline should be imposed in a lawyer discipline 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. Counsel for Dis. v. Spindler, ante* p. 501, 648 N.W.2d 319 (2002); *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Each case must be evaluated individually in light of its particular facts and circumstances. *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000). For the purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. Spindler, supra*; *State ex rel. NSBA v. Frank*, 262 Neb. 299, 631 N.W.2d 485 (2001).

The nature of depression, however, clouds several of the factors we normally consider in determining the appropriate sanction. Using a sanction as a deterrent for others loses some of its value. See *Sup. Ct. Bd. of Prof. Ethics v. Grotewold, supra*. The evidence in this case was that a major depression inhibits a person's ability to make rational choices by compromising his or her motivation to such an extent that the person cannot do what he or she knows should be done. As a result, threatening those like Thompson who suffer from an untreated mental illness with a severe sanction will have a limited effect, at best.

Our consideration of the maintenance and reputation of the bar as a whole is also affected by the nature of depression. See

State ex rel. NSBA v. Gleason, 248 Neb. 1003, 1007, 540 N.W.2d 359, 362 (1995) ("maintenance of the reputation of the bar is important to the court. The question is how to maintain the reputation"). The bar is not served by imposing punitive sanctions against those suffering from treatable mental illness. Instead, "the reputation of the profession can be vindicated by the diagnosis and successful treatment of the disease." *Sup. Ct. Bd. of Prof. Ethics v. Grotewold*, 642 N.W.2d 288, 295 (Iowa 2002).

The attitude of the offender is also of less importance because depression can negatively affect the attorney's attitude without his or her knowledge. In this case, Thompson repeatedly failed to cooperate with the Counsel for Discipline. Normally, such conduct would be treated as an aggravating factor, see *State ex rel. NSBA v. Simmons*, 259 Neb. 120, 608 N.W.2d 174 (2000), but here, the parties agree that Thompson's failure to cooperate with the Counsel for Discipline was a manifestation of Thompson's depression. Although Thompson initially failed to cooperate with the Counsel for Discipline, once treatment began, he became cooperative and expressed regret for the harm he had caused.

[9] Our main concern in determining what effect Thompson's depression should have on his sanction is the protection of the public. As we have repeatedly said, "the purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice." *State ex rel. NSBA v. Frederiksen*, 262 Neb. 562, 568, 635 N.W.2d 427, 432-33 (2001). Accord *State ex rel. NSBA v. Jensen*, 260 Neb. 803, 619 N.W.2d 840 (2000). For many lawyers suffering from depression, the proper treatment can return them to being productive members of the bar with little risk that they will engage in future misconduct. There is always the danger, however, that their treatment may be ineffective or that, even if effective, they will stray from it. Accordingly, it is necessary to construct a sanction which adequately protects the public by ensuring both that the treatment has been successful and that the lawyer will continue with the treatment.

In cases involving depression as a mitigating factor, a period of mandatory suspension coupled with terms of reinstatement will often be appropriate. The suspension is not designed as

punishment. Instead, it is meant as a time period in which the respondent can seek treatment without posing a danger to his or her clients. Once the respondent can demonstrate that treatment has resulted in a meaningful and sustained recovery, he or she should then be placed on a period of probation with treatment and practice monitoring components.

At the hearing there was evidence that the treatment of Thompson's depression was having a positive effect, but Thompson also candidly admitted that he was currently unable to engage in a full general practice of law. After reviewing the evidence, we agree with the referee that a suspension of 120 days adequately ensures there will be evidence of a meaningful and sustained recovery before Thompson is allowed to return to practice. At the end of that period, Thompson may apply for reinstatement subject to the terms of probation. Upon his application for reinstatement, Thompson will have the burden of proving that he is fit to practice law under the terms of his probation, including that treatment for his depression has resulted in a meaningful and sustained recovery. Such proof shall include a showing that he has continued therapy with a qualified psychiatrist and psychotherapist, unless such psychiatrist releases Thompson from treatment.

Following readmission, Thompson shall be subject to probation for a period of not less than 2 years. The Counsel for Discipline filed exceptions to the referee's recommended terms of probation. The referee recommended a treatment monitoring program and a practice monitoring program, both of which were to be monitored by the Counsel for Discipline. Apparently, the Counsel for Discipline complains that its office is not capable of acting as a monitor. Counsel for Discipline suggests that the Nebraska Lawyers Assistance Program (NLAP) be the monitor for the treatment monitoring program and that a practicing attorney be arranged as the monitor for the practice monitoring program.

As for the treatment component of Thompson's probation, he will be required to comply with treatment recommendations of his treating psychotherapist and psychiatrist as monitored by NLAP. If at any time NLAP believes that Thompson has failed to comply with his treatment requirements, it shall report the same to the Counsel for Discipline.

As for the practice monitoring component of Thompson's probation, the Counsel for Discipline shall serve as the monitor. However, a practicing attorney may be substituted as the monitor if Thompson and the Counsel for Discipline can agree upon a practicing attorney who is willing to serve as Thompson's monitor. If a practicing attorney does serve as the monitor, he or she shall not be compensated for his or her duties, but he or she shall be reimbursed by Thompson for actual expenses incurred. We note that the record shows that a local attorney volunteered to act in a supervisory capacity.

During the probationary period, Thompson will be limited to those matters where he has experience and is comfortable. The Counsel for Discipline and Thompson should agree on these areas. Thompson may not accept a case outside the agreed-upon areas without notifying his practice monitor and associating with a lawyer experienced in the relevant area of law.

As part of the practice monitoring program, Thompson will also be required to maintain a calendar control system in which Thompson shall, at least monthly, provide a list of all cases for which he is then responsible to his practice monitor. The names of Thompson's clients shall be kept confidential by way of a number assigned to each case. It will be the duty of Thompson to inform his clients that he is required to provide this list to his practice monitor.

The lists shall include the following:

1. Date attorney-client relationship began.
2. General type of case (i.e., divorce, adoption, probate, contract, real estate, civil litigation, criminal).
3. Date of last contact with client.
4. Type and date of work completed on file (i.e., pleading, correspondence, document preparation, discovery, court hearing).
5. Type and date of work that should be completed on the case.
6. Any applicable statute of limitations and its date.

The practice monitor shall have the right to contact Thompson with any questions the monitor may have regarding the list. If the monitor is not the Counsel for Discipline, then if at any time the monitor believes Thompson has violated a disciplinary rule or has failed to comply with the terms of this probation, he or she shall report the same to the Counsel for Discipline.

At the end of the 2-year probationary period, it will be Thompson's burden to show cause why the period of probation should not be extended for another year. If probation is extended, it will be Thompson's burden to show cause why the period of probation should not be extended for an additional year, until Thompson is released from probation.

CONCLUSION

It is the judgment of this court that Thompson be suspended from the practice of law for a period of 120 days, effective immediately, after which time Thompson may apply for readmission consistent with the terms of reinstatement as outlined above. Following reinstatement, Thompson shall be subject to a term of probation for not less than 2 years with the terms as outlined above. Thompson shall comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, Thompson shall be subject to punishment for contempt of this court. Accordingly, Thompson is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION AND PROBATION.

NEFF TOWING SERVICE, INC., APPELLEE, V. UNITED STATES FIRE INSURANCE CO., DOING BUSINESS THROUGH CRUM & FORSTER INSURANCE, APPELLANT.

652 N.W.2d 604

Filed November 1, 2002. No. S-01-960.

1. **Summary Judgment: Jurisdiction: Appeal and Error.** Generally, the denial of a motion for summary judgment is not a final, appealable order. However, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
2. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.

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. **Insurance: Contracts: Intent.** An insurance policy is a contract. 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.
5. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.
6. **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.
7. **Insurance: Contracts: Liability.** Generally, where the event for which an insured seeks coverage is plainly outside the scope of the coverage encompassed in the policy according to a plain reading of its terms, an insurer may not be obligated to provide coverage to the insured.
8. **Insurance: Liability.** In determining its duty to defend, an insurer must not only look to the petition, but must also investigate and ascertain the relevant facts from all available sources.
9. ____: ____. Where the insured has undertaken the responsibility for maintaining personal property and is in fact attempting to exercise control thereof at the time of an occurrence which damages the property, the insured has that degree of care, custody, or control of the property contemplated by a liability coverage exclusion.
10. **Insurance: Contracts: Claims.** Although an insurer is obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded with directions.

Thomas M. Locher, Thomas M. Braddy, and Ralph A. Froehlich, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellant.

Eugene L. Hillman and Patricia McCormack, of Hillman, Forman, Nelsen, Childers & McCormack, for appellee.

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

STEPHAN, J.

In this declaratory judgment action, United States Fire Insurance Co. (USFIC) appeals from an order of the district court for

Douglas County determining that an insurance policy issued to Neff Towing Service, Inc. (Neff Towing), provided liability coverage for a property damage claim asserted against Neff Towing. We reverse, based upon our conclusion that the claim falls within an exclusion to the liability coverage provided by the policy.

BACKGROUND

The relevant facts are either stipulated or uncontroverted. Neff Towing is a Nebraska corporation with its principal place of business in Omaha, Nebraska. It is engaged in the business of providing towing and trucking services. USFIC is a New York corporation with its home office located in the State of New York. USFIC issued insurance policy No. 136 145274 3 to Neff Towing, effective December 10, 1993, to December 10, 1994. The policy, referred to as a "Garage Policy," defines " '[g]arage operations' " as follows:

> "Garage operations" means [sic] the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations. "Garage operations" includes [sic] the ownership, maintenance or use of the "autos" indicated in SECTION I of this Coverage Form as covered "autos." "Garage operations" also include all operations necessary or incidental to a garage business.

The term " '[a]uto' " is defined by the policy to mean "a land motor vehicle, trailer or semi-trailer." A schedule in the policy lists "autos" owned by Neff Towing, including a 1985 GMC wrecker and a 1984 Freightliner tractor. The policy includes both "Liability Coverage" and "Garagekeepers Coverage," which are described in separate sections of the policy.

Under the Liability Coverage, the term covered "autos" includes the scheduled vehicles owned by the insured, as well as certain hired and nonowned vehicles used in connection with the insured's garage business. The Liability Coverage provides, under the heading " 'Garage Operations' — Covered 'Autos' ":

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident"

> and resulting from "garage operations" involving the ownership, maintenance or use of covered "autos."
>
> . . . .
>
> We have the right and duty to defend any "suit" asking for such damages . . . . However, we have no duty to defend "suits" for . . . "property damage" . . . not covered by this Coverage Form.

The "Exclusions" section of the Liability Coverage provides that coverage does not apply to property damaged while in the insured's "care, custody or control."

Under the separate "Garage Coverage Form" provided by the policy, a covered "auto" is defined as "[a]ny customer's 'auto' while left with your 'garage operations' for service, repair, storage or safekeeping." The Garagekeepers Coverage obligates USFIC to

> pay all sums the "insured" legally must pay as damages for "loss" to a covered "auto" or "auto" equipment left in the "insured's" care while the "insured" is attending, servicing, repairing, parking or storing it in your "garage operations" . . . [c]aused by . . . (1) [t]he covered "auto's" collision with another object; or (2) [t]he covered "auto's" overturn.

The Garagekeepers Coverage further provided that USFIC had the "right and duty to defend any 'suit' asking for these damages," but no duty to defend suits for losses which were not covered.

On November 12, 1994, Neff Towing was called to tow a disabled tractor-trailer unit owned by CRST, Inc., from a location near mile marker 17 on Interstate 80 east of Council Bluffs, Iowa. Neff Towing dispatched two towing vehicles to the scene of the disabled CRST tractor-trailer unit. One towing unit was a 1985 GMC wrecker, and the other was a 1984 Freightliner tractor. Neff Towing's GMC wrecker removed the disabled tractor from the scene, leaving the trailer unattached. While Neff Towing was attempting to attach its Freightliner tractor to the trailer, the trailer tipped onto its side and was damaged. Neff Towing's employee left the scene without attaching the trailer to the towing unit. On the following day, the president of Neff Towing returned to the scene where he observed CRST loading cargo from the damaged trailer onto another tractor-trailer, which was then driven away. Neff Towing then righted the damaged

empty trailer and towed it away for repairs. Pursuant to the Garagekeepers Coverage under the aforementioned policy, USFIC paid CRST $9,187.99 in full settlement of the damage to its trailer. The Garagekeepers Coverage did not extend to the cargo which had been contained in the trailer at the time of damage. Unlike the Liability Coverage which covers " 'property damage,' " defined as "damage to or loss of use of tangible property," the Garagekeepers Coverage is limited to paying for damages to a covered " 'auto' " or " 'auto' equipment."

Thereafter, CRST filed suit against Neff Towing, alleging that CRST delivered and transferred possession of the trailer to Neff Towing for the purpose of towing the trailer from the roadside on November 12, 1994, and that when CRST reclaimed possession of the trailer on the following day, its contents were damaged in the amount of $53,438, which CRST sought to recover with interest. Neff Towing filed an answer specifically alleging that "on or about November 12, 1994, defendant Neff Towing did come into possession of a trailer owned and operated by the plaintiff for purposes of towing said trailer." Neff Towing specifically denied that "the contents of the trailer, while in the possession of [Neff Towing] were damaged in the nature and to the extent as alleged in plaintiff's petition."

When Neff Towing's tender of the defense of this action to USFIC was declined, Neff Towing filed this declaratory judgment action in which it sought a determination that coverage for the cargo loss claim was afforded under the Liability Coverage of the USFIC Garage Policy described above. Both parties filed motions for summary judgment. At the hearing on the motions, arguments centered upon whether the claim of CRST was excluded by the "care, custody or control" exclusion in the policy's Liability Coverage. Counsel for USFIC argued that the exclusion applied because Neff Towing judicially admitted, in its answer to the petition filed by CRST, that it had taken possession of the trailer. Based upon the stipulated facts, the pleadings in the underlying action, and an uncontroverted affidavit, counsel for Neff Towing argued that the CRST trailer was "knocked over and damaged" before it ever came under the "care, custody, and control" of Neff Towing, and therefore the exclusion did not apply.

The district court sustained Neff Towing's motion for summary judgment and overruled that of USFIC. The district court reasoned that while it was obligated to consider the pleadings in the underlying suit by CRST against Neff Towing, it could also consider other pertinent facts as stipulated by the parties in determining whether the exclusion was applicable. The court determined that the exclusion was unambiguous but held that it was inapplicable because the stipulated facts revealed that Neff Towing was attempting to attach its tractor to the CRST trailer when the accident occurred, but never succeeded in doing so. For this reason, the district court concluded that "Neff Towing never had . . . care, custody, and control" of the trailer and its contents. It held that USFIC had a duty to defend Neff Towing in the action brought against it by CRST and to indemnify it for any damages adjudged against it pursuant to the Liability Coverage of the aforementioned policy.

USFIC perfected this timely appeal, which we moved 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).

ASSIGNMENTS OF ERROR

USFIC assigns that the district court erred in granting Neff Towing's motion for summary judgment and denying its own motion for summary judgment.

STANDARD OF REVIEW

[1] Generally, the denial of a motion for summary judgment is not a final, appealable order. However, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Knudsen v. Mutual of Omaha Ins. Co.*, 257 Neb. 912, 601 N.W.2d 725 (1999).

[2] When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with

regard to that question. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001).

[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. *American Fam. Mut. Ins. Co. v. Hadley, ante* p. 435, 648 N.W.2d 769 (2002); *Reisig v. Allstate Ins. Co., ante* p. 74, 645 N.W.2d 544 (2002).

ANALYSIS

As noted, the insurance policy in question provides separate Liability Coverage and Garagekeepers Coverage. In its operative second amended petition, Neff Towing alleges that any liability it may have to CRST for damage to the contents of its trailer is covered under the policy's Liability Coverage; it makes no claim under the Garagekeepers Coverage. The district court specifically determined that the latter coverage was inapplicable, and neither party has taken exception to this ruling. Accordingly, we focus our attention on the Liability Coverage to determine whether USFIC had a duty to defend or indemnify Neff Towing with respect to the CRST property damage claim.

In construing liability insurance policies, we have held that an insurer's duty to defend is broader than its duty to indemnify. *Ohio Cas. Ins. Co. v. Carman Cartage Co., supra*; *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996); *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). However, in a case such as this, where the facts are undisputed, a determination that a duty to defend exists will likewise be determinative of the existence of a duty to indemnify. The specific issue to be resolved is whether CRST's property was in the "care, custody, or control" of Neff Towing at the time the damage occurred. If this question is resolved in the negative, the policy exclusion claimed by USFIC is inapplicable and both a duty to defend and a duty to indemnify exist. If, however, the property was in the "care, custody, or control" of Neff Towing when damaged, the exclusion applies and USFIC has neither a duty to defend nor a duty to indemnify.

[4-7] Familiar general principles guide our determination of whether, as a matter of law, the claimed coverage exclusion

applies to the undisputed facts of this case. An insurance policy is a contract. 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. *American Fam. Mut. Ins. Co. v. Hadley, supra*. Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute. *American Fam. Mut. Ins. Co. v. Hadley, supra*; *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999). 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. *American Fam. Mut. Ins. Co. v. Hadley, supra*; *Volquardson v. Hartford Ins. Co., ante* p. 337, 647 N.W.2d 599 (2002). Generally, where the event for which an insured seeks coverage is plainly outside the scope of the coverage encompassed in the policy according to a plain reading of its terms, an insurer may not be obligated to provide coverage to the insured. *Farm Bureau Ins. Co. v. Witte, supra*.

The first step in our analysis requires that we determine whether the coverage exclusion is ambiguous. The district court cited *Clausen v. Columbia Nat. Ins. Co.*, 1 Neb. App. 808, 510 N.W.2d 399 (1993), for the proposition that the phrase "care, custody, or control" used in an insurance policy with reference to personal property is not ambiguous. In *Clausen*, the Nebraska Court of Appeals considered this phrase in the context of a provision in a commercial lines insurance policy which extended coverage to personal property of others in the " 'care, custody or control' " of the insured. 1 Neb. App. at 810, 510 N.W.2d at 401. The court cited a line of cases from other jurisdictions that held the phrase to be unambiguous and noted that while most of those cases considered the phrase in the context of a coverage exclusion, rather than an extension of coverage, that distinction was not determinative. The Court of Appeals held that the phrase " 'care, custody, or control' " was "unambiguous and should be given [a] common and ordinary meaning." *Id.* at 814, 510 N.W.2d at 403. The court noted that the term " 'care,' " when used in reference to personal property, would include such concepts as charge, supervision,

management, responsibility for or attention to safety and well-being, and temporary keeping for the benefit of the owner; " 'custody' " would encompass a temporary charge or keeping; and " 'control' " would include the exercise of regulation, influence, domination, or command with respect to property. *Id.* at 814-15, 510 N.W.2d at 403-04, quoting *Grana v. Security Insurance Group*, 72 Misc. 2d 265, 339 N.Y.S.2d 34 (1972), and Webster's Encyclopedic Unabridged Dictionary of the English Language (1989). We agree with this analysis and conclude that the phrase "care, custody, or control" as used in the USFIC Garage Policy is unambiguous.

[8] In determining whether the CRST claim against Neff Towing falls within the exclusion, USFIC argues that we should consider only the pleadings in the underlying case in which Neff Towing admitted that it "did come into possession of a trailer owned and operated by the plaintiff for purposes of towing said trailer." USFIC argues that this constitutes a judicial admission which conclusively establishes the applicability of the exclusion and forecloses examination of other facts pertinent to the claim. However, our law is well settled that in determining its duty to defend, an insurer must not only look to the petition, but must also investigate and ascertain the relevant facts from all available sources. *Mapes Indus. v. United States F. & G. Co.*, 252 Neb. 154, 560 N.W.2d 814 (1997); *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). If an insurer must look beyond the pleadings to ascertain relevant and available facts in deciding whether it is obligated to accept a tender of defense by an insured, it logically follows that a court which is asked to determine whether a duty to defend exists in a declaratory judgment action should likewise expand its focus beyond the pleadings, particularly in a case such as this where all relevant facts are known and not disputed. Accordingly, in our independent determination of the question of law presented in this appeal, we consider all of the evidence received and considered by the district court.

[9] In its ruling from the bench, the district court repeatedly used the phrase "care, custody, *and* control" in referring to the exclusion. (Emphasis supplied.) We deem it significant that the language of the policy is plainly stated in the disjunctive, i.e., "care, custody *or* control." (Emphasis supplied.) Thus, if the facts

establish any one of the three relationships between Neff Towing and the property of CRST, the exclusion applies. See *Clausen v. Columbia Nat. Ins. Co.*, 1 Neb. App. 808, 510 N.W.2d 399 (1993). Neff Towing argues, and the district court held, that because it was unsuccessful in actually attaching the CRST trailer to its towing unit, it never exercised care, custody, or control of the property. This argument is unrealistically narrow because it focuses exclusively on the factor of "custody," while ignoring "care" and "control." We determine that the better rule is "[w]here . . . the insured has undertaken the responsibility for maintaining personal property and is in fact attempting to exercise control thereof at the time of an occurrence which damages the property . . . the insured has that degree of 'care, custody or control of the property contemplated by the [liability coverage] exclusion." *Howard Assoc. v. Home Indem. Co.*, 34 Colo. App. 390, 392-93, 528 P.2d 980, 981 (1974).

[10] When CRST requested that Neff Towing tow CRST's disabled tractor-trailer unit laden with cargo, CRST authorized Neff Towing to exercise that degree of control over the property necessary to physically remove it from the roadside to a place of safety. This was of mutual benefit to CRST, which had an interest in protecting its stranded property, and Neff Towing, which was in the business of providing towing services. Neff Towing was the only entity authorized by the owner of the property to remove it from the roadside. This necessarily involved the exercise of "care, custody, or control" over the property. Neff Towing first acted pursuant to this authority when it detached the disabled tractor from its trailer and towed the tractor away. Neff Towing continued to exercise its right of control by backing its towing unit under the now-separated trailer in an unsuccessful attempt to couple the trailer to the towing unit so that the trailer also could be removed from the roadside. It was this very act of exercising control over the trailer which allegedly caused the cargo damage claimed by CRST. Although an insurer is obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy. *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 502 N.W.2d 484 (1993); *Iowa Mut. Ins. Co. v. Meckna*, 180 Neb. 516, 144 N.W.2d 73 (1966). We conclude that

the undisputed facts fall within the Liability Coverage exclusion of the USFIC Garage Policy, and thus there was no duty to defend or indemnify.

CONCLUSION

Based upon our independent review of the question of law presented in this appeal, we conclude that the CRST trailer and its cargo were in the "care, custody, or control" of Neff Towing at the time of the alleged loss, thereby falling within the unambiguous Liability Coverage exclusion stated in the policy. We, therefore, reverse the judgment of the district court granting Neff Towing's motion for summary judgment and overruling that of USFIC, and remand the cause to the district court with directions to vacate the judgment entered in favor of Neff Towing and to enter judgment in favor of USFIC in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

McCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
KEVIN B. HARRIS, APPELLANT.

652 N.W.2d 585

Filed November 1, 2002. No. S-01-1123.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of discretion.
2. **Juror Qualifications.** When a defendant, through diligence, is able to discover a reason to challenge a juror, the objection to the juror must be made at the time of voir dire.
3. **Juror Qualifications: Juror Misconduct: Waiver.** A defendant does not waive an objection to a juror when the juror has concealed the information that is the subject of the objection.
4. **Criminal Law: Jury Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that the misconduct was prejudicial to the extent that the defendant was denied a fair trial.
5. **Verdicts: Juror Misconduct: Proof.** Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that his conduct was of such character that prejudice may be presumed.

6. **Juror Qualifications: Juror Misconduct: Presumptions.** A juror is presumed to be biased when he or she conceals information for the purpose of being placed on the jury.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for a new trial.

Thomas C. Riley, Douglas County Public Defender, and Mikki E. Campbell for appellant.

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

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

CONNOLLY, J.

A jury convicted the appellant, Kevin B. Harris, of shoplifting. Harris contends that he was denied a fair trial because one of the jurors failed to disclose on a jury form that she was a convicted felon. We determine that the juror was biased, and we reverse, and remand for a new trial.

BACKGROUND

On August 30, 2000, Patrick Maly, a grocery store manager, while watching through a surveillance camera, saw a man pick up two bottles of vodka in the liquor department. He then observed the man walk to the back of the store and give the bottles to another person, whom Maly later identified as Harris. According to Maly, Harris put the bottles into a green bag and went to the exit of the store without going through the checkout stands.

Maly stopped Harris at the exit door and asked about the bottles. Harris denied that he had any bottles and continued toward the door. A struggle ensued between Maly, Harris, and another store manager, Robert Flood. Maly and Flood handcuffed Harris, and the bag fell to the floor. According to Maly, the man who initially took the vodka bottles appeared, took the bag, ran from the store, and drove away. The man was never identified or apprehended.

Flood testified that like Maly, he saw a man carrying two bottles of vodka toward the back of the store. He described the

struggle with Harris and stated that when Harris dropped the bag, there was a sound like bottles clinking together.

The record reflects inconsistent testimony whether the incident was videotaped. Maly stated that a videotape recording of the incident had been taped over, and Flood stated that the tape never recorded any video. The record also reflects inconsistent testimony about information that was provided to the investigating officers.

Harris did not present any evidence. At the end of the State's case, he moved for a dismissal of the case because the State had failed to make a prima facie case. The motion was overruled. The jury found Harris guilty. Harris moved for a new trial, alleging, among other things, that the trial court erred in overruling his motion for a directed verdict and that juror misconduct occurred.

Juror Qualification Form

At the hearing on the motion for a new trial, Harris entered into evidence a juror qualification form that Pamela Dortch, one of the jurors, filled out as part of the jury duty process. The form states:

> YOU ARE HEREBY REQUIRED, UNDER PENALTY OF LAW, to answer all the questions listed below and return this notice properly signed to the Jury Commissioner within TEN DAYS from the date of receipt. ANY PERSON WHO KNOWINGLY FAILS TO COMPLETE AND RETURN OR WHO WILLFULLY MISREPRESENTS A MATERIAL FACT ON THIS FORM FOR THE PURPOSE OF AVOIDING OR SECURING SERVICE AS A JUROR SHALL BE GUILTY OF CONTEMPT OF COURT.

Question No. 7 on the form asks, "Have you ever been convicted of a criminal offense punishable by imprisonment in the Nebraska Penal and Correctional Complex?" Dortch answered no to this question. Dortch left blank the questions asking for her county of residence and date of birth. On a question stating that people over age 65 may be exempt from jury duty, Dortch checked a box stating that her preference was to serve as a juror. Also entered into evidence was a district court journal entry showing that in 1990, Dortch was convicted of possession with intent to deliver a controlled substance and was sentenced to 1 to 3 years in prison.

Dortch's Testimony at Motion for New Trial

Dortch testified that she had been convicted in a criminal action and that she had not been pardoned. When asked whether she knew she had a felony conviction when she filled out the juror qualification form, Dortch stated that the conviction was years ago, that she thought she had put it behind her, and that she thought it was all erased. Dortch later admitted that she was also convicted of shoplifting in 1996 and spent some time in jail as a result.

When asked whether she remembered voir dire in Harris' case, Dortch stated that she felt kind of ill that day and was trying to stay awake. She did not remember the potential jurors' being asked questions about convictions or police contacts, but admitted that she might not have been paying full attention that day. She also did not remember the jurors' being asked whether anyone had been convicted of shoplifting. She further did not remember being asked whether she had any medical conditions that would keep her from sitting on a jury. She stated that she was very ill, that she was kind of sleepy, and that she dozed off a couple of times that day.

Dortch also testified that she felt ill and sleepy through the entire trial. She admitted that she did not focus during the trial and dozed off a few times. She said that she did miss things during the trial because she was ill and sleepy.

Dortch stated that she had previously met Alicia Gully, Harris' ex-wife, at a barbecue. Dortch stated that she was unaware that Gully had been married to Harris. She did not remember any questions at voir dire about whether anyone knew people who were connected to Harris. The voir dire of the jury is not in the record.

After the hearing, the trial court stated that it did not find Dortch's statements about her condition and illness during trial to be credible. The court stated, "I think [the statements] are made to justify the fact that she didn't know what she was doing and to avoid responsibility for what is under way at this time, so I don't find that particularly credible evidence in this matter." The court later found that Dortch intentionally falsified her statements and misled the court by failing to disclose that she had been convicted of a crime punishable by imprisonment. The court stated:

> There's no question that she knew about it and she intended to say that she hadn't been convicted of it. She notes that she wishes to serve as a juror in this case, and so it was an intentional—it was intentionally done to mislead those involved in the process.

The court also found, however, that there was no evidence that the jury panel was actually asked about prior convictions at voir dire or that Harris relied on the statements in the juror qualification form. The court concluded that a party who fails to inquire into an issue on voir dire waives any objections about a juror that are made after trial. Because of the lack of evidence about voir dire, the court determined that Harris waived any objection he had to Dortch and overruled Harris' motion for a new trial.

ASSIGNMENTS OF ERROR

Harris assigns, rephrased, that the district court erred in failing to sustain his motion for a new trial on the grounds that (1) Dortch failed to disclose that she was a convicted felon, (2) Dortch stated that she was not paying attention at voir dire and trial, and (3) there was insufficient evidence to support a guilty verdict.

STANDARD OF REVIEW

[1] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of discretion. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

ANALYSIS

Harris contends that he was denied a fair trial because Dortch was ineligible to serve as a juror. The State, however, contends that Harris waived any objection he had to Dortch by failing to object during voir dire.

STATUTES INVOLVED

Because we apply statutory law when discussing the issues of both waiver and fair trial, we first provide the relevant statutory sections. Neb. Rev. Stat. § 25-1601(1) (Reissue 1995) provides in part, "Persons disqualified to serve as either grand or petit jurors are: . . . persons who have been convicted of a criminal offense punishable by imprisonment in a Department of Correctional

Services adult correctional facility, when such conviction has not been set aside or a pardon issued." Neb. Rev. Stat. § 29-112 (Reissue 1995) also provides that any person sentenced to be punished for any felony, when the sentence has not been reversed or annulled, is deemed incompetent to be a juror. Neb. Rev. Stat. § 25-1609 (Reissue 1995) provides that it shall be a sufficient cause of challenge of a juror if he or she is disqualified under § 25-1601. Neb. Rev. Stat. § 25-1629 (Reissue 1995) requires that a juror qualification form be sent to potential jurors and requires that a juror who is disqualified under § 25-1601 be stricken from the proposed juror list.

WAIVER

Relying on *Turley v. State*, 74 Neb. 471, 104 N.W. 934 (1905), the State argues that Harris waived any objection that he had about Dortch because he failed to raise the issue during voir dire. We disagree.

In *Turley*, it was discovered after trial that a juror had formerly been convicted of a felony. We held that the issue was waived and stated:

> Great latitude is allowed the defendant upon the *voir dire* examination to enable him to ascertain whether there is any ground for objecting to the juror. He cannot waive an objection of this nature, and, after taking his chances of an acquittal before the jury selected, insist upon an objection which he should have raised upon the impaneling of the jury, and, if he makes no effort to ascertain whether a juror offered is qualified to sit, he must be held to have waived the objection.

Id. at 476, 104 N.W. at 936.

[2,3] *Turley* holds that when a defendant, through diligence, is able to discover a reason to challenge a juror, the objection to the juror must be made at the time of voir dire. *Turle*y does not stand for the proposition that an objection to a juror is waived when the juror has concealed information and the defendant through diligence cannot discover the information before trial. A defendant cannot waive something that has been concealed. *People v. Green*, 31 Cal. App. 4th 1001, 38 Cal. Rptr. 2d 401 (1995), *reversed on other grounds, Green v. White*, 232 F.3d 671 (9th Cir. 2000).

Under § 25-1629, a juror qualification form must be sent to potential jurors and any juror who is disqualified under § 25-1601 must be stricken from the proposed juror list. Attorneys must be able to rely on a statutory scheme intended to prevent disqualified jurors from ever being placed in the jury pool. Attorneys should not be required to ask again at voir dire about past convictions that would disqualify a juror when jurors have already filled out forms addressing the issue.

Here, Dortch gave false information on her juror qualification form. The record shows that she concealed information during voir dire. A defendant does not waive an objection to a juror when the juror has concealed the information that is the subject of the objection. Nothing in the record suggests that Harris could have discovered the information before trial. We conclude that the issue has not been waived.

Conviction of Crime and Juror Bias

[4,5] Harris contends that he was denied a fair trial because Dortch should have been disqualified as a juror. A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that the misconduct was prejudicial to the extent that the defendant was denied a fair trial. See *State v. Anderson*, 252 Neb. 675, 564 N.W.2d 581 (1997). Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that his conduct was of such character that prejudice may be presumed. *Ellis v. Far-Mar-Co*, 215 Neb. 736, 340 N.W.2d 423 (1983). When a juror deliberately conceals information, courts address the issue in terms of juror bias. See, e.g., *U.S. v. Bishop*, 264 F.3d 535 (5th Cir. 2001); *Green v. White, supra*; *McCoy v. Goldston*, 652 F.2d 654 (6th Cir. 1981). See, also, *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (en banc) (juror concealed fact that family member was crime victim).

Some courts hold that when a juror deliberately concealed information or purposely gave an incorrect answer during voir dire, bias is presumed, prejudice is presumed, and a new trial must be granted. See, e.g., *McCoy v. Goldston, supra*; *Fleming v. State*, 687 So. 2d 146 (Miss. 1997). The Fifth and Ninth Circuit Courts

of Appeals have specifically addressed the issue whether bias is presumed when a juror conceals that he or she has been convicted of a crime. *U.S. v. Bishop, supra*; *Green v. White, supra*; *Dyer v. Calderon, supra*.

In *Dyer*, the Ninth Circuit Court of Appeals noted that the Sixth Amendment to the U.S. Constitution guarantees criminal defendants a verdict by impartial and indifferent jurors. The bias or prejudice of a juror violates a defendant's right to a fair trial. The court further noted that the presence of a biased juror cannot be harmless and that the error requires a new trial without a showing of actual prejudice. *Id.*, citing *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927). The Ninth Circuit applied these concepts to a juror's concealment of his commission of a crime. *Green v. White*, 232 F.3d 671 (9th Cir. 2000).

In *Green*, a juror failed to disclose on a jury form that he had been convicted of a felony for passing bad checks, which would statutorily disqualify him from serving on a jury. The juror also failed to disclose during voir dire other encounters with the law, including a conviction for assault and an arrest for robbery. During deliberations, a question arose about the juror's impartiality because he stated that he knew the defendant was guilty the minute he saw him and made a reference to a desire to shoot the defendant. The Ninth Circuit determined that the juror deliberately lied and inferred that the juror had a desire to serve on the jury. The court then noted that while a court might be unable to say exactly what motive a juror would have to stay on a jury, it believed that " '[t]he individual who lies in order to improve his chances of serving has too much stake in the matter to be considered indifferent.' " *Id.* at 677, quoting *Dyer v. Calderon, supra*. The court then stated:

> "A juror . . . who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process. . . . [A] perjured juror is unfit to serve even in the absence of . . . vindictive bias. If a juror treats with contempt the court's admonition to answer voir dire questions truthfully, she can be expected to treat her responsibilities as a juror—to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions—with equal scorn. Moreover, a juror

> who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony."

Green v. White, 232 F.3d at 677, quoting *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (en banc). Finding that the juror's pattern of lies and misbehavior created "destructive uncertainties," the Ninth Circuit determined that the juror was biased and instructed the trial court to grant the defendant's request for a writ of habeas corpus. *Green v. White*, 232 F.3d at 678. See, also, *State v. Cho*, 108 Wash. App. 315, 30 P.3d 496 (2001) (bias presumed when juror withholds information to increase likelihood of being seated on jury); *State v. Akins*, 867 S.W.2d 350 (Tenn. Crim. App. 1993) (when juror willfully conceals or fails to disclose information during voir dire which reflects on that juror's impartiality, presumption of prejudice arises).

The Fifth Circuit in *U.S. v. Bishop*, 264 F.3d 535 (5th Cir. 2001), declined to adopt a per se presumption of bias except in extreme circumstances. In *Bishop*, a juror had pled guilty to a charge of embezzlement and the adjudication of the matter was deferred for 10 years under a state statute that allows courts to defer adjudication and place a defendant under community supervision. The juror answered no to questions on a juror questionnaire about whether she had ever been convicted of, or charged with, a crime. She also did not respond to voir dire questions about whether any potential jurors had been involved in criminal matters. She explained that she did not reveal the charge of embezzlement because her lawyer told her that because the adjudication of the charge had been deferred, she did not have to tell anyone about it.

The Fifth Circuit noted that motivations of jurors for concealing information can vary and that only those that truly affect a juror's impartiality can affect the fairness of a trial. Thus, the court determined that a felon's serving as a juror is not an automatic basis for a new trial. Instead, the defendant must demonstrate that the juror was actually biased or fundamentally

incompetent. *Id*. The court recognized that in the majority of situations, the party seeking a new trial must demonstrate bias through admission or factual proof. The court stated, however, that bias will be implied or presumed in extreme circumstances. The court also stated that "[i]ndicia of partiality are particularly problematic when coupled with the juror's lies or other efforts to hide a potential disqualification." *Id*. at 554.

The court discussed *Green v. White*, 232 F.3d 671 (9th Cir. 2000), and distinguished it, stating:

> [I]naccurate responses to voir dire questions are excused when caused by inattention or when a query does not elicit the specific information relevant to the juror's disqualification. . . . Failure to disclose a conviction due to a mistaken, but honest belief the record was expunged, or due to embarrassment, also does not suggest bias. . . . Even when a juror's non-disclosure is dishonest as opposed to mistaken, his behavior is not a basis for reversal unless the dishonesty appears to be rooted in bias or prejudice.

U.S. v. Bishop, 264 F.3d at 555. The court then determined that the juror would not be presumed to be biased. Unlike in *Green*, there was no suggestion in *Bishop* that the juror especially desired to serve on the jury, the juror's motivations appeared to be purely personal, and there were no other troubling circumstances involved. The *Bishop* court affirmed the defendant's convictions.

Here, we need not decide whether to adopt an automatic presumed-bias rule when a juror is statutorily disqualified, because under either an automatic or a conditional rule, Harris is entitled to a new trial.

[6] Dortch did not merely lie on her juror qualification form. Although her age is not apparent from the record, Dortch also marked a box on the juror qualification form for people over age 65, indicating that she would like to serve on a jury. The trial judge made specific findings of fact that Dortch wished to serve as a juror in the case and that she intentionally lied to mislead those involved in the process. Further, the record shows that Dortch also failed to disclose that she had been convicted of shoplifting, the same crime that Harris was charged with. Dortch stated that she did not remember questions asked at voir dire about whether anyone had been convicted of shoplifting, because

she was ill and sleepy. Although the voir dire is not in the record, the trial judge specifically found that Dortch's testimony about her illness and sleepiness was not credible. Finally, there was an allegation that Dortch had met Harris' ex-wife, Gully, although Dortch stated that she did not know Gully was Harris' ex-wife. Under these circumstances, there is more than mere juror dishonesty because of mistake or embarrassment. Instead, the inference is that Dortch deliberately lied with the motivation of being placed on the jury. Under either an automatic or a conditional rule of presumption, a juror is presumed to be biased when he or she conceals information for the purpose of being placed on the jury. Once bias is presumed, prejudice is presumed as well and the error cannot be harmless. We conclude that Harris is entitled to a new trial.

Sufficiency of Evidence

Harris contends that there was insufficient evidence to convict him. He contends that there was no videotape of the crime, that there was inconsistent evidence, and that the State's witnesses lacked credibility. Witnesses testified that they saw Harris take the bottles of vodka and attempt to leave the store. The credibility of the witnesses is a question for the jury. This assignment of error is without merit.

CONCLUSION

We conclude that there was sufficient evidence to convict Harris. But, because there is an inference that Dortch concealed information specifically to secure a place on the jury and because of other irregularities in her behavior, we conclude that she is presumed to have been biased. As a result, prejudice is presumed and Harris is entitled to a new trial.

Reversed and remanded for a new trial.

STATE OF NEBRASKA, APPELLEE, V. JASON S. BAKER, APPELLANT.

652 N.W.2d 612

Filed November 1, 2002. No. S-02-115.

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.** If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to an absolute discharge from the offense charged.
4. ____. The primary burden of bringing an accused person to trial within the time provided by law is upon the State, and the failure to do so entitles the defendant to an absolute discharge.
5. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Jurisdiction: Speedy Trial: Time: Appeal and Error.** 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.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded with directions to dismiss.

Robert P. Lindemeier, Lincoln County Public Defender, for appellant.

Don Stenberg, Attorney General, and Mark. D. Raffety for appellee.

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

WRIGHT, J.

NATURE OF CASE

Jason S. Baker filed a motion to discharge alleging violation of his statutory right to a speedy trial. The Lincoln County District Court denied Baker'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. Recek*, 263 Neb. 644, 641 N.W.2d 391 (2002).

[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.*

FACTS

On March 23, 1999, a juvenile court petition was filed alleging that Baker had subjected another person to sexual penetration without consent. This petition was dismissed on April 2, and a complaint was filed in Lincoln County Court charging Baker with first degree sexual assault, a Class II felony. On April 30, before the clerk of the district court, the Lincoln County Attorney subscribed and swore to an information charging Baker. However, the information was not file stamped until October 5. According to an order file stamped on October 19, Baker pled not guilty on October 4, and the Lincoln County District Court set a jury trial date for January 25, 2000.

On January 20, 2000, Baker filed a motion to discharge on speedy trial grounds, which the district court denied on February 2. The court explained that the speedy trial statute, Neb. Rev. Stat. § 29-1207 (Reissue 1995), "specifically states that the six month period to be counted toward speedy trial begins to run when the information is filed." The court found that the information was not filed in this case until October 5, 1999, the date the information was file stamped. The court separately considered whether Baker's Sixth Amendment right to a speedy trial or his due process rights had been violated and concluded that they had not. On February 11, 2000, Baker filed an appeal of the court's denial of his motion to discharge.

On February 6, 2001, the Nebraska Court of Appeals affirmed the district court's denial of Baker's motion to discharge. See *State v. Baker*, No. A-00-177, 2001 WL 221557 (Neb. App. Feb. 6, 2001) (not designated for permanent publication). The Court of Appeals also concluded that the 6-month period contained in

§ 29-1207 did not begin to run until October 5, 1999, the date the information was filed. It held that neither Baker's statutory right to a speedy trial nor his constitutional right to a speedy trial had been violated.

Baker's petition for further review was granted and subsequently dismissed as having been improvidently granted. The clerk of the district court received our mandate on September 14, 2001, and an order spreading the mandate was signed and filed on September 28. By order file stamped October 17, the district court set a trial date for December 18. On December 3, the court rescheduled the trial for January 29, 2002. We point out that following Baker's interlocutory appeal, the State did not advise the district court of any potential speedy trial problems. The State did not object to the trial dates set by the court, nor did the State attempt to show good cause why the court should extend the time for bringing Baker to trial as provided in § 29-1207(4)(f). On December 18, 2001, Baker filed a supplemental motion to discharge. The court denied Baker's motion on January 22, 2002, and he filed a notice of appeal from that decision on January 28.

ASSIGNMENTS OF ERROR

Baker assigns as error that the district court erred by failing to grant his motion to discharge, because the State did not bring him to trial within 6 months as required by Neb. Rev. Stat. §§ 29-1205 through 29-1209 (Reissue 1995). He does not claim that the court erred in failing to find a violation of his constitutional right to a speedy trial.

ANALYSIS

The speedy trial statute, § 29-1207, provides:

> (1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.
>
> . . . .
>
> (3) If such defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, order granting a new trial, or the mandate on remand.

[3,4] If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to an absolute discharge from the offense charged. *State v. Knudtson*, 262 Neb. 917, 636 N.W.2d 379 (2001). The primary burden of bringing an accused person to trial within the time provided by law is upon the State, and the failure to do so entitles the defendant to an absolute discharge. *Id.*

Baker argues that the district court erred by holding that the State was entitled to a new 6-month period for speedy trial purposes after his interlocutory appeal was decided. He asserts that the 6-month period commenced to run when the juvenile court petition was filed on March 23, 1999, or, in the alternative, that the 6-month period commenced when the information was file stamped on October 5, 1999. Baker argues that in either case, the 6-month period expired before trial and that, therefore, he was entitled to an absolute discharge.

The State argues that a new 6-month period for speedy trial calculations commenced to run on September 28, 2001, when the mandate was spread on the record following Baker's interlocutory appeal. The State asserts that it does not matter that the trial was not set until December 18 and later rescheduled for January 29, 2002, because in either case, the 6-month period did not elapse.

In *State v. Baker*, No. A-00-177, 2001 WL 221557 (Neb. App. Feb. 6, 2001) (not designated for permanent publication), the Court of Appeals determined that the information charging Baker with first degree sexual assault was filed on October 5, 1999. This determination became the law of the case, and therefore, pursuant to § 29-1207(2), the 6-month period commenced on October 5, 1999.

The issue presented is whether the State is entitled to an additional 6-month speedy trial period after the mandate was entered in the district court following appellate review of Baker's interlocutory appeal or whether such appeal merely tolled the original 6-month period until the district court reacquired jurisdiction. The State argues that our opinion in *State v. Kinser*, 256 Neb. 56, 588 N.W.2d 794 (1999), is controlling.

Kinser involved a jury trial conviction in district court. There, the judgment of conviction was reversed on appeal, and the cause

was remanded for a new trial. In *Kinser*, we construed § 29-1207(3) to mean that when a new trial is ordered after an appeal, the district court has 6 months to retry the defendant after the mandate is spread upon the record. We stated that § 29-1207

> specifies two categories of events from which the 6-month period may be computed: The date the indictment is returned or the information filed, see § 29-1207(2), or "[i]f such defendant is to be tried again following a mistrial, an order for a new trial, or *an appeal* or collateral attack, such period shall commence to run from the date of the mistrial, order granting a new trial, *or the mandate on remand.*"

(Emphasis in original.) *Kinser*, 256 Neb. at 58, 588 N.W.2d at 796-97.

[5] Unlike *Kinser*, the case at bar does not involve a defendant who is to be tried again. The district court concluded that § 29-1207 required that the 6-month period begin again after the mandate was spread on the record following Baker's interlocutory appeal. We disagree. 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. Recek*, 263 Neb. 644, 641 N.W.2d 391 (2002). 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. *State v. Portsche*, 261 Neb. 160, 622 N.W.2d 582 (2001). A fundamental principle of statutory construction requires that penal statutes be strictly construed. See *State v. Utter*, 263 Neb. 632, 641 N.W.2d 624 (2002).

Here, the key words in § 29-1207(3) are "tried again." Given their ordinary meaning, they can only refer to a defendant who has previously been put on trial. "[T]ried again," as used in § 29-1207(3), does not refer to a defendant who has yet to be brought to trial a first time and whose trial has been delayed because of the defendant's interlocutory appeal. To conclude otherwise would require us to ignore the plain language of § 29-1207(3). We therefore conclude that § 29-1207(3) does not apply to the case at bar because Baker has not yet been brought to trial.

[6] We next address the impact of Baker's interlocutory appeal upon the 6-month period for speedy trial purposes. The State urges this court to modify our decision in *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999), and hold that when a defendant files a motion to discharge and an appellate court finds no merit to the motion, the 6-month period should begin again after the cause is remanded to the trial court. In *Ward*, we explained 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." 257 Neb. at 386, 597 N.W.2d at 621.

The State claims that our decision in *Ward* could result in practical difficulties which violate the intent of § 29-1207. The State claims that a hypothetical defendant whose trial date was set for the last possible day in the 6-month period could file a motion to discharge on that day and appeal the trial court's denial of the motion. The trial court would subsequently be left with insufficient time to reset the trial date after the mandate was spread on the record following the appellate court's decision to affirm the denial of the motion to discharge. Although such a factual scenario is not before us, we point out that § 29-1207(4)(f) provides that other periods of delay may be excluded if the court finds they are for good cause. We decline the State's invitation to modify our decision in *Ward*.

We next consider whether Baker was timely brought to trial. Between October 5, 1999, and December 18, 2001, when Baker filed his second motion to discharge, there were two periods excludable under § 29-1207(4).

On January 20, 2000, Baker filed his first motion to discharge. The district court overruled this pretrial motion on February 2. This period is excludable under § 29-1207(4)(a) as "the time from filing until final disposition of pretrial motions of the defendant." Then the question becomes whether the excludable period commences January 20 or 21.

In *State v. Oldfield*, 236 Neb. 433, 442-43, 461 N.W.2d 554, 561 (1990), we explained:

> Although in some of our decisions it appears that the day on which a defendant filed a pretrial motion is counted

> within the exclusionary period under § 29-1207(4)(a) . . . nevertheless, as we have reaffirmed and expressed today, an excludable period under § 29-1207(4)(a) commences on the day immediately after the filing of a defendant's pretrial motion.

Therefore, in this case, we start counting the excludable period resulting from Baker's pretrial motion on January 21, 2000. Beginning with January 21, there are 13 days until February 2. This is the first excludable period.

Second, on February 11, 2000, Baker filed a notice of appeal of the district court's denial of his first motion to discharge. As we stated in *State v. Ward*, 257 Neb. 377, 386, 597 N.W.2d 614, 620 (1999), for speedy trial purposes, an interlocutory appeal "certainly constitutes a 'period of delay resulting from other proceedings concerning the defendant,' within the meaning of § 29-1207(4)(a)." Whereas the excludable time resulting from Baker's first motion to discharge, for speedy trial purposes, falls under the "pretrial motions" category of § 29-1207(4)(a), see *State v. Oldfield, supra*, his appeal of the district court's ruling on the motion to discharge falls under the "other proceedings concerning the defendant" category of § 29-1207(4)(a).

In *Ward*, we explained that in calculating the number of excludable days resulting from an interlocutory appeal, for speedy trial purposes, "the period to be excluded due to [the] appeal commence[s] on and includes . . . the date on which he filed his notice of appeal." 257 Neb. at 386, 597 N.W.2d at 620. Therefore, it is clear that in calculating the excludable time resulting from Baker's interlocutory appeal, for speedy trial purposes, we begin counting on February 11, 2000, the day the notice of appeal was filed.

In *State v. Kinser*, 256 Neb. 56, 60, 588 N.W.2d 794, 797-98 (1999), we stated that "[t]he district court first took action on the mandate by spreading it on the record . . . thus reacquiring jurisdiction from the appellate courts . . . ." In the case at bar, the district court first took action on the mandate by spreading it on the record on September 28, 2001. Beginning with February 11, 2000, there are 596 days until September 28, 2001. Adding the 13 excludable days resulting from Baker's pretrial motion to discharge to the 596 excludable days resulting from his interlocutory

appeal of the district court's ruling on that motion, we arrive at a total excludable period of 609 days.

We next proceed to calculate whether the 6-month period elapsed before Baker was brought to trial. The rule in Nebraska is clear that to calculate the time for speedy trial purposes, we must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add in any time excluded under § 29-1207(4) to determine the last day the defendant can be tried. See *State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999). The information was filed against Baker on October 5, 1999. If there were no time periods excluded under § 29-1207(4), the last day on which the State could have brought Baker to trial would have been April 5, 2000. Since there are 609 days excluded under § 29-1207(4), the last day the State could have brought Baker to trial was December 5, 2001. Baker's trial date was initially set for December 18, and then it was delayed to January 29, 2002. Thus, the 6-month speedy trial period elapsed before Baker was brought to trial. The State failed to meet its burden of bringing Baker to trial within the time provided by law.

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. Recek*, 263 Neb. 644, 641 N.W.2d 391 (2002). The district court's denial of Baker's motion to discharge was clearly erroneous.

CONCLUSION

Baker is entitled to an absolute discharge of the offense charged, because the State did not bring him to trial within the time required by § 29-1207. The judgment of the district court is reversed, and the cause is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WILLIAM "DOUG" JAY, APPELLANT AND CROSS-APPELLEE, V. MOOG AUTOMOTIVE, INC., A MISSOURI CORPORATION, AND CNA INSURANCE CO., APPELLEES AND CROSS-APPELLANTS.

652 N.W.2d 872

Filed November 8, 2002. No. S-01-477.

1. **Directed Verdict: Evidence: Appeal and Error.** When a motion for a directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
2. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from instructions given or refused, the 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 evidence, there is no prejudicial error.
3. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
4. **Products Liability: Words and Phrases.** In products liability litigation, the notion of a defective product embraces two separate concepts. The first, commonly labeled as a "manufacturing defect," is one in which the product differs from the specifications and plan of the manufacturer. The second concept of a defective product is one in which the product meets the specifications of the manufacturer but the product nonetheless poses an unreasonable risk of danger. This condition is generally characterized as a "design defect."
5. **Products Liability: Negligence: Damages: Proof.** To establish a prima facie case in negligence in a products liability case based upon negligent design, a plaintiff needs to establish some evidence of duty, breach, causation, and damages.
6. **Products Liability: Actions: Negligence.** In a products liability cause of action based on negligence, the manufacturer's conduct is at issue, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury.
7. **Products Liability: Proof.** In a products liability action on a claim of strict liability based on defect, a plaintiff must prove by a preponderance of the evidence that (1) the defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of the plaintiff's injury sustained while the product was being used in a way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) the plaintiff's damages were a direct and proximate result of the alleged defect.

8. **Products Liability: Actions.** In a products liability cause of action based on strict liability in tort, the quality of the product is at issue, that is, whether the product was unreasonably dangerous.
9. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
10. **Negligence.** Assumption of risk differs from contributory negligence in that a subjective standard is applied to the former and an objective standard is applied to the latter.
11. **Negligence: Pleadings: Proof: Trial.** When a defendant pleads the affirmative defense of assumption of risk, the defendant has the burden to establish the elements of assumption of the risk before that defense, as a question of fact, may be submitted to the jury.
12. **Negligence: Evidence: Trial.** Before the defense of assumption of risk is submissible to a jury, the evidence must show that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage.
13. **Negligence.** The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts. The standard to be applied in determining whether a plaintiff has assumed the risk of injury is a subjective one based upon the particular facts and circumstances of the event.
14. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
15. **Jury Instructions: Evidence: New Trial.** Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial.
16. **Products Liability.** A misuse defense is available in a products liability case based on a claim of strict liability.
17. **Products Liability: Negligence.** Failure to follow plain and unambiguous instructions is a misuse of the product.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and remanded for a new trial.

Christopher D. Jerram, of Kelley & Lehan, P.C., for appellant.

Joseph F. Gross, Jr., of Timmermier, Gross & Prentiss, for appellee Moog Automotive, Inc.

Don Stenberg, Attorney General, and Charles E. Lowe for amicus curiae State of Nebraska.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

William "Doug" Jay brought an action against Moog Automotive, Inc. (Moog), and others in the district court for Douglas County in connection with injuries Jay received after having been struck by a strut coil spring assembly which escaped a strut spring compressor. The jury returned a verdict in favor of Moog, the manufacturer of the compressor, and the district court entered judgment in Moog's favor. Jay appeals the judgment of the district court, and Moog cross-appeals. We determine that there is merit to Jay's appeal and no merit to Moog's cross-appeal. We reverse, and remand for a new trial.

II. STATEMENT OF FACTS

On November 15, 1993, Jay sustained permanent eye and neurological injuries as a result of being struck in the face by a strut coil spring assembly which escaped during compression from a model T40187C strut spring compressor machine manufactured by Moog. Jay was working as an automotive mechanic for Jensen Goodyear automotive repair shop in Omaha and, at the time of the accident, had over 11 years of automotive mechanic experience. He had previously used other strut spring compressors but had never used a Moog compressor prior to November 15.

Jay filed an action against Moog in the district court for Douglas County. Jay's second amended petition is the operative petition. In addition to Moog, Jay named Specialty Sales, Co., as a defendant. Specialty Sales is the company that sold the compressor to Jensen Goodyear and installed the compressor. Specialty Sales was dismissed as a party prior to trial. CNA Insurance Company, Jensen Goodyear's workers' compensation insurance carrier, was also made a party to the action pursuant to Neb. Rev. Stat. § 48-118 (Reissue 1993) for purposes of determining the nature and extent of any subrogation rights.

In his second amended petition, Jay asserted three "causes of action" against Moog: "negligence," "strict liability," and "breach of warranty." The substance of Jay's allegation, denominated "strict liability," was that the compressor was defectively designed.

In its answer, Moog alleged as affirmative defenses that Jay was "contributorily negligent," that Jay assumed the risk, and that

the compressor was altered, which alteration was a superseding cause of Jay's injury. The substance of Moog's defense, denominated "contributory negligence," was that Jay misused the compressor. At trial, Moog was given leave to amend its answer to specify that Jay misused the product as follows: (1) that Jay used the compressor without a retaining pin; (2) that Jay used the compressor on the upper strut mount, misplacing the upper arms; (3) that Jay applied a prying force on the strut assembly while the spring was compressed and the upper arms not fixed with a retaining pin; and (4) that Jay failed to follow directions and warnings not to use the compressor without a retaining pin.

Trial was held beginning April 2, 2001. At the close of Jay's evidence, Moog moved for a directed verdict on all three theories of recovery. Jay withdrew the breach of warranty claim, and the district court overruled Moog's motion for directed verdict on the remaining theories of recovery.

In its defense, Moog presented the expert testimony of Ted Sokol, Ph.D., a civil engineer. The district court overruled Jay's motion in limine to exclude Sokol's testimony, Jay's objections to Sokol's testimony, and his motion to strike filed after Sokol's testimony. Sokol testified regarding his reconstruction of the accident and concluded that the compressor was used improperly in the following respects: improper placement of the upper arms caused a misalignment of the holes for the strut; the retaining pin was removed or never inserted through the holes; and a prying force was used, possibly to realign the holes for the strut, which caused the upper arms to separate. Sokol further stated that the directions and warnings provided with the compressor were sufficient. At the close of all the evidence, Jay moved for directed verdict and Moog renewed its motion for directed verdict. The district court overruled both motions.

On April 9, 2001, the district court submitted Jay's theories of recovery of strict liability and negligence to the jury. The district court instructed the jury on Moog's affirmative defenses of assumption of risk and contributory negligence based on misuse as to each theory of recovery.

On April 10, 2001, the jury returned a unanimous general verdict in favor of Moog. The district court accepted the verdict and

entered judgment in favor of Moog. Jay appeals from the judgment, and Moog cross-appeals.

III. ASSIGNMENTS OF ERROR

Jay claims, renumbered and restated, that the district court erred in (1) failing to find that Neb. Rev. Stat. § 25-21,185.12 (Reissue 1995), authorizing the affirmative defense of assumption of risk, violates the Equal Protection Clause; (2) instructing the jury on assumption of risk and overruling Jay's motion to dismiss the affirmative defense when Moog's evidence was insufficient to support the instruction; (3) instructing the jury on "contributory negligence" as an affirmative defense because (a) contributory negligence is not a defense to a strict liability theory of recovery and (b) the evidence was not sufficient to support the instruction as to either the strict liability or the negligence theory of recovery; (4) allowing Sokol's testimony because it lacked foundation and was not relevant; (5) failing to sustain Jay's motion for directed verdict; and (6) refusing to allow Jay to question Moog's employees regarding prior injuries involving the compressor.

In its cross-appeal, Moog claims the district court erred in overruling its motion for directed verdict when Jay failed to prove any proximate causation between an alleged defect and the accident.

IV. STANDARDS OF REVIEW

[1] When a motion for a directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Malone v. American Bus. Info., ante* p. 127, 647 N.W.2d 569 (2002).

[2] In reviewing a claim of prejudice from instructions given or refused, the 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 evidence, there is no prejudicial error. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001).

[3] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Id.*

V. ANALYSIS

1. Cross-Appeal

Moog claims on cross-appeal that the district court erred when it denied Moog's motion for a directed verdict. We first consider Moog's cross-appeal, because if Moog's cross-appeal were meritorious, we would not reach the issues raised in Jay's appeal. We conclude, however, that the district court did not err in overruling Moog's motion for directed verdict and that Moog's cross-appeal is without merit.

[4] In products liability litigation, the notion of a defective product embraces two separate concepts. The first, commonly labeled as a "manufacturing defect," is one in which the product differs from the specifications and plan of the manufacturer. The second concept of a defective product is one in which the product meets the specifications of the manufacturer but the product nonetheless poses an unreasonable risk of danger. This condition is generally characterized as a "design defect." *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000). In this products liability case, Jay pursued two theories of recovery against Moog, negligence and strict liability, both of which were based on what Jay asserted to be failures in the design of the compressor.

[5,6] To establish a prima facie case in negligence in a products liability case based upon negligent design, a plaintiff needs to establish some evidence of duty, breach, causation, and damages. *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). In a products liability cause of action based on negligence, the manufacturer's conduct is at issue, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury. *Freeman v. Hoffman-La Roche, Inc., supra.*

[7,8] In a products liability action on a claim of strict liability based on defect, a plaintiff must prove by a preponderance of the evidence that (1) the defendant placed the product on the market for use and knew, or in the exercise of reasonable care

should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of the plaintiff's injury sustained while the product was being used in a way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) the plaintiff's damages were a direct and proximate result of the alleged defect. *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999). In a products liability cause of action based on strict liability in tort, the quality of the product is at issue, that is, whether the product was unreasonably dangerous. *Freeman v. Hoffman-La Roche, Inc., supra*.

[9] A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Green Tree Fin. Servicing v. Sutton, ante* p. 533, 650 N.W.2d 228 (2002). In the present case, Jay presented expert testimony to the effect that the Moog compressor was defectively designed because it required use of a pin and that there were alternative practical designs for the product that did not entail the risks associated with the pin design used by Moog. The expert also testified that Moog's testing of the product was inadequate. The expert further testified that the accident in the present case could not have occurred if the pin were secure. Because Jay testified that he used the pin, the implication most favorable to Jay is that the pin was not secured due to a design defect.

Based on the evidence presented by Jay, the jury could reasonably have found that the compressor was negligently or defectively designed. Under the negligence cause of action, the jury could have concluded that Moog's conduct in designing the compressor was not reasonable. Under the strict liability cause of action, the jury could have concluded that the design of the compressor was defective and made the compressor unreasonably dangerous. The jury could have found that the design of the compressor, which required the use of a pin, proximately caused the accident. Because reasonable minds could have found in Jay's favor, we conclude that the district court did not err in overruling

Moog's motion for directed verdict. We, therefore, find no merit to Moog's cross-appeal.

2. Appeal

[10] Jay claims on appeal that the district court erred by instructing the jury on the defenses of assumption of risk and contributory negligence as to both theories of recovery.

We have explained:

> "Assumption of risk rests in contract or in the principle expressed by the ancient maxim, '*volenti non fit injuria*,' whereas contributory negligence rests in tort. The former involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care, whereas the defense of contributory negligence implies the failure of the plaintiff to exercise due care. As stated in some decisions, assumption of risk is a mental state of willingness, whereas contributory negligence is a matter of conduct."

Cassio v. Creighton University, 233 Neb. 160, 173, 446 N.W.2d 704, 713 (1989). Assumption of risk differs from contributory negligence in that a subjective standard is applied to the former and an objective standard is applied to the latter. *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000); *Talle v. Nebraska Dept. of Soc. Servs.*, 249 Neb. 20, 541 N.W.2d 30 (1995).

(a) Assumption of Risk Defense as to Both Theories of Recovery: Sufficiency of Evidence

Jay asserts that the district court erred in instructing the jury on the affirmative defense of assumption of risk as to both his negligence and his strict liability theories of recovery. Jay argues that it was error to give the instruction for two reasons: (1) because the statute allowing the defense violates the constitutional guarantee of equal protection and (2) because the evidence was insufficient to support the instruction. We conclude that the evidence in this case was not sufficient to support the instruction on the affirmative defense of assumption of risk as to either theory of recovery. Because this error requires reversal and remand for a new trial, we need not consider Jay's constitutional claim.

[11,12] When a defendant pleads the affirmative defense of assumption of risk, the defendant has the burden to establish the elements of assumption of the risk before that defense, as a question of fact, may be submitted to the jury. *Everts v. Hardcopf-Bickley*, 257 Neb. 151, 595 N.W.2d 911 (1999). Before the defense of assumption of risk is submissible to a jury, the evidence must show that the plaintiff (1) knew of the specific danger, (2) understood the danger, and (3) voluntarily exposed himself or herself to the danger that proximately caused the damage. *Pleiss v. Barnes, supra*.

[13] The doctrine of assumption of risk applies a subjective standard, geared to the individual plaintiff and his or her actual comprehension and appreciation of the nature of the danger he or she confronts. *Pleiss v. Barnes, supra*. The standard to be applied in determining whether a plaintiff has assumed the risk of injury is a subjective one based upon the particular facts and circumstances of the event. *Talle v. Nebraska Dept. of Soc. Servs., supra*.

In the present case, although there was evidence that Jay knew of and understood the specific risk of using the compressor without a pin, there was no evidence to support a subjective finding that Jay voluntarily exposed himself to such risk. Jay consistently testified that he had in fact used the pin. Although Moog presented expert testimony that the accident could not have occurred if the pin were in place, the expert could only speculate that the pin was not in place because Jay chose not to use it. Moog presented no evidence of a subjective, conscious choice on Jay's part to voluntarily expose himself to the risk presented by using the compressor without a pin. It was therefore error for the district court to instruct the jury on the affirmative defense of assumption of risk as to both theories of recovery.

[14,15] Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001). Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial. *Springer v. Bohling*, 259 Neb. 71, 607 N.W.2d 836 (2000). We have generally held that

giving a jury instruction on assumption of risk is prejudicial error when the evidence is not sufficient to support the defense. See, *Everts v. Hardcopf-Bickley, supra*; *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991); *Trackwell v. Burlington Northern RR. Co.*, 235 Neb. 224, 454 N.W.2d 497 (1990); *Vanek v. Prohaska*, 233 Neb. 848, 448 N.W.2d 573 (1989). We conclude in this case that instructing the jury on assumption of risk as to both theories of recovery was prejudicial error and that we must reverse, and remand for a new trial.

(b) "Contributory Negligence" as
Defense to Strict Liability

Because the jury instruction on assumption of risk was prejudicial error requiring reversal and remand, it is not necessary that we consider Jay's remaining assignments of error in order to dispose of this appeal. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002); *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000).

The majority of Jay's assignments of error relate generally to issues involving the sufficiency of the specific evidence presented in this case or to the specific expert testimony admitted. We will not consider such other issues in the present appeal because such issues may or may not recur on remand. However, the legal issue Jay raises regarding contributory negligence as a defense to Jay's strict liability theory of recovery is worthy of comment to avoid error on remand of this cause, and we therefore address that issue. We conclude that the affirmative defense which was characterized by Jay, Moog, and the district court as "contributory negligence" was in substance an affirmative defense of "misuse" and that misuse is a proper defense in a products liability case based on a theory of recovery of strict liability.

In its amended answer, Moog asserted as an affirmative defense to both Jay's negligence and strict liability theories of recovery that Jay was "contributorily negligent" in four respects. In two separate instructions, addressing both negligence and strict liability theories of recovery, the district court referred to

Moog's assertion that Jay was "contributorily negligent" and instructed the jury in part as follows:

> [T]he Defendant claims the Plaintiff himself was negligent in one or more of the following ways:
>
> 1. The Plaintiff used the 40187C tool without a retaining pin;
>
> 2. The Plaintiff used the 40187C tool on the upper strut mount misplacing the upper arms;
>
> 3. The Plaintiff applied a prying force on the strut assembly while the spring was compressed and the upper arms not fixed with a retaining pin; and
>
> 4. The Plaintiff failed to follow directions and warnings not to use the tool without a retaining pin.

[16] Jay argues generally on appeal that as a matter of law, it is error for a district court to give a contributory negligence instruction as a defense to a strict liability theory of recovery. Jay specifically contends that because of statutory amendments in 1992, including the enactment of new comparative negligence statutes, contributory negligence is not a defense to a strict liability theory of recovery in Nebraska. The contention raised by Jay is not at issue in this case because the affirmative defense pled by Moog constitutes the affirmative defense of "misuse," and the issue on appeal is therefore the propriety of a misuse affirmative defense where the plaintiff alleges a strict liability theory of recovery. We conclude that a misuse defense is available in a products liability case based on a theory of recovery of strict liability.

[17] In its answer, Moog pled as a defense that Jay used the compressor without a retaining pin, used the compressor on the upper strut mount misplacing the upper arms, and applied a prying force on the strut assembly while the spring was compressed and the upper arms not fixed with a retaining pin. These assertions describe specific misuses of the compressor. Moog also asserts that Jay failed to follow directions and warnings not to use the compressor without a retaining pin. Failure to follow plain and unambiguous instructions is a misuse of the product. *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984).

We have stated both prior and subsequent to the 1992 statutory amendments noted by Jay that misuse of the product is a defense

to a strict liability theory of recovery. See, *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000); *Erickson v. Monarch Indus., supra*. We have also distinguished between contributory negligence and misuse, stating that while "traditional 'contributory negligence' in the sense of a failure to discover a defect or to guard against it, is not a defense to a suit in strict tort," misuse of the product is a defense. *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 567, 209 N.W.2d 643, 655 (1973), *disapproved on other grounds, National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983). We find nothing in the statutory amendments noted by Jay or elsewhere that would change our prior holdings that misuse of the product is a proper affirmative defense to a strict liability theory of recovery. We therefore conclude that on remand, if Moog's evidence supports the instruction, rather than the instruction given at trial, the district court may instruct the jury on misuse of the product as an affirmative defense to Jay's strict liability theory of recovery using an appropriately tailored instruction. See NJI2d Civ. 11.25.

VI. CONCLUSION

We conclude that the district court did not err in overruling Moog's motion for directed verdict, and we therefore reject Moog's cross-appeal. We conclude, however, that the district court committed prejudicial error by instructing the jury on the affirmative defense of assumption of risk as to both theories of recovery because there was not sufficient evidence to support the instruction. We therefore reverse the judgment, and remand the cause to the district court for a new trial. We further conclude that misuse of the product is an allowable defense to Jay's strict liability theory of recovery, and if warranted by the evidence on remand, the jury may be instructed on the affirmative defense as to this theory of recovery.

REVERSED AND REMANDED FOR A NEW TRIAL.

Angela Kosmicki, appellee and cross-appellant, v. State of Nebraska, Department of Health and Human Services, and Ron Ross, director, appellants and cross-appellees.

652 N.W.2d 883

Filed November 8, 2002. No. S-01-508.

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: 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.
4. **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.
5. **Administrative Law: Appeal and Error.** An appellate court accords deference to an administrative agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent.
6. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
7. **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.
8. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia 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.
9. **Contracts: Words and Phrases.** A contract, in its broad sense, is an agreement, obligation, or legal tie whereby a party binds itself, or becomes bound, expressly or impliedly, to pay a sum of money or to perform or omit to do some certain act or thing.
10. **Duress: Proof.** The burden of proving duress is placed upon the party alleging it.
11. **Duress.** What constitutes duress is a question of law, but existence of duress is a question of fact.
12. **Contracts: Duress.** To be voidable because of duress, an agreement must not only be obtained by means of the pressure brought to bear, but the agreement itself must be unjust, unconscionable, or illegal.

13. **Duress.** The essence of duress is the surrender to unlawful or unconscionable demands. It cannot be predicated upon demands which are lawful or the threat to do that which the demanding party has a legal right to do.
14. **Contracts.** Adhesion contracts are not automatically unconscionable or void.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Don Stenberg, Attorney General, Michael J. Rumbaugh, Special Assistant Attorney General, Royce N. Harper, and Michele M. Lewon, Senior Certified Law Student, for appellants.

Rebecca L. Gould, D. Milo Mumgaard, and Sue Ellen Wall, of Nebraska Appleseed Center for Law in the Public Interest, Inc., for appellee.

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

GERRARD, J.

The Welfare Reform Act (Act), Neb. Rev. Stat. § 68-1708 et seq. (Reissue 1996 & Cum. Supp. 2000), limits recipients of public assistance to no more than 2 years of cash assistance and generally requires that while receiving cash assistance benefits, recipients engage in certain approved work-related activities. Full-time postsecondary education is among the work-related activities acceptable under the Act. The question presented in this appeal is whether Angela Kosmicki's pursuit of a bachelor's degree meets the work activity requirement of the Act when the evidence does not show that Kosmicki will be self-sufficient prior to the expiration of the 2-year cash assistance benefit limitation.

FACTUAL AND PROCEDURAL BACKGROUND

On September 16, 1998, while Kosmicki was living in Scottsbluff, Nebraska, she applied for public assistance benefits from the Nebraska Department of Health and Human Services (Department) for herself and her son. On November 9, Kosmicki signed a self-sufficiency contract, as required by the Act. Kosmicki's service plan required her to complete an associate degree at Western Nebraska Community College.

In August 1999, Kosmicki moved to Lincoln, Nebraska, to join her newborn daughter's father. In February 2000, Kosmicki left Lincoln to escape an abusive relationship, returned to Scottsbluff, and reapplied for benefits. In April, Kosmicki moved to a domestic violence shelter in Lincoln, and Kosmicki's public assistance case was transferred to the Lincoln office of the Department. On May 12, a new service plan was concluded with the Department in which Kosmicki would do an independent job search, but if her job search was unsuccessful, Kosmicki would attend workshops at Curtis & Associates, Inc.

Kosmicki did not attend required workshops at Curtis & Associates and telephoned her caseworker on June 20, 2000, to inform him that she wished to complete her education and was trying to enroll at the University of Nebraska-Lincoln (UNL). By this time, a total of 8 months had elapsed of the 24 months of cash assistance benefits to which Kosmicki was limited under the Act. Kosmicki's caseworker informed her that if she could not complete a degree program at UNL before reaching her 2-year time limit for cash assistance benefits, then Kosmicki would have to engage in at least 30 hours per week of other approved work activity in order to remain eligible for cash assistance. If, on the other hand, Kosmicki could receive a degree from UNL within the 2-year cash assistance limitation period, Kosmicki's status as a full-time student would satisfy her work activity requirement under the Act.

Kosmicki, at the time, had four to five semesters to complete at UNL before receiving a bachelor's degree. Because Kosmicki could not complete a degree before the end of the 2-year cash assistance limitation period, Kosmicki's caseworker informed her that she could not attend UNL. Kosmicki was told, however, that she would be allowed to complete her associate degree at Southeast Community College. Kosmicki refused to sign a new self-sufficiency contract under the terms offered by the Department.

In July 2000, Kosmicki was informed that as of August 1, 2000, her aid to dependent children payments and medical assistance would stop, although her food stamps would increase to $302 per month, as the result of an initial sanction imposed under

the Act. Kosmicki appealed, and the director of the Department affirmed the sanction.

Kosmicki appealed to the district court under the Administrative Procedure Act, generally raising two arguments. Kosmicki argued that her self-sufficiency contract with the Department was void because the contract was involuntary on her part and that the Department erred in concluding that Kosmicki could not attend UNL. The district court found that the contract was valid, but concluded that the Department had erred in concluding that attending UNL would not be an acceptable work activity pursuant to the Act and the Department's regulations. The district court remanded the case to the Department for the negotiation of a new self-sufficiency contract consistent with the district court's order. The State appeals.

ASSIGNMENTS OF ERROR

The State's sole assignment of error is that the district court erred in concluding that Kosmicki was entitled to renegotiate a new self-sufficiency contract that included Kosmicki's attending UNL, because Kosmicki cannot complete a degree within the 2-year time limit on her cash assistance benefits. On cross-appeal, Kosmicki assigns that the district court erred in concluding that there was no duress, coercion, and intimidation on the part of the Department

> when the contract formation process outlined by statute and [Department] regulations, and designed to equalize the extreme disparity in bargaining power between low-income families and the State . . . are not followed, and the applicant family is finally forced to accept a contract containing standard clauses that do not reflect the interests and barriers of the applicant family.

STANDARD 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. *Hauser v. Nebraska Police Stds. Adv. Council, ante* p. 605, 650 N.W.2d 760 (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.* 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. *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002).

[4,5] 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. *Id.* However, an appellate court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent. See *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995). See, also, *Capitol City Telephone v. Nebraska Dept. of Rev., ante* p. 515, 650 N.W.2d 467 (2002).

ANALYSIS

Postsecondary Education

The intent of the Act was, in part, to reform the welfare system to remove disincentives to work, promote economic self-sufficiency, and provide individuals and families the support needed to move from public assistance to economic self-sufficiency. See § 68-1709. The Act was intended to change public assistance from entitlements to temporary, "contract-based" support, accomplished through individualized assessments of the personal and economic resources of the applicant and the use of individualized self-sufficiency "contracts." See § 68-1709. To that end, the Act limits recipients of public assistance to no more than 2 years of cash assistance and generally requires that while receiving cash assistance benefits, recipients engage in certain approved work-related activities, which can include full-time postsecondary education.

When an individual or family applies for public assistance benefits, a comprehensive assessment of the applicant's personal and financial assets is conducted by the Department. Based on the results of the assessment, the applicant and Department case manager are to develop a self-sufficiency contract, built upon the

premise of urgent action, and detailing the responsibilities, roles, and expectations of the applicant family, the case manager, and other service providers. See §§ 68-1719 and 68-1720. Cash assistance may be provided for a period of time not to exceed a total of 2 years for recipient families, absent certain exceptions which are not pertinent to this appeal. See § 68-1724. Cash assistance is also provided only while recipients are actively engaged in the specific work-related activities outlined in the self-sufficiency contract. § 68-1723.

Under the self-sufficiency contract, the principal wage earner and other nonexempt members of the applicant family are "required to participate in one or more of the following: Education, job skills training, work experience, job search, or employment." § 68-1721(1). Education consists of "the general education development program, high school, Adult Basic Education, English as a Second Language, *postsecondary education*, or other education programs approved in the contract." (Emphasis supplied.) § 68-1721(2). A regulation of the Department, 468 Neb. Admin. Code, ch. 2, § 020.06B1 (1997), provides, in relevant part:

> Post-secondary education is limited to that which is directly related to the fulfillment of an individual's vocational goal. The participant can participate in postsecondary education for up to 24 months. . . . A postsecondary education program that can be included in the Self-Sufficiency Contract should be for occupations that facilitate economic self-sufficiency. In order for postsecondary education to be included in the Contract, the client should demonstrate that the education program will lead to economic self-sufficiency.

The principal goal of the Act is the achievement of self-sufficiency as expediently as possible. The self-sufficiency contract is "built upon the premise of urgent action." § 68-1719. The Legislature has determined that "the primary purpose of the welfare programs in this state is to provide temporary, transitional support for Nebraska families so that economic self-sufficiency is attained in as an expeditious manner as possible, with the goal of attaining such *self-sufficiency within two years of the initial receipt of public assistance*." (Emphasis supplied.) § 68-1709. See, also, 42 U.S.C. § 608(b)(2)(A)(iii) (2000);

45 C.F.R. § 261.12(c) (2001) (stating that for state-administered welfare programs, individual responsibility plans should "be designed to move the individual into whatever private-sector employment he or she is capable of handling as quickly as possible").

To that end, the Act and its associated regulations emphasize that a self-sufficiency contract must include specific goals for both the State and the recipient of benefits. To ensure that a recipient makes progress toward self-sufficiency, "goals shall be set with timelines and benchmarks that facilitate forward momentum." § 68-1719.

> The Contract will identify the goals to be achieved and will include time lines and benchmarks that facilitate forward momentum. The goals should be clear and specific; measurable and verifiable; realistic - within the control of the individual; adequate - contribute to accomplishment of the goal; congruent with the individual's values; and time-limited - can be accomplished in a reasonable time frame *and within the overall time limit*.

(Emphasis supplied.) 468 Neb. Admin. Code, ch. 2, § 020.05 (1997).

It is undisputed in this case that Kosmicki did not meet, nor did she intend to meet, the requirements of her self-sufficiency contract as set forth in the May 12, 2000, service plan. The issue is whether the Department was correct in its determination that Kosmicki's proposal, to obtain a bachelor's degree at UNL, would not be an acceptable goal of an amended self-sufficiency contract. We conclude that the Department's position is supported by the language and purpose of the Act.

[6-8] In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Capitol City Telephone v. Nebraska Dept. of Rev., ante* p. 515, 650 N.W.2d 467 (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. *Volquardson v. Hartford Ins. Co., ante* p. 337, 647 N.W.2d 599 (2002). The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia 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. *Willers v. Willers*, 255 Neb. 769, 587 N.W.2d 390 (1998).

Considered as a whole, the Act reflects the Legislature's intent that recipients of public assistance become self-sufficient as quickly as possible and that they attain self-sufficiency within 2 years of initially receiving benefits. The Department's regulations, consistent with the purpose and language of the Act, require that postsecondary education must lead to economic self-sufficiency to be included in a self-sufficiency contract and that the goals set forth in a self-sufficiency contract must be attainable within the 24-month overall time limit imposed by the Act. See §§ 020.05 and 020.06B1. In this case, it is not disputed that Kosmicki's proposed goal—a bachelor's degree from UNL—could not be achieved within the 24 month overall time limit. It was, therefore, unacceptable pursuant to § 020.05.

The legislative history of § 68-1721 supports the conclusion that the Legislature did not intend for recipients of public assistance to pursue a course of postsecondary education that cannot be completed prior to the end of the cash assistance limitation period. The inclusion of "postsecondary education" as acceptable work activity under the Act was a result of a committee amendment to 1995 Neb. Laws, L.B. 455. See Executive Sessions, Health and Human Services Committee, 94th Leg., 1st Sess. 4 (Mar. 29, 1995). A floor amendment was offered to remove the language added by the committee amendment, and in voting to reject the floor amendment, the Legislature specifically debated the intent of the postsecondary education provision. See, generally, Floor Debate, 94th Leg., 1st Sess. 4244-65 (Apr. 10, 1995). The debate, considered as a whole, reflects the Legislature's understanding that the postsecondary education provision was intended to permit a recipient of public assistance to complete a course of postsecondary education within the cash assistance limitation period. See *id*. As stated by the principal introducer of L.B. 455:

> A community college is a postsecondary education. It was always the intent that that be included. [One senator] brought forward the fact that he wanted it stated more plainly. And, certainly, if a woman came in and only had three semester hours left for her college degree, it would make no sense in that individual initial assessment to say, well, we aren't going to pay for that. I mean, how much sense does that make when, with that additional three hours, she could go out and get an excellent job? And so it's always been the intent to provide the new training, the new skills to women; it has never been the intent for the state to provide a four-year college education. This does not do that, it just give[s] the caseworker the possibility of allowing women to attend either a community college or what may be necessary in order to complete their education to go out and earn a living wage.

Floor Debate, Health and Human Services Committee, 94th Leg., 1st Sess. 4249 (Apr. 10, 1995).

In concluding that Kosmicki should have been permitted to pursue her bachelor's degree, the district court reasoned that there are many occupations in which employers require education, but not necessarily a degree. For instance,

> [b]y attending UNL business college for two years and taking a number of accounting classes, an individual may make themselves [sic] marketable to a company that is looking to hire a bookkeeper or accountant and does not require the person to be a CPA or to have a bachelor's degree. . . . Likewise, an individual who takes two years of college courses at UNL in the area of Computer Science may be able to find excellent employment and become self sufficient without ever having obtained a bachelor's degree.

The district court's reasoning is plausible, but is misplaced in the instant case. The record clearly establishes that Kosmicki's course of education at UNL was not intended to make Kosmicki self-sufficient before the end of her cash assistance limitation period. We recognize that there is testimony in the record to suggest that the Department has applied a de facto rule that a recipient of benefits must obtain a degree within 2 years in order for postsecondary education to be included in a self-sufficiency

contract. The validity of such a standard, if it exists, is not before us in this case. It may be possible for a recipient of benefits to demonstrate that even without obtaining a degree, his or her course of postsecondary education will lead to self-sufficiency within the cash assistance limitation period. That circumstance, however, is not presented in the instant case.

The purpose of the Act is to ensure, to the greatest extent possible, that recipients of public assistance benefits become self-sufficient before the expiration of their 2-year limitation period on cash assistance benefits. The Act, and regulations promulgated by the Department, require that self-sufficiency contracts establish reasonable goals to achieve that purpose. While postsecondary education is acceptable work-related activity under the Act, a course of postsecondary education is only an appropriate goal for a self-sufficiency contract if the postsecondary education will lead to economic self-sufficiency within the cash assistance limitation period. There is no evidence in the present record to suggest that Kosmicki's pursuit of a bachelor's degree at UNL would satisfy that criterion. Therefore, the district court erred in determining that Kosmicki was entitled to have her education at UNL included in her self-sufficiency contract.

Cross-Appeal

In her cross-appeal, Kosmicki contends that the district court erred in determining that the self-sufficiency contract set forth in her May 12, 2000, service plan was not void and unenforceable. Kosmicki's assignment of error seems to advance two claims: (1) The self-sufficiency contract is void because of the relative bargaining position of the parties and (2) the self-sufficiency contract is void because the Department failed to reassess Kosmicki when she reapplied for benefits.

There are several reasons that Kosmicki's argument fails. First, we note that even a declaration that the May 12, 2000, service plan was void would not permit Kosmicki to pursue a bachelor's degree from UNL while receiving cash assistance benefits. The Act requires that a self-sufficiency contract be in place and that a recipient of benefits engage in approved work activity in order for cash assistance benefits to be paid. Even if the May 12 service plan was void, pursuit of a bachelor's degree at

UNL would still be an unacceptable goal of a new service plan, based on our reasoning set forth above. In other words, even if Kosmicki's cross-appeal has merit, it furnishes no discernible basis for relief.

[9] Second, although the Act uses the word "contract" to describe the documents setting forth the respective obligations of the recipient and the State, we are not persuaded that the Legislature's use of the term was intended to import the body of law associated with contractual interpretation and enforcement. The self-sufficiency contracts created under the Act are creatures of statute, and not common law. At common law, a contract, in its broad sense, is an agreement, obligation, or legal tie whereby a party binds itself, or becomes bound, expressly or impliedly, to pay a sum of money or to perform or omit to do some certain act or thing. *McNally v. Ponce*, 150 Neb. 267, 34 N.W.2d 262 (1948). In this case, however, the legal ties between the parties, and their rights and remedies, are created by and set forth in the Act, not the self-sufficiency contract. The self-sufficiency contract serves as a means for the State and a recipient of public assistance to memorialize a specific plan of action by which a recipient can attain self-sufficiency; however, it is not given legal effect by the agreement of the parties and therefore is not a contract as that term is generally used in civil law. Given that, we are not convinced that the enforceability of statutory requirements can be voided in the same manner as a civil contract that is created solely by agreement of the parties.

[10-12] Third, even assuming that principles of contract law are applicable to the instant case, Kosmicki failed to show that the May 12, 2000, self-sufficiency contract should be rescinded due to duress. The burden of proving duress is placed upon the party alleging it. *Lustgarten v. Jones*, 220 Neb. 585, 371 N.W.2d 668 (1985). What constitutes duress is a question of law, but existence of duress is a question of fact. *Id*. To be voidable because of duress, an agreement must not only be obtained by means of the pressure brought to bear, but the agreement itself must be unjust, unconscionable, or illegal. *Bock v. Bank of Bellevue*, 230 Neb. 908, 434 N.W.2d 310 (1989); *Lustgarten, supra*. There is no evidence in the record to support a finding that the self-sufficiency contract is itself unjust, unconscionable, or illegal.

[13] Furthermore, there is no evidence to support a finding that the self-sufficiency contract was the result of duress on the part of the State. The essence of duress is the surrender to unlawful or unconscionable demands. It cannot be predicated upon demands which are lawful or the threat to do that which the demanding party has a legal right to do. *Id.* Clearly, the State's requirement that Kosmicki enter into a self-sufficiency contract in order to receive cash assistance was lawful, as it was required by the Act.

Kosmicki also claims that the May 12, 2000, self-sufficiency contract is unconscionable and void because the Department failed to conduct a new comprehensive asset assessment when she reapplied for benefits after moving to Scottsbluff. First, we note that Kosmicki's caseworker in Lincoln testified that when he was assigned to Kosmicki's case, he reviewed her previous assessment and went over that assessment with Kosmicki to determine what, if anything, had changed. The caseworker testified that he had performed an acceptable assessment based on Kosmicki's change of circumstances. Furthermore, we are unable to discern precisely how the Department's alleged failure to perform a reassessment bears on whether the May 12 self-sufficiency contract was the result of duress. A comprehensive assets assessment "shall structure personal resources information and control subjectivity," and is used "[t]o develop a self-sufficiency contract . . . and promote services which specifically lead to self-sufficiency." § 68-1718(3)(a). The assessment does not function, however, to enhance the bargaining position of an applicant in any substantive way. For the foregoing reasons, the district court's finding that Kosmicki's May 12 self-sufficiency contract was not the product of duress is supported by competent evidence.

[14] Kosmicki finally argues that the May 12, 2000, self-sufficiency contract is an adhesion contract and is therefore void. Again, even if we were to assume that contract principles apply under these circumstances, Kosmicki's argument is without merit. Even if the self-sufficiency contract could somehow be construed as an adhesion contract, adhesion contracts are not automatically unconscionable or void. See *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571 (Tex. 1999) (citing authorities). Kosmicki does

not contend that the self-sufficiency contract is unconscionable, and there is no evidence that the May 12 self-sufficiency contract did not fall within Kosmicki's reasonable expectations as the allegedly adhering party. See, generally, *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604 (1981) (citing authorities). In short, Kosmicki's assignment of error on cross-appeal is without merit.

CONCLUSION

The purpose of the Act is to make sure that recipients of public assistance benefits attain economic self-sufficiency within 2 years of receiving public assistance. To that end, recipients are required to engage in work activity and pursue goals that will lead to such self-sufficiency within the 2-year limitation period on cash assistance. Kosmicki failed to demonstrate that her desired goal of pursuing a bachelor's degree at UNL was consistent with achieving self-sufficiency within 2 years of receiving public assistance, and the district court erred in concluding that Kosmicki was entitled to include that goal in her self-sufficiency contract. The judgment of the district court is reversed to that extent. The district court correctly determined, however, that Kosmicki's May 12, 2000, self-sufficiency contract was valid, and that determination is affirmed. The judgment of the district court is, therefore, affirmed in part and in part reversed, and the cause is remanded to the district court with directions to affirm the decision of the Department.

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

STATE OF NEBRASKA, APPELLEE, V. CARLOS AGUILAR, ALSO KNOWN AS JUAN CARLOS, APPELLANT.

652 N.W.2d 894

Filed November 8, 2002. No. S-01-733.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility.

2. **Rules of Evidence: Other Acts: Appeal and Error.** Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 1995), and the trial court's decision will not be reversed absent an abuse of discretion.
3. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
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. **Rules of Evidence: Other Acts: Proof: Words and Phrases.** Prior bad act evidence is evidence of other crimes, wrongs, or acts, aside from the crime charged, which tend to prove the character of a person and to show that he or she acted in conformity therewith when committing the charged crime.
6. **Rules of Evidence: Other Acts.** Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
7. **Evidence: Words and Phrases.** Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means its relevance does not depend upon its tendency to show propensity.
8. **Rules of Evidence: Other Acts.** Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of the coverage under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
9. **Convictions: Appeal and Error.** Not all trial errors, even those of a constitutional magnitude, entitle an accused to a reversal of an adverse trial result. It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside.
10. **Motions to Strike: Jury Instructions.** 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 Madison County: ROBERT B. ENSZ, Judge. Affirmed.

Jim K. McGough, of Copple, Rockey & McGough, P.C., for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

McCormack, J.

NATURE OF CASE

Carlos Aguilar was convicted by jury of four counts of delivery of a controlled substance, all Class III felonies. During the trial, outside the presence of the jury, Aguilar objected to testimony that he characterized as prior bad acts. He argues that this evidence had not been subject to a Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), hearing (404 hearing) and moved for a mistrial. That motion was overruled. After the jury returned its verdict, Aguilar moved for a new trial because of the alleged erroneous admission of certain evidence. In addition, he asserted the trial court erroneously allowed the jury to read transcripts of alleged drug transactions while the recording was being played. Aguilar timely filed his appeal.

BACKGROUND

Aguilar was charged with four separate counts of delivery of a controlled substance, methamphetamine. All four counts occurred between March and June 2000.

March 25, 2000

The first count occurred on March 25, 2000. Ramon Rodriguez agreed to be a confidential informant for the Norfolk police, and he was to receive $100 for each attempt to make a controlled purchase of illegal drugs. Rodriguez was supervised by Officer Steven Mills. He was to attempt to purchase illegal drugs from a woman named "Yolanda" who lived in a trailer park near Johnson's Park in Norfolk. Before Rodriguez was sent to make the purchase, Mills searched his body, planted a tape recorder on him, and gave him money to make the purchase.

At about 8 p.m., Mills drove Rodriguez to a location near Johnson's Park near Yolanda's trailer. Tricia Frazier, Aguilar's girl friend, was at the trailer when Rodriguez arrived. Bobbie Kleinberg arrived at about the same time. While Rodriguez was inside the trailer, several other individuals arrived, including Aguilar. Kleinberg left, as did another individual, leaving only Rodriguez, Frazier, and Aguilar at the trailer. Later, Yolanda arrived.

After Yolanda arrived, Kleinberg returned and spoke to Aguilar. Kleinberg was going to "hook up" Aguilar with some drugs, i.e., get him drugs from a third-party source. Rodriguez then asked Yolanda if she had any drugs to sell him, but he was unable to purchase any drugs from her. Rodriguez then left the trailer, walked back to Johnson's Park, and made contact with Mills. Rodriguez was searched and informed Mills of what had transpired.

Rodriguez returned to the trailer at around 10 p.m. Before leaving for the trailer, Rodriguez was again searched by Mills and had a recording device planted on him. When Rodriguez arrived at the trailer, he observed Aguilar and Frazier. He asked Aguilar if he had any "coke" or "crank," and Aguilar stated that he was waiting for some. About a half hour later, Kleinberg arrived and talked to Aguilar about a possible drug purchase. Kleinberg then left. While she was gone, two other individuals came to the trailer.

Kleinberg again returned to the trailer, and she, Rodriguez, Aguilar, and Frazier left to obtain the drugs. The two other individuals left and went their own way. According to Rodriguez, he rode with Frazier in her van and they followed Aguilar and Kleinberg in her "Tracker" automobile. They drove to a parking lot by 12th Street and Prospect Avenue in Norfolk. Mills observed the van and the Tracker leave the trailer home, but did not follow them. According to Rodriguez, Kleinberg got out of the Tracker and went into a house across the street from the parking lot where they were parked. Aguilar climbed into the van.

Kleinberg later exited the house, walked over to Frazier's van, and climbed in. Once inside the van, she gave Aguilar the illegal drugs. Rodriguez, Aguilar, and Frazier then drove in Frazier's van to the apartment of Toni Shipley and went into a bedroom. According to Rodriguez, Aguilar separated a portion of the drug, which he concluded to be roughly an "eight ball" in quantity. He then bagged it up and sold it to Rodriguez. An "eight ball" is approximately 3 to 3½ grams of a drug. Rodriguez, Aguilar, and Frazier then drove back to the trailer in Frazier's van, and once they arrived, Rodriguez walked to Mills' vehicle and was searched. He gave Mills the drug and the tape recorder and told Mills what had occurred.

May 15, 2000

On May 15, 2000, Rodriguez met with Mills and another officer at approximately 7 p.m. Rodriguez was again searched, equipped with a recording device, and given money to make a controlled purchase. He was instructed to try to purchase another "eight ball" of methamphetamine from Aguilar.

Rodriguez was let out of the car by Mills and walked down an alley to a house located on Indiana Street in Norfolk, where Aguilar and Frazier were residing. He knocked on the door and went into the home. He saw Aguilar, Frazier, and Shipley sitting at the dining room table smoking methamphetamine from a piece of aluminum foil. Rodriguez also observed an "eight ball" or more of methamphetamine in a plastic bag on the table. They began conversing, and Aguilar sprinkled more methamphetamine from the table into another piece of foil. He, Frazier, and Shipley proceeded to smoke the second foil. After the parties were finished smoking the second foil, Shipley left the home and Frazier went into the kitchen. Rodriguez then purchased methamphetamine from Aguilar. Aguilar picked the drugs up from the table, and Rodriguez paid him. Aguilar gave Rodriguez the drugs, and Rodriguez put them in his pocket. Rodriguez then left and met with Mills and told him what had happened. Mills searched Rodriguez and took the recording device and the drugs. Mills also took the leftover purchase money from him.

May 19, 2000

On May 19, 2000, Rodriguez was again instructed by Mills to purchase drugs from Aguilar. Rodriguez was searched, given the money to make the controlled purchase, and equipped with a recording device. He was instructed to go to the corner of Eighth Street and Norfolk Avenue, where a laundromat was located, to attempt the purchase. Mills and Rodriguez parked their vehicle a couple of blocks south of the laundromat, and Rodriguez walked to it.

Upon entering the laundromat, Rodriguez saw Frazier and spoke with her about purchasing an "eight ball" of methamphetamine. She had some methamphetamine and put it in her laundry basket. Rodriguez then placed his money in the laundry

basket and took the drugs. He then walked outside and noticed Aguilar drive by in Frazier's van. He walked to the side of the building where the van was parked and stopped to talk to Aguilar. Rodriguez showed the methamphetamine that Frazier gave him to Aguilar, and Aguilar exchanged it for a larger amount.

After he was finished talking to Aguilar, Rodriguez found Mills. Mills searched Rodriguez and took the recording device and the drugs given to Rodriguez by Aguilar, and Rodriguez discussed what had happened. According to Mills, when Rodriguez was in the laundromat, he saw Frazier's van drive by, so he followed the van. He was able to observe Rodriguez and Aguilar talking at the van.

June 6, 2000

The fourth count against Aguilar arose out of another controlled purchase of illegal drugs by Rodriguez on June 6, 2000. Before making the purchase, Rodriguez was again searched by Mills and was given purchase money and a recording device. Rodriguez testified that he was dropped off on the corner of Fourth Street and Omaha Avenue and that he walked to the Indiana Street location. He knocked on the door, went inside, and noticed Aguilar and Frazier sitting in the dining room playing a dice game. As Rodriguez was standing in the dining room, Aguilar pulled a Ziploc bag from his pocket, containing what appeared to be a gram of methamphetamine. In exchange for the bag, Rodriguez gave him $100.

Rodriguez later saw Mills and got into Mills' car. He gave Mills the drugs and the recording device and told Mills what had happened.

Procedural History

The recordings of the alleged transactions were duplicated onto compact discs, and transcribed by Rodriguez with the help of a police officer. Much of the recorded conversations were in Spanish, so Rodriguez translated the conversations into English, while the officer typed. The translations were verified by two interpreters.

According to Rodriguez, the recordings of the conversations at issue and the partial transcripts of those conversations accurately portray the conversations that took place during and around the

time of the alleged transactions. Exhibits 41, 42, 43, 48, and 49 accompany the March 25, 2000, transaction. Exhibits 44 and 50 accompany the May 15 transaction. Exhibits 45 and 51 accompany the May 19 transaction. Finally, exhibits 46 and 52 accompany the June 6 transaction.

The trial court held a 404 hearing to determine whether the purported prior bad act evidence would be admissible at trial. The particular acts found relevant and admissible included (1) Aguilar's acquisition of drugs from Kleinberg on March 25, 2000, before selling drugs to Rodriguez and (2) evidence of Aguilar's smoking a foil of methamphetamine on May 15. The trial court found that the above events were proved by clear and convincing evidence and demonstrated opportunity, identity, and knowledge.

The trial court also found that there was a need for transcripts of the recordings and that it was within its discretion to allow them to be used. Aguilar argued that the recordings and the transcripts contained evidence of other acts committed by Aguilar that was not argued at the 404 hearing. The trial court noted that it wanted redacted compact discs and transcripts to be introduced to the jury.

Aguilar filed a motion in limine to exclude the State from using any testimony or evidence on the recordings or the transcripts. Aguilar argued that they contain inadmissible prior bad act evidence not subject to the 404 hearing. The record does not reflect additional discussions or rulings on the admissibility of the recordings or transcripts prior to the trial.

During the trial, the State offered exhibits 41 and 48, a redacted transcript and recording of Rodriguez' first attempt to purchase illegal drugs at Yolanda's trailer on March 25, 2000. Aguilar voir dired Rodriguez about the manner in which the transcripts were created, and he did so again each time a recording and transcript of an alleged transaction occurred. Following voir dire, Aguilar objected to the offer, but his objection was overruled.

Outside the presence of the jury, Aguilar argued the allegations contained in his April 12, 2001, motion in limine, which motion states as follows:

> 1. Both the audiotapes and the transcripts contain evidence of prior bad acts in violation of *Neb. Rev. Stat.*

> § 27-404(2) in the absence of a 404 hearing to determine the admissibility of any prior bad acts therein;
>
> 2. They contain inadmissible hearsay;
>
> 3. They are irrelevant to the charges against [Aguilar];
>
> 4. The prejudicial weight of the tapes and accompanying transcripts outweigh their probative value in violation of *Neb. Rev. Stat.* § 27-403;
>
> 5. The accompanying transcripts supplied with the audiotapes violate the best evidence rule, *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000) and *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000), and places undue emphasis on testimonial evidence; and
>
> 6. There is insufficient foundation to support the allocation of speakers on the accompanying transcript.

The trial court overruled the motion. It noted that such evidence is testimonial in nature and should not go back to the jury room, but that the jury could use the transcripts to follow along with the recording. Aguilar expressed his concern about the existence of rule 404 evidence on the recordings and transcripts. The State noted that it would excise as much of that information as it could out of the tapes and that it tried to pare down the evidence to just the transaction charged. To that, Aguilar responded:

> To the extent that there's any other conversations on these tapes that have to do with other drug deals, our position is, No. 1, they shouldn't come in as 404 evidence. However, if they do come in, we'd ask the Court to give a limiting instruction telling [the jury] they don't apply to this case.

The trial court stated that it would give a limiting instruction at the time the evidence was published to the jury.

The instruction actually given by the trial court was not the limiting instruction contemplated. The instruction given told the jurors that the transcript was allowed for the limited purpose of following along with the recording, for assistance in identifying speakers, and for the benefit of an English translation of the portions of the conversations in Spanish. That same basic instruction was given to the jury each time a recording and transcript was offered.

When the recording and transcript of the May 15, 2000, transaction were offered to the jury, Aguilar again specifically

requested a rule 404 limiting instruction. The trial court stated that it would wait until the completion of the recording for any additional instruction, but never issued a rule 404 instruction in regard to the recording or transcript.

Aguilar complains of Rodriguez' being allowed to testify, over objection, that he observed Aguilar smoke a second foil of methamphetamine on May 15, 2000. Aguilar claims that this evidence exceeded the trial court's order because at the 404 hearing, the court limited the admission of prior bad act evidence with regard to smoking to the statement that Aguilar was seen "smoking a foil" of methamphetamine. Aguilar claims that his second foil was never subject to a 404 hearing.

Kleinberg testified at trial about events surrounding the March 25, 2000, delivery. Her testimony centered on events occurring immediately after she obtained the drugs for Aguilar on March 25 and gave the drugs to him. According to Kleinberg, she asked if Aguilar would give her some of the drugs that she had given to him. She stated that he then placed a quantity of the drug in a cellophane cigarette package and gave it to her.

At that point, Aguilar made a motion for mistrial, arguing that such evidence was not subject to a prior hearing outside the presence of the jury and was offered in violation of rule 404. The trial court overruled the motion. The trial court did, however, give a limiting instruction, which stated:

> Before we go any further, ladies and gentlemen, I'm going to give you an instruction at this time that any evidence that [Aguilar] may have been involved in a drug transaction with this witness on or about March 25, 2000, has been received only for the limited purposes of identity and for preparation, plan, or the opportunity to commit the crimes that have been charged in this case. You must consider the evidence for those limited purposes and for no other purposes.

After the direct examination of Kleinberg, the trial court stated that it had reviewed the motion for mistrial. It concluded that part of her testimony went beyond the testimony and evidence of the 404 hearing regarding Aguilar's giving drugs to Kleinberg. The trial court determined that it was error to include such testimony but that had there been a hearing on that part of

the transaction, it would have been admissible subject to the same limiting instruction previously given to the jury.

At the close of the State's evidence, Aguilar made motions to reconsider striking the testimony of Kleinberg and for directed verdict. The trial court overruled the motion for directed verdict. However, the court sustained the motion to reconsider and struck the additional testimony of Kleinberg not subject to the 404 hearing which did not directly deal with Rodriguez' purchase from Aguilar. Aguilar renewed his motion for mistrial due to the error, but was overruled. The jury was ordered to disregard the stricken testimony of Kleinberg about Aguilar's giving her some drugs. The jury was also reminded of the rule 404 limiting instruction that had been given during Kleinberg's testimony.

After the jury returned its verdict of guilty on all four counts, Aguilar filed a motion for new trial. Aguilar alleged that (1) the manner in which the tapes were handled at the time of trial placed an undue emphasis on them and (2) rule 404 evidence was allowed which was not subject to the previous 404 hearing. The trial court overruled the motion for new trial.

ASSIGNMENTS OF ERROR

Aguilar alleges that the trial court erred in (1) admitting evidence of other crimes in violation of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), and rule 404; (2) not granting a mistrial or motion for new trial; and (3) allowing the jury to review transcripts of the tapes of the controlled buys.

STANDARD OF REVIEW

[1] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

[2] Because the exercise of judicial discretion is implicit in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rules 403 and 404(2), and the trial court's decision will not be reversed absent an abuse of discretion. *Trotter, supra.*

[3] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999).

[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. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002).

ANALYSIS

Rule 404 Evidence

According to Aguilar, the trial court erred in admitting evidence of other crimes in violation of rules 403 and 404. In Aguilar's brief, he focuses on the evidence of his smoking drugs with Frazier and Shipley on May 15, 2000, and the March 25 incident when he gave Kleinberg drugs after he had initially obtained drugs from her. In addition, he argues that the recordings and accompanying transcripts contained prior bad act evidence.

[5] Prior bad act evidence is evidence of other crimes, wrongs, or acts, aside from the crime charged, which tend to prove the character of a person and to show that he or she acted in conformity therewith when committing the charged crime. *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000).

[6,7] Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2). *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means its relevance does not depend upon its tendency to show propensity. *Id.*

[8] Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of rule 404(2) coverage. See *U.S. v. Heidebur*, 122 F.3d 577 (8th Cir. 1997), quoting *U.S. v. Williams*, 95 F.3d 723 (8th Cir. 1996). In *U.S. v. Swinton*, 75 F.3d 374 (8th Cir. 1996), the court said that where evidence of crimes is so blended or connected with the ones on trial so that proof of one incidentally involves the other or explains the circumstances, it is admissible as an integral part of the immediate context of the crime charged. The

court further said where the other evidence is so integrated, it is not extrinsic and therefore not governed by rule 404(2). The trial court must, however, still follow rule 403, which excludes evidence where the probative value is outweighed by the prejudicial value.

In *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002), the alleged prior bad act evidence was that the defendant smoked marijuana just before he shot the victim. We said the act of smoking marijuana was not subject to the statute governing the admissibility of prior bad acts, as the State did not introduce the prior smoking of marijuana as evidence of the defendant's character to prove that he acted in conformity with that behavior on a later occasion, but, rather, smoking marijuana was contemporaneous with his other acts immediately before shooting the victim and was offered to explain the circumstances of the victim's death. See, *U.S. v. Carroll*, 207 F.3d 465 (8th Cir. 2000); *U.S. v. O'Dell*, 204 F.3d 829 (8th Cir. 2000); *U.S. v. Phelps*, 168 F.3d 1048 (8th Cir. 1999); *U.S. v. Tate*, 821 F.2d 1328 (8th Cir. 1987); *State v. Powers*, 10 Neb. App. 256, 634 N.W.2d 1 (2001).

The first inquiry is to determine if the evidence which Aguilar claims constitutes prior bad acts is, in fact, rule 404 evidence.

Methamphetamine Foils

The first alleged error raised by Aguilar is the admission of evidence that Aguilar smoked either one or two foils of methamphetamine when Rodriguez purchased drugs on May 15, 2000.

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

Because the exercise of judicial discretion is implicit in rule 401, it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rules 403 and 404(2), and the trial court's decision will not be reversed absent an abuse of discretion. *Trotter, supra.*

[9] Not all trial errors, even those of a constitutional magnitude, entitle an accused to a reversal of an adverse trial result. It

is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside. *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996).

The smoking of the foil or foils occurred on May 15, 2000, at Aguilar's residence. Rodriguez was present because he had gone to the residence to purchase methamphetamine from Aguilar. Rodriguez did, in fact, purchase methamphetamine from Aguilar, and Aguilar smoked one or two foils of methamphetamine during this visit. We determine that the evidence of Aguilar's smoking the foils of methamphetamine on this occasion was not rule 404 evidence. It is part of the factual setting of the crime of Aguilar's selling methamphetamine to Rodriguez and is intrinsically intertwined with the charged offense.

Kleinberg's Testimony

The second alleged error raised by Aguilar is the admission of evidence of delivery by him of drugs to Kleinberg on March 25, 2000.

Aguilar complains of the following portion of Kleinberg's testimony:

> Q. You gave the whole half ounce to [Aguilar]?
> A. Yes.
> Q. Did you ask him if he would hook you up with some of that?
> A. I asked for some.
> Q. Did he?
> A. Huh?
> Q. Did he hook you up with some crank?
> A. I was given some, yes, for the —
> Q. How much did he give you approximately?
> A. I really don't know. I can't recall.
> Q. Did he weigh it out?
> A. No.
> Q. Or did he eyeball it?
> A. It was just grabbed that I saw.
> Q. Did you have anything to put it in or did you just take it in your hand?
> A. Cigarette cellophane.

Q. Like in a cigarette pack?
A. Yes.

The trial court, on a motion to reconsider its rulings as to Kleinberg's testimony, stated the following:

> However, on the motion to reconsider striking the testimony of Bobbie Kleinberg, I too have thought about that since that time, and as I indicated from my statements, that was, while I considered that error, it was harmless error because it could have come in.
>
> I guess the fact that it's error means that there should be something done about it. And looking at harmless error is after the fact, you know. Well, what was done at the time and was that — is that a real problem. Well, if it's error, the error should be removed whether it's harmless or otherwise, so I'm going to sustain [Aguilar's] motion to reconsider. And having reconsidered, I'm going to give an instruction to the jury which will direct that they [sic] — that the testimony of Bobbie Kleinberg as to [Aguilar's] giving some of the drugs to her after she had given drugs to [Aguilar], that is stricken and the jury will be directed to disregard that part of the testimony. But the prior testimony about the drugs being given by Miss Kleinberg to Mr. Aguilar are still admitted for the limited purpose of showing preparation, plan, identity, and opportunity.

The delivery of drugs by Kleinberg to Aguilar is not rule 404 evidence, but is direct evidence that forms the factual setting of the crime charged to show the source of the drugs Aguilar received and then sold to Rodriguez. See, *U.S. v. Heidebur*, 122 F.3d 577 (8th Cir. 1997); *U.S. v. Williams*, 95 F.3d 723 (8th Cir. 1996). As to all other testimony of Kleinberg, it was stricken by the court and the jury was instructed not to consider it.

[10] The trial court concluded that the admission of Kleinberg's testimony, other than the testimony of the dealing of drugs by Kleinberg to Aguilar, was error. The trial court then concluded, however, that this error was harmless. The trial court's action in striking the portion of Kleinberg's testimony that the trial court considered the admission of to be error and instructing the jury to disregard such testimony removed any

prejudice to Aguilar. 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). We conclude, therefore, that this assignment of error is without merit.

Recordings and Transcripts

At the pretrial hearing, the trial court noted that the recordings and transcripts contain information beyond the scope of the hearing, but did not believe that conversations contained in the recordings fit within the category of bad acts. However, the court asked the parties to get together and redact the recordings and transcripts.

Despite any attempts to remove references to alleged prior bad acts, the transcripts that the jury read contained references to other bad acts or crimes committed by Aguilar that were not discussed at the 404 hearing. Prior bad act evidence is evidence of other crimes, wrongs, or acts, aside from the crime charged, which tend to prove the character of a person and to show that he or she acted in conformity therewith when committing the charged crime. *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000).

The tapes and transcripts contain past drug dealings involving purchases and distribution by Aguilar. The trial court overruled Aguilar's objection and did not give a limiting instruction.

We conclude that the acts complained of are prior bad acts which would be subject to rule 404. We further conclude that the trial court erred in admitting the prior bad acts contained in the recordings and transcripts at issue, and particularly so in not giving a proper limiting instruction to the jury. The actions discussed by Aguilar were not proved outside of the presence of the jury by clear and convincing evidence. See, *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001); *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). Additionally, Aguilar requested, but never received, a proper rule 404 limiting instruction.

Having determined that the trial court erred in admitting the transcripts in the manner described above, we now determine if this error is harmless.

On each occasion that Rodriguez purchased drugs from Aguilar, Rodriguez was first searched by Mills and then provided money for the purchase. On each occasion, immediately after the purchase, Rodriguez returned to Mills, to whom he turned in the drugs and relayed what had occurred. On most of these occasions, Rodriguez was being directly observed by Mills for a portion of the time. Based on this evidence, we determine that the evidence properly admitted at trial overwhelmingly establishes Aguilar's guilt beyond a reasonable doubt. As a result, we conclude that the error in admitting that portion of the tapes containing prior bad act evidence did not materially influence the jury in reaching its verdict and was harmless beyond a reasonable doubt. As such, we determine that Aguilar's assignment of error as to receipt of the tapes is without merit.

Motion for Mistrial

Aguilar assigns as error the trial court's failure to grant a mistrial at the conclusion of Kleinberg's testimony concerning the events occurring on March 25, 2000.

The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999).

Aguilar's argument in support of his motion for mistrial was that the evidence produced by Kleinberg was not subject to a prior hearing outside the presence of the jury and was offered in violation of rule 404. As previously explained, the testimony of Kleinberg, with the exception of the direct delivery of drugs by Kleinberg to Aguilar, was subsequently stricken by the court, and the jury was instructed in this regard. If there was an abuse of discretion on the part of the trial court in initially denying the motion for mistrial, this abuse of discretion was corrected by the court's subsequently striking the majority of the testimony of Kleinberg and instructing the jury to disregard the stricken testimony. We conclude that Aguilar's assignment of error in regard to the denial of the motion for mistrial is without merit.

We have reviewed Aguilar's assignment of error of the failure of the trial court to grant his motion for new trial and conclude that his assignment of error is without merit.

Transcripts of Tapes

Aguilar complains of the court's allowing the jury to review the transcripts of the tapes. The tape recordings were mainly in Spanish. The transcripts that were given to the jury during the playing of the tapes were in English. Neither the transcripts nor the tapes were permitted to go back to the jury room. The reason the jury was allowed to review transcripts of the tapes while the tapes were being played in open court was because portions of the tapes were in Spanish and the transcripts were in English. In *State v. Wade*, 7 Neb. App. 169, 581 N.W.2d 906 (1998), the Nebraska Court of Appeals held that the transcripts of audiotape recordings of a defendant's conducting drug transactions was admissible for the limited purpose of assisting the jury in identifying the speakers at any particular time. The Court of Appeals cited *United States v. Onori*, 535 F.2d 938 (5th Cir. 1976), which stated that the need or desire for transcripts of a tape arises from two circumstances: (1) where portions of the tape may be inaudible and (2) where it may be difficult to identify the speakers. In *State v. Loveless*, 209 Neb. 583, 308 N.W.2d 842 (1981), we held that it was not an abuse of discretion of the trial court in admitting a tape and the transcript of the tape, noting that the limited purpose of the transcript was to identify the speakers at any particular time.

In Aguilar's case, since the tapes were partly in Spanish, the English transcripts would assist in identifying speakers and allowing the jury to understand what was being said. We determine that Aguilar's assignment of error in this regard is without merit.

CONCLUSION

For the reasons set out above, we determine that the admission of the evidence concerning Aguilar's smoking of foils of methamphetamine was not rule 404 evidence. We further determine that any error assigned to the admission of Kleinberg's testimony is without merit for the reasons that Kleinberg's testimony, with the exception of the testimony of the direct sale of drugs from Kleinberg to Aguilar, was stricken and the jury instructed to disregard it. As to any prior bad act evidence that was contained in the tape recordings played for the jury, we determine that any error in the failure to redact the tapes, failure to hold a 404

hearing, failure to give a rule 404 limiting instruction, and in the admission of any prior bad acts evidence on these tapes was harmless error beyond a reasonable doubt because the evidence properly admitted at trial overwhelmingly established Aguilar's guilt. As to the motions for mistrial and for new trial, we determine that the court did not abuse its discretion in denying both of the motions and further find that the trial court did not abuse its discretion in allowing the jurors to read transcripts in English of the conversations on the tapes, which were in Spanish, during the time that the tapes were being played.

AFFIRMED.

WRIGHT, J., participating on briefs.

DAVID WAYNE HENDERSON, APPELLANT, V.
MICHELE LYN HENDERSON, APPELLEE.

653 N.W.2d 226

Filed November 8, 2002. No. S-01-843.

1. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
2. **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.
3. **Divorce: Child Support: Public Policy.** Public policy provides that parents have a duty to support their minor children until they reach majority or are emancipated, and a parent is not relieved of this duty by virtue of divorce.
4. **Child Support: Rules of the Supreme Court: Words and Phrases.** The Nebraska Child Support Guidelines provide that in calculating the amount of support to be paid, a court must consider the total monthly income, defined as the income of both parties derived from all sources, except all means-tested public assistance benefits.
5. **Social Security: Public Assistance.** Social Security disability insurance program benefits are not means-tested public assistance benefits, but are based on prior earnings of the recipient, not on the financial need of the recipient.
6. **Child Support: Social Security.** A noncustodial parent is entitled to credit against a monthly child support obligation for Social Security benefits paid to his or her minor child as a result of the noncustodial parent's disability.
7. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed in part, and in part reversed and remanded with directions.

Julie A. Effenbeck, of Law Office of Julie A. Effenbeck, for appellant.

Michele Lyn Henderson, pro se.

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

WRIGHT, J.

NATURE OF CASE

David Wayne Henderson appeals from a dissolution decree entered on July 20, 2001. In the decree, the district court included an adult child in its child support calculation, made a finding concerning competency of the adult child, awarded custody of the adult child, and divided the property of the parties.

SCOPE OF REVIEW

[1] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Brockman v. Brockman, ante* p. 106, 646 N.W.2d 594 (2002).

FACTS

David and Michele Lyn Henderson were married in Oklahoma City, Oklahoma. Two children were born to the marriage: Dustin Wayne, born May 11, 1981, and Nicole Renee, born December 29, 1984.

In his petition for dissolution of marriage, David sought custody of Nicole. Dustin, who is developmentally disabled, was living independently in Salina, Kansas, when the parties separated. At the time of the dissolution hearing, Dustin was living with Michele in Texas, awaiting placement in housing in Irving, Texas.

The district court awarded the parties the personal property in their possession and awarded certain real estate and a van to David. The court ordered David to pay all liens on that property. The court also ordered David to deliver to Michele certain property she requested in a letter to the court, including "the diploma,

her AOT certification, her medical books and supplies, the silverware and Dustin's records."

The district court found that "Dustin is not competent and is in need of his parents' financial care." Michele was ordered to pay child support of $200 per month until one or both children "become emancipated from the control and care of their parent or are otherwise of age, competent, or emancipated." Custody of Dustin was awarded to Michele, and custody of Nicole was awarded to David, with reasonable rights of visitation for both parents. David was directed to provide medical coverage for Nicole and for "his adult son if possible," and Michele was directed to pay 61 percent of any medical bills not covered by insurance. Michele was ordered to pay $250 toward David's attorney fees.

The child support calculation worksheet completed by the district court has been summarized as follows:

BASIC NET INCOME AND SUPPORT CALCULATION

	Mother	Combined	Father
Total income from all sources	$21,132		$14,000
Fed. HH–2 exempt	(1,361)	HH–2 exempt	(291)
Deductions			
a. Taxes - State	(357)		(226)
b. FICA .0675			(945)
. . . .			
f. Total disposable	19,414		12,538
Monthly net income - disposable	1,618		1,045
Combined monthly net income		2,663	
Percent contribution of each parent	61		39
Monthly support from table 1		633 – 1 910 – 2	
Each parent's monthly share	386 – 1 555 – 2		247 – 1 355 – 2

SPLIT CUSTODY CALCULATION

Total amount owed to father by mother	$555

Total amount owed to mother by father	$355
Support to be paid by mother	$200

$139 when there is only one child supported.

Michele, who was living in Texas, did not attend the dissolution hearing. David testified that Michele does not work but receives disability payments because she is disabled with disconnective tissue disorder and congestive heart failure. David testified that Michele receives a monthly total of $2,271 in disability and Social Security payments. David testified that Dustin was receiving Supplemental Security Income and $274 per month in disability payments based on Michele's disability. Dustin was also employed part time.

At the time of the dissolution hearing, David worked for Nutri-Shield, Inc., in Horton, Kansas, where his gross earnings were $731 twice a month. He had health insurance through his employer, but Nicole's insurance was provided by the state. Nicole was receiving $174 in monthly Social Security payments based on Michele's disability. After August 2001, the amount was scheduled to be $274 per month.

Michele wrote a letter to the district court stating that she was unable to attend the hearing and unable to afford an attorney to represent her. She stated that she received $916 monthly from Social Security and $845 monthly in private long-term disability payments. She stated that Dustin cannot drive, cook, clean, or handle his own affairs. She indicated that Dustin receives $241 per month in Social Security benefits and $200 per month in Supplemental Security Income benefits. The letter indicates that Michele enclosed a number of credit slips, bills, and other documents, but they are not included in the bill of exceptions filed with this court.

ASSIGNMENTS OF ERROR

David asserts that the district court erred (1) in considering an adult child when calculating child support, (2) in making a finding of competency as to the adult child of the parties, (3) in entering a custody order pertaining to the adult child, and (4) in dividing the parties' property and assets.

ANALYSIS

Child Support Calculation

David first assigns as error the inclusion of Dustin, an adult child, in the child support calculation made by the district court. The court entered an order which clearly indicates that it based its decision on two children, even though Dustin is an adult.

Neb. Rev. Stat. § 42-351 (Reissue 1998) provides that the district court has jurisdiction in divorce actions to render judgments and make orders concerning, inter alia, "the custody and support of minor children." See, also, *Kimbrough v. Kimbrough*, 228 Neb. 358, 422 N.W.2d 556 (1988). Neb. Rev. Stat. § 42-364(1) (Reissue 1998) states that "[w]hen dissolution of a marriage or legal separation is decreed, the court may include a parenting plan developed under the Parenting Act, if a parenting plan has been so developed, and such orders in relation to *any minor child* and the child's maintenance as are justified . . . ." (Emphasis supplied.) See, also, *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986). Additional provisions throughout § 42-364 refer only to "minor" children. A minor is an unmarried person under the age of 19. Neb. Rev. Stat. § 43-2101 (Reissue 1998). Based on these statutes, the district court had no authority to include Dustin, who is more than 19 years of age, in its child support calculations.

[2] In *Meyers*, 222 Neb. at 375, 383 N.W.2d at 788, this court noted that the issue of whether courts have the power to compel divorced parents to "directly support a handicapped child beyond minority . . . presents an exercise in statutory construction." 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. *In re Estate of Krumwiede, ante* p. 378, 647 N.W.2d 625 (2002).

The *Meyers* court found that § 42-364 was clear and unambiguous in conferring authority to compel divorced parents to support minor children, but also clear and unambiguous in conferring no authority for the support of adult children.

> In effect, the mother asks us to read the word "minor" out of the statute and to add words such as to include adult children who are handicapped to the extent they cannot

> support themselves. More than that, she wishes us to write into the statute a requirement that divorced parents maintain their handicapped offspring in an institution of higher learning to an indefinite age. This we cannot do; as the foregoing rules of statutory construction demonstrate, it is the function of courts to apply statutes, not to enact them.

Meyers, 222 Neb. at 376, 383 N.W.2d at 789.

[3] The public policy of this state provides that parents have a duty to support their minor children until they reach majority or are emancipated, and a parent is not relieved of this duty by virtue of divorce. *Reinsch v. Reinsch*, 259 Neb. 564, 611 N.W.2d 86 (2000). See, also, *Waldbaum v. Waldbaum*, 171 Neb. 625, 107 N.W.2d 407 (1961). The deciding factor is whether the child has reached the age of majority or become emancipated. Dustin is an adult, and he lived independently in Kansas prior to moving to Texas with his mother, where he was awaiting placement in housing for persons with disabilities. Nebraska law does not provide that payments for his support should be included in a decree of dissolution.

The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Brockman v. Brockman, ante* p. 106, 646 N.W.2d 594 (2002). The district court abused its discretion in basing the child support award on two children, when one of the children is an adult.

[4,5] The child support guidelines provide that in calculating the amount of support to be paid, the court must consider the total monthly income, defined as the income of both parties derived from all sources, except all means-tested public assistance benefits. *Dueling v. Dueling*, 257 Neb. 862, 601 N.W.2d 516 (1999). Social Security disability insurance program benefits are not means-tested public assistance benefits, but are based on prior earnings of the recipient, not on the financial need of the recipient. *Hartman v. Hartman*, 261 Neb. 359, 622 N.W.2d 871 (2001).

The worksheet included here indicates that the district court used the figures provided by Michele to determine her annual income. We are unable to determine if such figures were a part of the record. In Michele's letter to the court, she stated that she received $916 monthly in Social Security benefits and $845

monthly from a disability insurance policy, for a total of $1,761 per month, or $21,132 per year. This is the figure used by the court to calculate Michele's annual income.

[6] The district court order stated that Michele should receive a credit against her child support obligation for any Social Security payments made to David or Nicole. A noncustodial parent is entitled to credit against a monthly child support obligation for Social Security benefits paid to his or her minor child as a result of the noncustodial parent's disability. See *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990). Social Security benefit payments which are the result of the obligor's disability are a substitute for the obligor's loss of earning power and his or her obligation to pay for the support of his or her dependents. *Gress v. Gress*, 257 Neb. 112, 596 N.W.2d 8 (1999). We have held that when a noncustodial parent becomes disabled *after* a child support order has been issued, "Social Security dependency benefits paid on behalf of the child based on the noncustodial parent's disability can be applied to satisfy the noncustodial parent's child support obligation." See *Hartman*, 261 Neb. at 365, 622 N.W.2d at 876. The same principle applies here. The court should have ordered that Michele receive credit for only those benefits received by Nicole based on Michele's disability. Dustin is an adult, and no child support credit should have been entered for him.

In addition, David testified that he earned $731 twice a month, for a total of $1,462 per month or $17,544 per year. The worksheet indicates that David's yearly income is $14,000. The only evidence concerning David's wages, other than his testimony, is a photocopy of one pay stub, which also shows the $731 bimonthly amount. The child support calculation worksheet itself states that the court will "require copies of [the] last 2 years' tax returns to verify 'total income' figures and copies of present wage stubs to verify the pattern of present wage earnings." None of these documents are in the record.

Therefore, the judgment must be reversed and the cause remanded for a recalculation of child support based only on the minor child, Nicole. The district court is directed to comply with the guidelines and to use correct figures in recalculating child support.

Finding of Competency Concerning Adult Child

[7] David assigns as error the district court's finding of competency as to Dustin. However, this alleged error is not discussed in the brief. Errors that are assigned but not argued will not be addressed by an appellate court. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002). This error is subsumed in the court's error in basing the child support calculation on two children.

Custody Order Concerning Adult Child

David's final assignment of error asserts that the district court erred in entering a custody order pertaining to Dustin, the adult child. Custody of Dustin was awarded to Michele, and custody of Nicole was awarded to David, with reasonable rights of visitation to each parent. David does not specifically address this alleged error in his brief, and this court is not required to consider it. We note, however, that for the same reasons we found the child support order to be an abuse of discretion, the court's order concerning custody is in error.

Division of Property and Assets

David next argues that the district court erred in its division of property and assets. The court awarded each party the personal property in his or her possession, and it awarded certain real estate and a van to David. David was also directed to deliver certain property to Michele as requested in her letter to the court.

The record before us makes it impossible to determine the method used by the district court to arrive at the property division. David testified at the hearing concerning debts and the responsibility for them, but Michele did not appear. The court may have considered letters and other information sent to it by Michele. The journal entry indicates that a letter from Michele was marked as an exhibit. Exhibit 3, which was filed on May 11, 2001, states that it includes copies of various documents to support Michelle's requests related to the division of property, but the documents are not included in the bill of exceptions. The court noted at the end of the hearing that other materials had been included with the letters, but the court had not looked at them.

We are unable to determine whether the district court abused its discretion in the division of property. David complains that the exhibits were marked by the court but not received into evidence

and that he would have objected to their offer if given the opportunity. This error has not been assigned, and therefore, we do not address it.

CONCLUSION

That portion of the district court's order concerning division of the parties' property is affirmed. However, the court abused its discretion by including Dustin, a disabled child over the age of 19 years, in the child support calculation. The court also erred in awarding custody of an adult child. That portion of the court's order concerning child support and custody is reversed, and the cause is remanded for a recalculation of child support.

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

THE GOVERNOR'S POLICY RESEARCH OFFICE AND LAUREN L. HILL, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE GOVERNOR'S POLICY RESEARCH OFFICE, STATE OF NEBRASKA, APPELLEES, V. KN ENERGY, A DIVISION OF KINDER MORGAN, INC., APPELLANT.

652 N.W.2d 865

Filed November 8, 2002. No. S-01-1217.

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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **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.
4. **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.
5. **Standing.** Either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.
6. **Actions: Parties: Standing.** To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some

real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.

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 action, and it is not sufficient that one has merely a general interest common to all members of the public.
8. **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.
9. **Administrative Law: Statutes.** The Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded for further proceedings.

M.J. Bruckner and John C. Fowles, of The Bruckner/Fowles Law Firm, P.C., and B.J. Becker for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellees.

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

WRIGHT, J.

NATURE OF CASE

The Lancaster County District Court found that KN Energy (KNE) lacked standing to challenge a request by the Governor's Policy Research Office (GPRO) for repayment of $390,000 from a revolving loan fund created by the Municipal Natural Gas Regulation Act (Act). The court granted summary judgment in favor of the GPRO in the amount of $390,000 plus interest and costs. KNE timely appealed.

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. *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002).

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *In re Application No. C-1889, ante* p. 167, 647 N.W.2d 45 (2002).

MUNICIPAL NATURAL GAS REGULATION ACT

The Act, Neb. Rev. Stat. §§ 19-4601 to 19-4623 (Reissue 1997 & Cum. Supp. 2000), makes provision for the Municipal Natural Gas Regulation Revolving Loan Fund (Fund). The Fund was created to make loans to municipalities for rate regulation, to pay the costs of administration, and to fund a study of natural gas utility systems. § 19-4617. The GPRO administers the Fund. See *id*. Municipalities which apply for a loan from the Fund must provide a budget statement that specifies the proposed use of the loan proceeds, which may only be used for the costs and expenses incurred by a municipality to analyze rate filings by utilities and establish area-wide rates, and to finance litigation costs of any appeals. *Id*.

The Act provides that the GPRO bills the utility for the amounts disbursed and that the utility may recover these amounts through a special surcharge added to utility bills. See § 19-4617(1)(b). The surcharge may be billed on monthly statements for up to 12 months and shown as a charge for rate regulation expense. *Id*.

BACKGROUND

KNE provides natural gas to customers within municipalities around the State of Nebraska. The municipalities are divided into 11 geographic rate areas. From February through October 1999, a number of municipalities served by KNE adopted resolutions stating their intention to conduct a review of one or more elements of KNE's total end rate. Four of the rate areas filed applications for loans from the Fund, and payments totaling $390,000 were made to municipalities by the GPRO.

During December 1999, at rate hearings in areas 2, 3, 4, and 7, KNE presented evidence that its current area-wide rates were insufficient (1) to enable it to meet the cost of furnishing natural gas service, including adequate provisions for depreciation of its utility property, and (2) to earn a fair and reasonable return

upon the investment in such property. KNE also presented evidence to show that the disallowance of certain contract costs would exacerbate this insufficiency.

Between February and June 2000, governing bodies in 16 municipalities in rate areas 2, 3, 4, and 7 adopted rate ordinances that prohibited KNE from including in its rates certain above-market costs. On May 30, 2000, the GPRO wrote to KNE requesting payment of $390,000 within 30 days. The $390,000 figure represented loans the GPRO had made in the following amounts: rate area 2, $84,864; rate area 3, $79,482; rate area 4, $106,119; and rate area 7, $119,535.

In a letter dated June 15, 2000, KNE refused to remit the amount, claiming it had no legal obligation to reimburse the Fund. KNE asserted that it had informed the municipalities' attorneys that the review process was flawed and that the hearings were not covered by the Act. KNE stated that it had previously communicated to a division of the GPRO its concerns about the receipt of loans by municipalities that had failed to meet statutory requirements. KNE alleged that it received no response to its concerns.

On July 27, 2000, the Attorney General's office, on behalf of the GPRO, made written demand for the $390,000. In response, KNE reiterated that it was not obligated to repay the amount. Two representatives of KNE met with representatives of the Attorney General's office, and a second written request was sent on October 4. KNE did not respond or make payment.

In December 2000, the GPRO filed a declaratory judgment action against KNE, alleging that it had violated the Act by refusing to pay the requested $390,000. The GPRO alleged that as a result of KNE's refusal, it had been unable to disburse loan proceeds to compensate legal representatives and expert witnesses and for other services necessary to complete the rate review proceedings. The GPRO asked the district court to declare that the requirement for payment of loan amounts in § 19-4617 is direct and unconditional and that KNE has no discretion to decline to pay the amounts billed.

In its answer, KNE asserted what it labeled as "affirmative defenses," including:

> a. The [GPRO] did not have legal authority to make the payments from the [Fund because]

> i. the municipalities did not conduct a *NEB. REV. STAT.* §19-4618 review;
>
> ii. appropriate resolutions were not adopted by municipalities representing 70% or more of the customers in Rate Areas 2, 3, 4 and 7; and
>
> iii. the resolutions adopted by those municipalities which purported to conduct the review did not conform to the provisions of §19-4618.
>
> b. The amounts . . . include costs incurred by other Rate Areas that did not initiate rate reviews.
>
> . . . .
>
> f. [KNE] has no obligation to reimburse the [GPRO] or the [Fund] for amounts improperly disbursed from the [Fund].

The cities of Alliance, Broken Bow, Burwell, Chappell, Gordon, Kimball, Loup City, Ord, Oshkosh, Ravenna, and Sidney and the villages of Ansley and Hemingford intervened, alleging that appropriate resolutions had been adopted by the municipalities representing 70 percent or more of the KNE customers. Subsequently, the intervenors filed a notice of dismissal without prejudice, stating that their interests were aligned with and adequately represented by the GPRO.

In its reply, the GPRO asserted that KNE lacked standing to assert claims or defenses related to the loan amounts under the Act and that KNE had no discretion to refuse to pay the amounts billed. The GPRO filed a motion for summary judgment and motion in limine.

In granting the GPRO's motion for summary judgment, the district court stated:

> Consequently, even if [KNE] is successful with any of its affirmative defenses, [KNE] has no legally protectable interest or right which is benefitted by the relief it requests. [KNE] is not entitled to the avails of the action and has not sustained a direct injury which will be satisfied by success on any of the affirmative defenses.

The district court found that the GPRO had established a prima facie case based upon the following undisputed facts:

> 1. The municipalities applied for loan funds under NEB. REV. STAT. §19-4617.

2. The GPRO determined the applicants were entitled to receive loan funds authorized by §19-4617.

3. The funds the GPRO distributed to the municipalities were from [the Fund] authorized by §19-4617.

4. The amount of the loan was $390,000.00.

5. [The] GPRO first made demand on [KNE] for repayment of the funds on May 30, 2000.

6. [KNE] failed to make payment of the loan amount within 30 days of when demand was made.

7. [KNE] has not paid any portion of the $390,000.00 loan.

The court concluded that KNE had produced no evidence to rebut or place at issue any of these material facts.

The district court found that the GPRO had established its right to payment from KNE and that KNE had raised no legal issue other than the affirmative defenses already addressed. The court entered judgment as a matter of law against KNE in the amount of $390,000 plus prejudgment and postjudgment interest and costs.

ASSIGNMENTS OF ERROR

KNE's assignments of error can be summarized into three claims: The district court erred (1) in finding that KNE does not have standing to challenge the request for reimbursement by the GPRO; (2) in ignoring the judgments of the Lancaster County District Court in KN Energy v. Cities of Alliance et al., case No. CI 00-1309; KN Energy v. Cities of Chappell et al., case No. CI 00-1310; and KN Energy v. Village of Hemingford et al., case No. CI 00-1311, involving rate areas 2, 3, and 4, in which the court held that the resolutions and actions of the municipalities in those rate areas did not comply with § 19-4618; and (3) in ignoring the plain and unequivocal language of the Act.

ANALYSIS

The basis for the district court's judgment was its conclusion that KNE lacked standing to raise the affirmative defenses asserted and that, therefore, there were no material issues of fact in dispute and that GPRO was entitled to judgment as a matter of law. 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. *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002). The State asserts that once the loan was made, KNE was precluded from objecting to payment. The State claims that after the loan funds were disbursed, KNE had no standing to object to repayment of the loan and that KNE's only remedy was to seek reimbursement from its customers.

[3,4] KNE asserts that the district court erred in finding that it lacked standing when the issue of standing was not raised by the GPRO in its summary judgment motion. 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. *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 611 N.W.2d 404 (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. *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000).

[5] We have held that the requirement of standing is fundamental to a court's exercise of jurisdiction and that either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. See *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998). The district court did not err in addressing the question of KNE's standing in this action.

The remaining question is whether the Act gives KNE standing to challenge repayment of the loan funds. The Act provides that the utility must pay the loan amount to the GPRO within 30 days of billing. The utility is permitted to recover the amount by adding a special surcharge to utility bills for up to 12 months as a rate regulation expense.

[6] The district court addressed the issue of standing in terms of whether KNE was the real party in interest. Neb. Rev. Stat. § 25-301 (Cum. Supp. 2000) provides: "Every action shall be prosecuted in the name of the real party in interest . . . ." In *Eli's, Inc. v. Lemen*, 256 Neb. 515, 527, 591 N.W.2d 543, 552 (1999), we stated:

> "To determine whether a party is a real party in interest, the focus of the inquiry is whether that party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy."

[7] 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. See *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001). 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 action, and it is not sufficient that one has merely a general interest common to all members of the public. *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000).

Although KNE acknowledged that it did not directly benefit from any of the affirmative defenses, it argued that it is a fiduciary of those who are obligated to repay the loan and that it has a duty to defend on behalf of the ratepayers. The district court found that KNE did not suggest that standing was conferred on it through an assignment of rights from the ratepayers, but its relationship with its customers "appears to be no different than that which exists between any purveyor of goods and the purveyor's customer." The court concluded that the Act did not confer any responsibility on KNE as a fiduciary and that KNE had no standing to raise issues belonging to its customers.

The district court then addressed KNE's assertion that it has a legitimate interest in the outcome because KNE incurred expenses defending the rate reviews which were instigated as a result of the funding provided by the loan. KNE claimed it incurred expenses in cases that were decided earlier in the Lancaster County District Court and were on appeal at the time of the final order in this case. The court stated that Neb. Rev. Stat. § 25-10,105 (Reissue 1995) provides that costs are determined and assessed by the trial court at the time of judgment. Shifting of attorney fees and costs is allowed only by statute or where the uniform course of procedure has been to allow recovery of fees. The court found that in the prior rate cases, each

party was ordered to bear its own costs, and that those judgments are res judicata as to the issue of KNE's costs in this case. Therefore, the court concluded that KNE did not have standing to raise affirmative defenses in this case merely because it was forced to defend the earlier rate cases.

KNE also argued that if it did not have standing to raise the affirmative defenses, no other party had standing. The district court stated:

> That is not an issue this court must resolve. It is worth noting that some issues in this world do not involve disagreements that are suitable for decision by courts. ***Ritchhart v. Daub,*** 256 Neb. 801, 594 N.W.2d 288 (1999). Some disputes are purely political. On some issues, it is up to the electors to determine whether an action of government is one which warrants retention or discharge of their elected officials. Whether this is one of those cases, or is one for which a remedy is available to an entity with standing is left for another case. [KNE] does not possess standing to raise the affirmative defenses.

[8] In addressing the issue of standing, we must consider the entire Act and its purpose. Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *In re Application No. C-1889, ante* p. 167, 647 N.W.2d 45 (2002). 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. *Ottaco, Inc. v. McHugh*, 263 Neb. 489, 640 N.W.2d 662 (2002).

[9] We conclude that KNE has standing to question whether there has been a proper disbursement of funds under the Act. An administrative agency such as the GPRO has limited power, and its power is to be strictly construed. The Legislature may delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute. *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995). However, this delegated authority is limited to the powers delegated to the agency by the statute which the agency

is to administer. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). The GPRO must adhere to the Act in disbursing loans from the Fund.

The Act requires that the utility reimburse the Fund within 30 days of the demand and that to recover the amount, the utility must surcharge its customers within 12 months. The question of whether the GPRO acted in excess of its authority in making an unauthorized distribution relates to the utility's interest in having to surcharge its customers to recover a distribution that may not have been authorized. KNE, which is being requested to pay $390,000, has a real interest in the subject matter of the controversy. Its interest in the matter is more than a general interest common to all members of the public.

Sections 19-4617 and 19-4618 set forth the terms and conditions under which a loan may be made by the GPRO to the requesting municipality. Under § 19-4617(1)(b), loans are required to be repaid by the utility, which may then recover the amount through a special surcharge on customers.

We conclude that a utility which is subject to the terms of the Act has standing to challenge the validity of the GPRO's actions if and when the utility alleges that amounts were improperly disbursed from the Fund or if it is alleged that the GPRO has exceeded its authority granted by the Legislature. The affirmative defenses raised by KNE present questions of both law and fact regarding these issues that prevent the case from being summarily decided. The district court erred in concluding that KNE lacked standing and therefore erred in granting summary judgment to the GPRO.

CONCLUSION

KNE has standing to assert defenses to the GPRO's demand for payment. Therefore, the judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., and CONNOLLY, J., not participating.

ROBERT E. DAY, JR., APPELLANT, V. ROBIN E. HELLER, APPELLEE.

653 N.W.2d 475

Filed November 22, 2002. No. S-00-928.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefits of all reasonable inferences deducible from the evidence.
3. ____: ____. In an appellate review, the grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon.
4. **Torts: Marriage: Divorce.** A tort action against a former or current spouse is not inherently prohibited.
5. **Actions: Fraud: Paternity: Public Policy.** A fraud claim against a mother for her misrepresentation of biological fatherhood is contrary to public policy.
6. **Actions: Equity: Paternity: Public Policy.** An assumpsit claim against a mother for her misrepresentation of biological fatherhood is contrary to public policy.
7. **Actions: Pleadings.** In actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader.
8. **Courts: Public Policy.** It does not lie within the power of any judicial system to remedy all human wrongs, and to attempt to correct such wrongs or give relief from their effects may do more social damage than if the law leaves them alone.
9. **Actions: Mental Distress: Paternity: Public Policy.** An intentional infliction of emotional distress claim against a mother for her misrepresentation of biological fatherhood is contrary to public policy.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and INBODY and CARLSON, Judges, on appeal thereto from the District Court for Sarpy County, GEORGE A. THOMPSON, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

John W. Ballew, Jr., of Ballew, Schneider & Covalt, for appellant.

Robert F. Peterson and Mark L. Laughlin, of Laughlin, Peterson & Lang, for appellee.

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

CONNOLLY, J.

This appeal presents the question whether we will recognize a tort or assumpsit cause of action against a mother for her misrepresentation of biological fatherhood. Robert E. Day, Jr., alleges that for 12 years, his former wife, Robin E. Heller, represented that Robert was the biological father of a child born during their marriage. Robert now seeks damages for fraud, assumpsit, and intentional infliction of emotional distress. The district court entered summary judgment for Robin.

The Nebraska Court of Appeals reversed, holding that neither res judicata nor collateral estoppel barred Robert's action. *Day v. Heller*, 10 Neb. App. 886, 639 N.W.2d 158 (2002). The Court of Appeals' decision impliedly recognized tort and assumpsit causes of action for a mother's misrepresentation of biological fatherhood. Because we determine that Robert's tort and assumpsit causes of action are contrary to public policy, we reverse.

BACKGROUND

Robert and Robin married on August 30, 1986, and on July 14, 1987, Robin gave birth to a child, Adam. On May 31, 1991, the marriage was dissolved. Robin was granted custody of Adam, subject to Robert's reasonable visitation rights. The court ordered Robert to pay child support in the initial amount of $270 per month and to provide medical insurance coverage for Adam. According to Robert's petition, the trial court entered subsequent orders increasing Robert's child support obligation and requiring him to pay one-half of Robin's employment-related daycare costs for Adam. Also, the court entered a modification order in which Robert was ordered to pay one-half of Adam's uninsured medical expenses. Robert also alleged that he paid legal fees for enforcement of his visitation rights.

Robert alleged that at all times following Adam's birth, Robin represented to him that he was Adam's biological father. According to Robert's answers to Robin's interrogatories, Robin misled him as to the due date for Adam's birth, telling him that Adam was due 3 weeks before his actual due date. Robert alleges that it was not until July 1997, following the birth of his daughter with his current wife, that he first became suspicious of whether he was Adam's biological father. According to

Robert, it was at this time that a doctor told him " 'there is no reason to let a healthy baby and mom go over term in a pregnancy.' " This statement led Robert to count back from the time of Adam's birth to the likely time of conception. Robert realized that Adam's conception "would have taken place while [Robert] had been away from [Robin] for several weeks." Robert sought DNA testing in April 1999. (The record does not show how this was accomplished.) The testing, according to Robert's allegations, showed a 0-percent probability that Robert was Adam's father. Robert also alleged that he could not have, through due diligence, discovered before April 1999 that he was not Adam's biological father.

On May 19, 1999, Robert consented to the adoption of Adam by Robin's new husband, Patrick Heller. On July 27, Patrick adopted Adam.

On February 15, 2000, Robert filed the present action. Robert pled three causes of action. In his first cause of action, fraud, Robert alleged that Robin had intentionally and willfully concealed that another man was Adam's biological father; that Robin misrepresented and concealed Adam's biological parentage with the intention that Robert would rely on it, which he did; and that as a direct and proximate result of Robin's concealment, he suffered damages.

In his second cause of action, assumpsit, Robert alleged that since the entry of the decree in 1991, he had paid child support, employment-related daycare expenses, and health insurance for Adam. Robert alleged that because he is not Adam's biological father, Robin has been unjustly enriched, and that fairness and justice require Robin to repay him.

In his third cause of action, emotional distress, Robert alleged that Robin intentionally and recklessly misrepresented that Robert was Adam's father when she knew this was false and that she continued to conceal the fact from Robert; that Robin's conduct in misrepresenting and concealing the true paternity of Adam for nearly 12 years was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency; and that given the emotional bond that he formed with Adam, he suffered and continues to suffer emotional distress.

Robert sought damages for the following: (1) amounts he paid under the original and modified decree for child support, daycare costs, health insurance, and medical expenses; (2) costs he paid to exercise and enforce his visitation privileges with Adam; (3) general damages for Robin's alleged intentional infliction of emotional distress; and (4) attorney fees incurred in the present action.

Robin moved for summary judgment. The district court rejected Robin's argument that under res judicata and collateral estoppel, the recital of paternity in the dissolution decree barred Robert's claims. But, the court concluded that there were no genuine issues of material fact for each of Robert's causes of action and that Robin was therefore entitled to judgment as a matter of law. Robert appealed.

The Court of Appeals reversed. *Day v. Heller*, 10 Neb. App. 886, 639 N.W.2d 158 (2002). It determined that the trial court, instead of deciding whether any real issue of material fact existed, had attempted to decide the factual issues. It also determined that neither res judicata nor collateral estoppel barred Robert's action. The Court of Appeals noted that whether, after a dissolution proceeding has become final, a party can bring a tort action against a former spouse is an issue of first impression in Nebraska and concluded that such an action should be allowed. *Id.* In reversing, the Court of Appeals implicitly recognized that a party could maintain tort and assumpsit actions against a mother for her misrepresentation of biological fatherhood. We granted Robin's petition for further review.

ASSIGNMENTS OF ERROR

Robin assigns that the Court of Appeals erred in determining that (1) res judicata and collateral estoppel do not bar Robert's claims and (2) factual issues exist which preclude summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the

moving party is entitled to judgment as a matter of law. *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002).

[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 benefits of all reasonable inferences deducible from the evidence. *Id.*

[3] In an appellate review, the grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon. *Foreman v. AS Mid-America*, 255 Neb. 323, 586 N.W.2d 290 (1998).

ANALYSIS

[4] The Court of Appeals noted that whether a party can bring a tort claim against a former spouse after a dissolution proceeding has become final is a question of first impression in Nebraska. Nebraska abolished the interspousal tort immunity in *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979), and we agree with the Court of Appeals that a tort action against a former or current spouse is not inherently prohibited. This case, however, turns on a different question, Will Nebraska recognize a tort or assumpsit cause of action against a mother for her misrepresentation and concealment of biological fatherhood? Because we conclude that Robert's tort and assumpsit causes of action are contrary to public policy, we need not address Robin's res judicata and collateral estoppel arguments.

Robert's causes of action can be subdivided into two categories. The first consists of his fraud and assumpsit claims. These claims seek to recover for the creation of Robert's parent-child relationship with Adam. The second consists of Robert's intentional infliction of emotional distress claim. Liberally construed, this claim seeks to recover for the emotional harm suffered when a misrepresentation of biological fatherhood leads to the threatened destruction of a parent-child relationship. Because the two categories present different policy questions, we analyze them separately.

Robert's Fraud and Assumpsit Causes of Action

[5,6] Robert's fraud claim seeks to recover the child support he was ordered to pay under the dissolution and supplemental

decrees and the costs associated with the enforcement of his visitation rights. Similarly, Robert's assumpsit claim is for Robin's unjust enrichment as a result of receiving child support payments. We conclude that Robert's fraud and assumpsit causes of action are contrary to public policy.

As we read his petition, Robert's fraud and assumpsit claims are for Robin's misrepresentation that led Robert to make investments of time, emotion, and money in Adam that he would not have made had he known that Adam was not his biological son. In effect, Robert is saying, "He is not my son; I want my money back." Robert's fraud and assumpsit causes of action focus on the burdens of the parent-child relationship, while ignoring the benefits of the relationship. We do not believe that having a close and loving relationship "imposed" on one because of a misrepresentation of biological fatherhood is the type of "harm" that the law should attempt to remedy. See *Nagy v. Nagy*, 210 Cal. App. 3d 1262, 258 Cal. Rptr. 787 (1989).

Moreover, a tort or assumpsit claim that seeks to recover for the creation of a parent-child relationship has the effect of saying "I wish you had never been born" to a child who, before the revelation of biological fatherhood, was under the impression that he or she had a father who loved him or her. Accord Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes With Parent-Child Relationships*, 33 Loy. L.A. L. Rev. 449 (2000) (advocating tort where misrepresentation of biological fatherhood threatens existing parent-child relationship, but questioning tort that allows recovery for creation of parent-child relationship). We decline to allow a party to use a tort or assumpsit claim as a means for sending or reinforcing this message.

Robert's Intentional Infliction of Emotional Distress Cause of Action

For his intentional infliction of emotional distress claim, Robert alleges:

> 2. Defendant intentionally and recklessly represented to Plaintiff after the birth of Adam Robert Day that Plaintiff was the father of said child when in fact Defendant knew

> that Plaintiff was not the father of said child and continued to conceal this fact from Plaintiff.
>
> 3. Defendant's conduct in misrepresenting and concealing the true paternity of Adam Robert Day to Plaintiff for nearly twelve years was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency so as to be considered utterly intolerable.
>
> 4. As a result of Defendant's conduct and subsequent revelation that he is not the biological father of Adam Robert Day, Plaintiff has suffered and continues to suffer emotional distress given the emotional bond he formed with this child over a twelve year period.
>
> 5. Defendant's initial misrepresentation and concealment of the true paternity of this child over a twelve year period while accepting court ordered child support, employment-related daycare expense, health insurance and other economic benefits on the part of the child while at the same time preventing Plaintiff from exercising visitation rights with said child and causing Plaintiff to incur significant attorney fees in doing so constitutes outrageous conduct so severe that no reasonable person should be expected to endure it.

Paragraph 5 mirrors Robert's fraud and assumpsit claim. With this allegation, Robert is seeking to recover for nothing more than the anger he felt when he learned that he had made investments in Adam that he would not have made had he known there was no biological relationship. To the extent Robert's intentional infliction of emotional distress claim seeks to recover for the creation of a parent-child relationship, it is barred for the same reasons that his fraud and assumpsit claims are barred. See *Nagy v. Nagy, supra*.

[7] Robert's intentional infliction of emotional distress cause of action is subject however to a second interpretation which raises different policy questions. "[I]n actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader." *Fitzpatrick v. U S West, Inc.*, 246 Neb. 225, 229, 518 N.W.2d 107, 112 (1994). Thus, we also consider this second interpretation of Robert's intentional infliction of emotional distress claim.

Liberally construed, paragraphs 2 through 4 of Robert's intentional infliction of emotional distress claim seek recovery for the emotional harm Robert suffered when Robin's misrepresentation and concealment of biological fatherhood threatened to destroy his parent-child relationship with Adam. In other words, Robert's petition can be read as saying that before he learned he was not Adam's father, he and Adam had a loving relationship; that learning the truth damaged this relationship; and that as a result of the damage to the relationship, Robert suffered severe emotional distress.

[8,9] Whether to recognize an intentional infliction of emotional distress claim for the threatened destruction of a parent-child relationship presents a more difficult question than whether to recognize a claim for the creation of a parent-child relationship. Having a close and loving parent-child relationship suddenly destabilized by a revelation that there is no biological relationship has the potential to cause grief, anxiety, shock, and fear. Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes With Parent-Child Relationships*, 33 Loy. L.A. L. Rev. 449 (2000). However, " '[i]t does not lie within the power of any judicial system . . . to remedy all human wrongs . . . [and to] attempt to correct such wrongs or give relief from their effects "may do more social damage than if the law leaves them alone." . . .' " *Nagy v. Nagy*, 210 Cal. App. 3d 1262, 1269, 258 Cal. Rptr. 787, 790-91 (1989). Not surprisingly, other courts have reached conflicting conclusions in deciding whether to recognize similar claims. Compare, e.g., *Doe v. Doe*, 358 Md. 113, 747 A.2d 617 (2000) (public policy bars tort claim against former spouse based on misrepresented paternity), *Nagy v. Nagy, supra* (Johnson, J., concurring), and *Steve H. v. Wendy S.*, 67 Cal. Rptr. 2d 90 (Cal. App. 1997), *superseded by* 946 P.2d 817, 68 Cal. Rptr. 2d 859, and *review dismissed and cause remanded* 960 P.2d 510, 77 Cal. Rptr. 2d 706 (1998), with *G.A.W. v. D.M.W.*, 596 N.W.2d 284 (Minn. App. 1999) (public policy is not bar), *Doe v. Doe*, 122 Md. App. 295, 712 A.2d 132 (1998), *rev'd* 358 Md. 113, 747 A.2d 617 (2000), and *Koelle v. Zwiren*, 284 Ill. App. 3d 778, 672 N.E.2d 868, 220 Ill. Dec. 51 (1996). See, also, Berger, *supra* (advocating extension of tort);

Robert G. Spector, *Marital Torts: The Current Legal Landscape*, 33 Fam. L.Q. 745 (1999) (questioning propriety of tort based on misrepresentations of biological fatherhood). Although persuasive arguments exist for both positions, we conclude that the law should not hold a mother liable in tort when her misrepresentation of paternity threatens an existing parent-child relationship.

Intentional infliction of emotional distress claims, like Robert's, present risks to the parties' child by unavoidably thrusting the child and his relationship with Robert into the center of the litigation. A child's emotional development and psychological well-being are tied to the level of conflict between the child's parents. See, *Steve H. v. Wendy S., supra*; Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 Wm. Mitchell L. Rev. 495 (2001); Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. Va. L. Rev. 547 (2000). While we recognize that generally, the mere danger of parental conflict is not enough to bar an otherwise valid tort claim, see *Steve H. v. Wendy S., supra* (Vogel, J., dissenting), the tort Robert proposes presents a particularly unique brand of intrafamilial warfare. Unlike a case involving a battery or a car accident, the quality of the parent-child relationship will be at the center of the lawsuit. The closer the plaintiff was to the child before he learned that he was not the biological father, the greater the potential for disruption and the more likely that a disruption to the relationship would cause him severe emotional distress.

Because the tort necessarily places the quality of the parent-child relationship at its center, the child will become a focal point of litigation. In many cases, the mother will turn to the child to rebut the plaintiff's characterization of the parent-child relationship. As a result, the child will be subject to discovery concerning the nature of his or her relationship with the plaintiff and may even be called to testify at trial. The temptation for one party to manipulate the child's view of the other will be great, and we can conceive of the situation where the child " 'become[s] a strategic tool for advantageous use of one family member over another.' " See *Steve H. v. Wendy S.*, 67 Cal. Rptr. at 95 (quoting *Bock v. Lindquist*, 278 N.W.2d 326 (Minn. 1979)).

A custody dispute is the only other type of action that is between parents and has at its center the quality of a parent-child relationship. The negative consequences of a bitter custody battle are well established:

> Qualitative and quantitative research conducted over the past thirty years demonstrates that highly conflicted custody cases are detrimental to the development of children, resulting in perpetual emotional turmoil, depression, lower levels of financial support, and a higher risk of mental illness, substance abuse, educational failure, and parental alienation. The level and intensity of parental conflict is now thought to be the most dominant factor in a child's post divorce adjustment and the single best predictor of a poor outcome. Research shows that children exposed to violence and high levels of conflict "bear an acutely heightened risk of repeating the cycle of conflicted and abusive relationships as they grow up and try to form families of their own."

Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 Wm. Mitchell L. Rev. 495, 496-97 (2001). Custody determinations, however, are a necessary adjunct to the resolution of a relationship turned sour. The legal system cannot force parents to stay together when they have made the decision to separate. The child's only option is to endure the bitterness of the custody battle.

But no similar compelling reasons exist for adopting an intentional infliction of emotional distress claim with the quality of the parent-child relationship at its center. Even advocates of the tort concede that it will not deter others from engaging in similar conduct:

> It may be especially unlikely that a spouse intent on preserving a marriage will be deterred from lying about the paternity of a child born during the marriage, or that a spouse intent on ending a marriage and winning custody will be deterred from telling the truth about the paternity of the child.

Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes With Parent-Child Relationships*,

33 Loy. L.A. L. Rev. 449, 527 (2000). Moreover, although advocates of the tort claim that it affirms societal values, *id.*, we believe that it sends an incoherent message. We can conceive of the situation where a successful claimant executes a judgment lien on the mother's only automobile or garnishes the mother's wages. It would be inherently inconsistent to allow a person to premise a tort claim on his love for a child and then allow him to execute on property or garnish income necessary for that child's well-being.

Ultimately, the only valid reason for adopting the tort is to compensate the plaintiff for his emotional injury. We are not unsympathetic to a plaintiff who has been led to believe that a child is his when in fact the child is not. But, forced to choose between adopting a tort that carries all the detrimental effects of a custody battle or asking a plaintiff to go uncompensated for his emotional pain, we choose the latter.

CONCLUSION

Because we conclude that Robert's fraud, intentional infliction of emotional distress, and assumpsit causes of action are contrary to public policy, Robin is entitled to summary judgment. Accordingly, we reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to enter an order affirming the district court's entry of summary judgment for Robin.

REVERSED AND REMANDED WITH DIRECTIONS.

STEVEN J. HAUSER, APPELLANT AND CROSS-APPELLEE, V. NEBRASKA POLICE STANDARDS ADVISORY COUNCIL AND NEBRASKA COMMISSION ON LAW ENFORCEMENT AND CRIMINAL JUSTICE, APPELLEES AND CROSS-APPELLANTS.

653 N.W.2d 240

Filed November 22, 2002. No. S-01-476.

1. **Actions: Equity: Public Meetings: Appeal and Error.** Actions for relief under the public meetings laws are tried as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. Thus, the approach taken is that such cases are tried and reviewed by the appellate courts as equity cases.

2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Public Meetings: Notice: Waiver: Time.** Any person who has notice of a meeting and attends the meeting must object specifically to the lack of public notice at the meeting or the person will be held to have waived his or her right to object on that ground at a later date.
4. ____: ____: ____: ____. A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given.
5. **Public Meetings: Waiver.** If a person present at a meeting observes an alleged public meetings laws violation in the form of an improper closed session and fails to object, that person waives his or her right to object at a later date.
6. **Pleadings: Appeal and Error.** Where a particular theory of the case is not stated in a plaintiff's petition, he or she cannot raise it for the first time on appeal.
7. **Judgments: Appeal and Error.** 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.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

R. Bradley Dawson, of Clough, Dawson & Piccolo, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellees.

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

MCCORMACK, J.

NATURE OF CASE

For the second time, we consider issues raised by the revocation of Steven J. Hauser's law enforcement certificate. Hauser's certificate was revoked by the Nebraska Police Standards Advisory Council (Council), an action later approved by the Nebraska Commission on Law Enforcement and Criminal Justice (Commission).

After the revocation, Hauser filed two separate petitions in the district court for Hall County. In the first, docketed as case

No. CI00-923 in the district court, Hauser alleged that the actions of the Council violated Neb. Rev. Stat. § 84-1413 (Reissue 1999) of Nebraska's public meetings laws, Neb. Rev. Stat. § 84-1408 et seq. (Reissue 1999 & Cum. Supp. 2002). In Hauser's other petition, case No. CI00-983 in the district court, he challenged the statutory authority of the Council and Commission to revoke his certificate.

In case No. CI00-983, the district court reversed the revocation, finding that the Commission acted in excess of its statutory authority. In case No. CI00-923, the district court concluded that there could be no violation of the public meetings laws where the hearings had already been found in case No. CI00-983 to be a nullity.

On appeal, we reversed the district court's decision entered in case No. CI00-983 and remanded the cause. See *Hauser v. Nebraska Police Stds. Adv. Council, ante* p. 605, 650 N.W.2d 760 (2002). Hauser now appeals the district court's decision entered in case No. CI00-923.

BACKGROUND

On February 24, 2000, the Nebraska Law Enforcement Training Center filed an administrative complaint with the Council seeking to revoke Hauser's law enforcement certificate. A hearing on the matter was held by the Council on August 21 through 23. At the start of the hearing, the acting chairman of the Council indicated that the hearing was closed, as requested by Hauser.

The hearing before the Council was bifurcated. The first stage of the hearing addressed whether the Council had jurisdiction to consider the complaint and revoke Hauser's certificate. After all the evidence was received, the acting chairman stated that "we will entertain a motion to go into executive session to make a determination." The next notation in the bill of exceptions indicates that a discussion was held off the record and that the Council was in recess from 4:10 to 7:40 p.m. After returning from the recess, the acting chairman announced in the presence of Hauser and his counsel that

> in regard to the jurisdiction and authority interest, it's by full consensus of the Police Standards Council, it's been

> determined that we do have the authority and jurisdiction to hear the decertification of Mr. Steven Hauser. The findings will follow with the final memorandum in order at the completion of this hearing.

Hauser did not object to any perceived public meetings laws violations at that time.

The Council immediately proceeded to the second stage of the hearing for consideration of the merits of the complaint. Various miscellaneous matters were resolved before the Council adjourned for the evening. The next day, the Council received evidence until late afternoon. After closing arguments were made by each party, the acting chairman stated:

> We're going to directly go to executive session. I'm not sure that we're going to have — even though it's 4:30, I don't know if we'll have enough time to arrive at any type of decision tonight. I would like to reconvene at 9 o'clock in the morning. Any problems with that?

The parties answered no, and the Council adjourned at 4:35 p.m. The bill of exceptions next indicates that on August 23, at 9:25 a.m., the acting chairman announced that it was the unanimous decision of the Council to recommend to the Commission that Hauser's law enforcement certificate be revoked. The acting chairman also stated that a written report and recommendations would follow. The record on appeal includes a written report of the Council's findings and conclusions, signed by the acting chairman and dated September 18, 2000. Again, Hauser and his counsel were present for the announcement of the Council's decision, and no objection was made.

After the Council's actions, the matter was forwarded to the Commission, where a hearing was held on October 27, 2000. The Commission's hearing was closed on the vote of the Commission members, evidence was received, and the Commission went into executive session to deliberate the matter. The Commission continued its deliberations in executive session on November 1. That afternoon, the Commission returned to open session and voted to revoke Hauser's law enforcement certificate.

Hauser filed two petitions in district court seeking to overturn the revocation of his certificate. In case No. CI00-923, Hauser alleged that the Council's actions violated § 84-1413 of

the public meetings laws and were thus void under § 84-1414. In case No. CI00-983, Hauser alleged, among other things, that the actions of the Council and the Commission were made in excess of their statutory authority or jurisdiction. Also alleged in this petition was that the Council and Commission violated § 84-1413.

On March 30, 2001, the district court entered orders in each case. In case No. CI00-983, the district court reversed the revocation of Hauser's law enforcement certificate. The court found that the Commission acted beyond its statutory authority, that the Commission's decision was based upon unlawful procedure, and that the Council did not promulgate any rules and regulations governing the revocation. This order was later reversed, and the cause remanded by this court in *Hauser v. Nebraska Police Stds. Adv. Council, ante* p. 605, 650 N.W.2d 760 (2002), where we held that the rules and regulations were valid.

In the order entered in case No. CI00-923, the district court concluded that because the decision in case No. CI00-983 was null and void, there could not be a violation of the public meetings laws. Hauser appeals from this decision, and the Council and Commission (collectively the appellees) cross-appeal. We moved the case to our docket on our own motion.

ASSIGNMENTS OF ERROR

Hauser assigns, rephrased, that the district court erred in finding that the Council did not violate § 84-1413 of the public meetings laws.

On cross-appeal, the appellees claim the district court erroneously concluded that the revocation proceedings were without the authority of law and a nullity.

STANDARD OF REVIEW

[1,2] Actions for relief under the public meetings laws are tried as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. Thus, the approach taken is that such cases are tried and reviewed by the appellate courts as equity cases. *Wasikowski v. Nebraska Quality Jobs Bd., ante* p. 403, 648 N.W.2d 756 (2002). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided

that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

Hauser claims that the Council violated § 84-1413 of the Nebraska public meetings laws. Hauser concedes that the Council was entitled to deliberate in executive session after each phase of the hearing. However, to comply with § 84-1413, Hauser argues that the Council should have conducted a rollcall vote on the question of whether to exit executive session after such question had been properly moved and seconded. Then, Hauser claims that the Council should have conducted a rollcall vote in open session on the question of whether the Council had jurisdiction to revoke Hauser's law enforcement certificate after that question had likewise been properly moved and seconded. Hauser contends that similar actions were required of the Council after the second phase of the hearing. Although Hauser fails to identify which provision of § 84-1413 was violated, in light of these arguments, we analyze this case under § 84-1413(2), which provides in relevant part: "Any action taken on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted or if the member was absent or not voting."

[3,4] We have previously held that the failure to timely object to purported public meetings laws violations prevents parties from asserting such violations to this court. In *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992), we stated that any person who has notice of a meeting and attends the meeting must object specifically to the lack of public notice at the meeting, or be held to have waived his or her right to object on that ground at a later date. See, also, *Witt v. School District No. 70*, 202 Neb. 63, 273 N.W.2d 669 (1979); *Alexander v. School Dist. No. 17*, 197 Neb. 251, 248 N.W.2d 335 (1976). A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given. *Otey v. State, supra*; *Witt v. School District No. 70, supra*; *Alexander v. School Dist. No. 17, supra*.

In *Wasikowski v. Nebraska Quality Jobs Bd., ante* p. 403, 648 N.W.2d 756 (2002), we extended this principle to prevent a party from arguing that a public body failed to properly convene a closed session. In that case, several plaintiffs challenged the Nebraska Quality Jobs Board's decision to approve an application for wage benefit tax credits under the Quality Jobs Act, Neb. Rev. Stat. § 77-4901 et seq. (Reissue 1996 & Cum. Supp. 2002). One of the plaintiffs attended the board's meeting where it considered the application in closed session; however, the plaintiff did not object to the board's convening a closed session.

[5] *Wasikowski* dealt with a purported closed session violation under § 84-1410, and not with a lack of sufficient public notice under § 84-1411. We held, however, that under the logic of *Otey* and *Witt*, "[i]f a person present at a meeting observes an alleged public meetings laws violation in the form of an improper closed session and fails to object, that person waives his or her right to object at a later date." *Wasikowski v. Nebraska Quality Jobs Bd., ante* at 417, 648 N.W.2d at 768.

Hauser claims the Council violated § 84-1413(2); however, Hauser's failure to object acts as a waiver of this argument. Hauser never objected to the lack of a rollcall vote when the Council exited executive sessions. He also never objected to the lack of a rollcall vote when the Council announced its decision after each phase of the bifurcated hearing. Our decisions in *Otey v. State, supra*, and *Wasikowski v. Nebraska Quality Jobs Bd., supra*, dealt with purported violations of §§ 84-1411 and 84-1410, respectively. However, we made it clear in *Wasikowski* that each of those provisions relate to § 84-1414, under which citizens may commence lawsuits regarding compliance with or violations of the public meetings laws. Section 84-1413 is equally related to § 84-1414. "Thus, despite the difference in grounds for objection," the logic of *Wasikowski* applies in this case: If a person present at a meeting observes and fails to object to an alleged public meetings laws violation in the form of a failure to conduct rollcall votes before taking action on questions or motions pending, that person waives his or her right to object at a later date. See *Wasikowski v. Nebraska Quality Jobs Bd., ante* at 417, 648 N.W.2d at 768. Had Hauser made a proper objection,

the Council could easily have considered the purported shortcomings of its proceedings.

[6] In his brief to this court, Hauser also identifies § 84-1410 as a provision the Council violated. However, in his petition filed in case No. CI00-923, the only statute identified by Hauser that the Council violated was § 84-1413. Where a particular theory of the case is not stated in a plaintiff's petition, he or she cannot raise it for the first time on appeal. *Wait v. Cornette*, 259 Neb. 850, 612 N.W.2d 905 (2000).

[7] The district court correctly rejected Hauser's public meetings laws argument, albeit for reasons different than those articulated here. 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. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002). Because of our conclusion in this case, we need not address the appellees' cross-appeal.

CONCLUSION

Hauser's failure to object to an alleged violation of § 84-1413 by the Council waives his right to make that argument to this court. Therefore, the decision of the district court is affirmed.

AFFIRMED.

BRADLEY T. AND DONNA T., HUSBAND AND WIFE, AS PARENTS, GUARDIANS, AND NEXT FRIENDS OF D.T., A MINOR CHILD, APPELLEES, V. CENTRAL CATHOLIC HIGH SCHOOL, APPELLANT.

653 N.W.2d 813

Filed November 22, 2002. No. S-01-552.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. ____: ____. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
3. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.

4. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
5. **Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence, waives any error in the ruling on the motion.
6. **Directed Verdict: Records.** While a renewed motion for directed verdict need not state with precision every basis asserted in the initial motion for directed verdict, the substance of the renewed motion must appear in the record.
7. **Verdicts: Jury Instructions.** Objections to the verdict form should be made at the jury instruction conference or at the time the verdict is returned.
8. **Verdicts: Waiver.** A failure to raise an objection to the verdict form constitutes a waiver of the same.
9. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed.

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

William A. Francis, of Cunningham, Blackburn, Francis, Brock & Cunningham, for appellant.

James H. Truell, of Truell, Murray & Walters, P.C., for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Bradley T. and Donna T. as "parents, guardians, and next friends" of D.T., a minor, filed this action in the district court for Hall County on behalf of D.T. against Central Catholic High School (CCHS), of Grand Island, Nebraska, after D.T. was sexually assaulted at CCHS by another student while D.T. was enrolled at the school. Following trial, the jury found in favor of Bradley and Donna. CCHS appeals. For the reasons set forth below, we affirm.

STATEMENT OF FACTS

On Thursday, November 6, 1997, D.T. was a sophomore attending CCHS. After classes had been dismissed for the day,

D.T. remained at school to participate in conditioning exercises with friends on the wrestling team. She ran the hallways and stairs with the wrestling team for approximately 45 minutes and then went to the stage area in the gymnasium and began operating the wrestling clock, timing wrestlers who were working out. No adults were present in the gymnasium while the students were working out.

While D.T. was sitting on the stage, J.R., also a sophomore at CCHS, entered the stage area of the gymnasium. J.R. had just completed daily conditioning exercises with the basketball team. J.R. tackled D.T. as she was sitting on the stage and began grabbing D.T.'s chest and groin. J.R. then pinned D.T. to the floor, stating, " 'If you don't get up within the next five seconds, you'll have to give me a hand job.' " Another student finally pushed J.R. off of D.T., and D.T. left the stage area and went to the girls' locker room.

Unbeknownst to D.T., J.R. followed her into the girls' locker room, and as D.T. sat down on a locker room bench, J.R. shoved her back onto the bench and straddled her body. No school personnel were present in the girls' locker room.

As he was straddling D.T., J.R. attempted to put his hand up D.T.'s shirt and down her pants. When he was unsuccessful in those attempts, he stood up, pulled his pants down, and attempted unsuccessfully to pull D.T.'s pants down. While his pants were down, J.R. sat on D.T.'s chest and rubbed his exposed penis over her mouth and cheeks. When D.T. would not open her mouth, J.R. pinched her nose to block her breathing, to try to force her to open her mouth. During the trial, D.T. described these events as follows: "And I clenched my mouth even harder and just went — turned my head away, and he kind of laughed and thought it was funny, but that — you know, like it was a game. He did that two or three times, trying to clench my nose." J.R. then stood up, and D.T. was able to get off the bench and leave the locker room.

J.R. followed D.T. after she had left the locker room and was headed toward the school lobby, suggesting to her that her locker door was open and that " '[they] should go check it.' " When D.T. told him that the door was shut, he threatened, " 'Well, I can go open it. Then you'll have to come shut it.' "

Ultimately, D.T. reached the school lobby, where she encountered friends. She caught a ride home with one of these friends.

D.T. did not tell her parents about J.R.'s actions when she reached home. The next day, Friday, November 7, 1997, she reported the incident to Joyce Messing, CCHS' guidance counselor. D.T. testified about her initial meeting with Messing as follows:

> [W]hen I walked in to Mrs. Messing, the first thing I did was start bawling.
>
> . . . .
>
> . . . She asked me what was wrong, and I told her that I had been harassed by — I kept on using the word "harassed." I never used the word "assault," even though that's what it was — I told her by another student. She said, "Wait a second here." She stopped me from going any further, and she mentioned, she goes, "Is this person [J.R.]?" And I said, "Yes." And I didn't know why she guessed, but I said, "Yes."

Messing then asked D.T. to wait while she brought John Golka, the principal of CCHS, into the office. D.T. then informed Golka and Messing about the preceding day's incident involving J.R. Golka told D.T. that he would meet with J.R. on Monday.

On Sunday, November 9, 1997, D.T. told her mother, Donna, about the assault. On Monday, November 10, D.T. returned to school. During the day, she passed J.R. at least twice in the hallway. On these occasions, J.R. would make "gestures" to D.T., such as unbuttoning his shirt. On Monday afternoon, Golka advised D.T. that he had not yet talked to J.R.

On Tuesday, November 11, 1997, D.T. continued to see J.R. in school, where he would give her "weird looks." On Tuesday, Golka required that D.T. produce evidence of the incident with J.R., and during the day, D.T. brought three or four students to Golka to inform him about what they knew concerning the incident. During this period, D.T. spoke with Messing more than once about her apprehension due to continuing to encounter J.R. at school.

J.R. was expelled from school on Wednesday, November 12, 1997, after admitting a portion of the allegations reported by D.T. D.T. learned about J.R.'s expulsion the same day.

Prior to J.R.'s removal from school, Donna had taken D.T. to the Crisis Center and the Family Violence Coalition in Grand Island so that D.T. could receive counseling as a result of J.R.'s assault. On Wednesday, November 12, 1997, a representative of the Family Violence Coalition contacted the Grand Island Police Department regarding the incident. A police officer with the Grand Island Police Department investigated the incident as a sexual assault and spoke to D.T. on November 16.

Shortly after D.T. and Donna had sought help at the Crisis Center, D.T. began to see Linda Renter Beran, a mental health practitioner associated with the Crisis Center. Beran testified at trial over objection. Initially, Beran saw D.T. once a week for 4 weeks. D.T. again had several sessions with Beran in the fall of 1998. Beran testified that D.T. reported that the incident affected her physically, hampered her ability to sleep, caused nervousness and a decrease in her self-confidence, and diminished her trust in the system and in the ability of the people that she would have trusted to protect her.

In addition to D.T.'s testimony recounting the assault, she testified as to the distress she suffered as a result of the incident. D.T. testified that as a result of the assault, she was scared, tense, nervous, and angry. She testified that her grades dropped after the assault and that she stopped participating in afterschool athletic activities because she "was kind of scared." She further testified that following the assault, her relationship with her parents changed in that "my relationship with . . . my parents actually didn't go so well." She stated that the assault also affected her relationship with her friends. "I just felt like nobody else wanted to listen, so I wouldn't talk to anybody, not family, not friends, not boyfriends. Nobody just knew about me. I just kept everything quiet."

Donna also testified at trial concerning the changes she witnessed in D.T. after the November 6, 1997, incident. She stated that before the incident, D.T. had been very talkative, outgoing, and friendly. Donna testified that after the incident, D.T. became "very angry, very controlling, difficult to communicate with, very quiet" and that she ceased to be an outgoing individual. Donna also testified that D.T.'s grades in school dropped, from A's to B's and C's. Following the November 6 incident, Bradley

and Donna took D.T. to her physician at least twice, seeking treatment for D.T.'s inability to sleep and for the stomach pains she was experiencing.

Bradley and Donna brought a two-count negligence action on behalf of D.T. against CCHS, Golka, and Robert Ripp, CCHS' superintendent. During the proceedings, Golka and Ripp were dismissed as defendants. An amended petition was filed on November 13, 2000. In the amended petition, Bradley and Donna alleged that as a result of CCHS' negligence, D.T. had suffered psychological and emotional injury, public humiliation, and pain and suffering associated with the incident, for which Bradley and Donna sought special and general damages. CCHS did not demur to the amended petition.

The 2-day jury trial began on February 5, 2001. The record contains approximately 300 pages of testimony from seven witnesses and seven exhibits. The narrative of events recited above in this opinion is taken from the testimony.

Golka testified at trial. Golka testified, inter alia, that he was aware of a previous incident involving J.R. resulting in a referral in which a female student other than D.T. had alleged that J.R. had inappropriately touched her. At the time of the earlier alleged assault, Golka stated that he had advised J.R. that "if the allegations were true, he'd need to stop. If they were not [true], that then he needed to continue to not engage in anything of that nature." Golka acknowledged that providing for the safety of children attending CCHS was a "top priority" of the school.

Ripp also testified at trial. Ripp agreed with Golka that maintaining a safe environment for students at CCHS was the school's responsibility. During cross-examination, Ripp was asked whether he agreed with Golka that one of the priorities of the school system was to watch out for the safety of the children. Ripp responded, "Absolutely."

Messing also testified at trial. According to Messing, it was her understanding generally that incidents such as that of November 6, 1997, "need[ed] to be immediately reported to law enforcement." She testified specifically that she believed CCHS had an obligation to report J.R.'s assault of D.T. to law enforcement authorities. Messing testified that she felt she had met her obligation when she reported the assault to Golka. Messing testified that

following D.T.'s meeting with Messing and Golka, Messing asked Golka what should be done next, and Golka responded that "he would take care of it." It is uncontroverted that CCHS did not notify law enforcement officials of J.R.'s assault of D.T.

Although the substance of the motion is not contained in the record on appeal, an order entered by the district court reflects that the district court denied CCHS' motion for directed verdict made at the close of all the evidence. The case was submitted to the jury on February 6, 2001. The jury was instructed on both counts I and II. The jury verdict form given to the jury did not separately identify the two counts. The general verdict form stated that the jury finds "for the plaintiff [sic] and against the defendant in the amount of $_____." On February 7, the jury returned a unanimous verdict in favor of Bradley and Donna and against CCHS in the amount of $125,000. The district court entered judgment on the jury verdict. On February 15, CCHS filed a motion for new trial for various reasons, which the district court overruled on April 17. CCHS appeals.

ASSIGNMENTS OF ERROR

On appeal, CCHS assigns four errors. CCHS claims, restated, that the district court erred (1) in overruling CCHS' motion for judgment on the pleadings, (2) in overruling CCHS' motions for directed verdict, (3) in overruling CCHS' motion for new trial due to an irregularity in the verdict form, and (4) in overruling CCHS' motion for new trial due to an excessive jury verdict.

STANDARDS OF REVIEW

[1,2] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001). A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001).

[3] The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Id.*

ANALYSIS

Motion for Judgment on Pleadings

[4] For its first assignment of error, CCHS claims that the district court erred in denying CCHS' motion for judgment on the pleadings. This assignment of error, however, is not argued in CCHS' brief. Errors that are assigned but not argued will not be addressed by an appellate court. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002); *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001).

Motion for Directed Verdict

For its second assignment of error, CCHS claims that the district court erred in denying CCHS' motions for a directed verdict made "at the close of Plaintiffs' case and at the close of the evidence." For the reasons stated below, we do not consider this assignment of error.

[5] The record reflects that CCHS moved for a directed verdict at the close of Bradley and Donna's case, and the bases for that motion appear and were argued on the record. The district court overruled the motion, and CCHS proceeded to offer evidence. We have long held that a defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence, waives any error in the ruling on the motion. *Spulak v. Tower Ins. Co.*, 251 Neb. 784, 559 N.W.2d 197 (1997). By proceeding with trial and introducing evidence, CCHS waived any error in the district court's ruling on CCHS' motion for directed verdict made at the close of Bradley and Donna's case.

On appeal, CCHS also claims the district court erred in overruling CCHS' motion for a directed verdict at the close of all the evidence. The judge's notes indicate that CCHS renewed its motion for directed verdict at the close of all the evidence, but the record does not contain either the motion or, more particularly, the substance of such motion.

Pages 257 to 259 of the bill of exceptions reflect that after presenting the testimony of several witnesses, CCHS informed the district court that CCHS had no additional evidence. The district court then asked Bradley and Donna if they had any rebuttal evidence, and they stated they did not. After this dialog,

the trial went into recess. Following the recess, Bradley and Donna reopened the record to reflect the parties' stipulation that two of the originally-named defendants were employees of CCHS, acting within the scope of their employment, and as a result, were dismissed from the case. Thereafter, both counsel rested and the case proceeded to closing arguments. The bill of exceptions does not reflect that CCHS moved for a directed verdict at the close of all the evidence or thereafter when the record was reopened to permit the inclusion of the stipulation. Moreover, no written motion appears in the record.

[6] In order to preserve for appeal the question whether CCHS was entitled to a directed verdict, CCHS' renewed motion for directed verdict must appear in the record. See, generally, *State v. Williams*, 247 Neb. 878, 883, 530 N.W.2d 904, 908 (1995) ("[i]t is a basic tenet of Nebraska law that the party appealing has the responsibility for including within the bill of exceptions matters from the record which the party believes are material to the issues presented for review"). A renewed motion for directed verdict need not restate with precision every basis asserted in the initial motion for directed verdict. The two should be considered together. See, *Aronson v. Harriman*, 321 Ark. 359, 901 S.W.2d 832 (1995); *Stacy v. Merchants Bank*, 144 Vt. 515, 482 A.2d 61 (1984). To consider the motions together, however, the substance of the renewed motion must appear in the record. Otherwise, an appellate court has no way of knowing whether grounds remained the same as the original motion for directed verdict.

Because the defense proceeded with trial and introduced evidence, CCHS waived any error in the district court's ruling on CCHS' motion for directed verdict made at the close of Bradley and Donna's case. Because the substance of CCHS' renewed motion for directed verdict does not appear in the record, we have nothing of substance to review on appeal. Therefore, we do not consider CCHS' second assignment of error, because the correctness of the district court's rulings on CCHS' motions for directed verdict is not before us.

Motion for New Trial: Verdict Form

On appeal, CCHS claims that the district court erred in overruling its motion for new trial due to "irregularity" based upon

the use of a general verdict form by the jury. We reject this assignment of error.

[7,8] We have previously stated that objections to the verdict form should be made at the jury instruction conference or at the time the verdict is returned. See, *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 235 Neb. 207, 454 N.W.2d 671 (1990); *In re Estate of Kajewski*, 134 Neb. 485, 279 N.W. 185 (1938); *McGrew Machine Co. v. One Spring Alarm Clock Co.*, 124 Neb. 93, 245 N.W. 263 (1932). We have also stated that a failure to raise such an objection constitutes a waiver of the same. See *McGrew Machine Co., supra*. Further, for the sake of completeness, we observe that the use of a general verdict form, even where there are multiple causes of action, may be permissible. See *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997) (citing Neb. Rev. Stat. § 25-1122 (Reissue 1995)).

[9] Nothing in the record of the trial indicates CCHS objected to the verdict form at the jury instruction conference, see *Hiway 20 Terminal, Inc., supra*, or at the time the jury verdict was returned, see *In re Estate of Kajewski, supra*. The record in the instant appeal does not include the jury instruction conference. It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed. *Reisig v. Allstate Ins. Co., ante* p. 74, 645 N.W.2d 544 (2002); *Harders v. Odvody*, 261 Neb. 887, 626 N.W.2d 568 (2001). CCHS has failed to present a record supporting the assigned error, and accordingly, we reject this assignment of error.

Motion for New Trial: Excessive Verdict

The jury awarded Bradley and Donna $125,000 in damages. For its final assignment of error, CCHS claims the district court erred in denying its motion for new trial based upon the claim that the jury verdict was excessive. The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001). On

appeal, the fact finder's determination of damages is given great deference. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000); *Seeber v. Howlette*, 255 Neb. 561, 586 N.W.2d 445 (1998).

The record in the instant appeal contains evidence of changes in D.T.'s personality and behavior, the erosion of D.T.'s relationship with her parents, and D.T.'s difficulties with friends, all as a result of the sexual assault and the events which soon followed the assault. D.T.'s grades dropped, and she ceased to participate in afterschool activities. She experienced difficulty sleeping and pains in her stomach, both of which forced her to seek medical attention. Given this record, we determine that the award of damages was not so excessive as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. See, *Norman, supra*; *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998). The jury's determination of damages is supported by the evidence and bears a reasonable relationship to the elements of damages proved, and thus, we do not disturb the award on appeal. See *id*. The district court did not err when it denied CCHS' motion for new trial based on the claim of an excessive jury verdict. Accordingly, we find no merit to this assignment of error.

CONCLUSION

Finding no error in the entry of judgment in favor of Bradley and Donna and against CCHS, we affirm.

AFFIRMED.

MICHAEL JACOBSON, APPELLEE, V. SOLID WASTE AGENCY OF NORTHWEST NEBRASKA (SWANN), APPELLANT.

653 N.W.2d 482

Filed November 22, 2002. No. S-01-602.

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. **Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Municipal Corporations.** A municipality has an affirmative duty to supervise and control the collection of garbage within its corporate limits.
4. **Statutes: Ordinances: Presumptions.** All ordinances are presumed to be valid. However, the power of a municipality to enact and enforce any ordinance must be authorized by state statute.
5. **Statutes: Ordinances.** Where there is a direct conflict between a municipal ordinance and a state statute, the statute is the superior law. However, if the municipal ordinance and state statute in question are not contradictory and can coexist, then both are valid.
6. **Courts: Statutes: Ordinances.** A court has a duty to harmonize state and municipal legislation on the identical subject.
7. **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.
8. **Ordinances: Presumptions: Proof.** In considering the validity of a regulation, courts generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority, and the burden rests on those who challenge their validity.
9. **Ordinances: Evidence.** To overturn an ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Reversed and remanded with directions.

Dennis D. King, of Smith, King, and Freudenberg, P.C., for appellant.

Thomas A. Hawbaker, of Law Offices of Thomas A. Hawbaker, and Joe M. Hawbaker for appellee, and, on brief, Michael Jacobson, pro se.

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

STEPHAN, J.

Solid Waste Agency of Northwest Nebraska (SWANN) appeals from a declaratory judgment entered by the district court for Dawes County which determined that Michael Jacobson was not liable to SWANN for solid waste collection, transportation, and disposal service charges.

BACKGROUND

Procedural Background

Jacobson, a resident of Gordon, Nebraska, initiated this action by filing a pro se petition for declaratory judgment in the district court for Dawes County. He sought a declaration that he is not obligated to pay solid waste collection, transportation, and disposal charges assessed by SWANN because he does not use or benefit from SWANN's services. In its answer, SWANN denied Jacobson's claim that he does not use or benefit from its services and alleged that Jacobson did not comply with its rules and regulations for opting out of service charge liability.

At a hearing on November 7, 2000, the parties advised the court that Jacobson would be filing a motion for summary judgment challenging the legal validity of the rules and regulations relied upon by SWANN. Jacobson subsequently filed a motion for summary judgment asserting that three specific rules adopted by SWANN on January 21, 1999, were not authorized under the Integrated Solid Waste Management Act, Neb. Rev. Stat. §§ 13-2001 to 13-2043 (Reissue 1997), and violated his rights under the state and federal Constitutions. A hearing on the motion was held on January 31, 2001. The parties offered a stipulation of facts which was received in evidence. Counsel for SWANN then advised the court that the parties had agreed to file an additional stipulation and requested that the matter be deemed submitted on the merits for final disposition. Thereafter, the parties filed a "Stipulation for Submission of Case" which referred to the prior receipt by the court of the factual stipulation and further stated that "the parties agree that this case shall be deemed submitted for a decision on the merits, and the decision of the Court shall be considered a final judgment in this matter."

Stipulated Facts

Jacobson is the sole resident and tenant of real property located at 613 North Ash Street, Gordon, Nebraska. SWANN is a political subdivision created under the Interlocal Cooperation Act, Neb. Rev. Stat. §§ 13-801 to 13-827 (Reissue 1997), and the Integrated Solid Waste Management Act. The city of Gordon, located in Sheridan County, Nebraska, is a member of

SWANN, and Jacobson's residence in Gordon is located within SWANN's jurisdictional area.

SWANN was formed for the purpose of management, collection, disposal, and recycling of solid waste within its jurisdictional area. As part of its official functions, SWANN picks up and disposes of or receives solid waste in each of its member jurisdictions. SWANN provides additional services and benefits within each member jurisdiction, including the provision of dumpsters and solid waste containers, the provision of recycling services, the sponsorship of educational programs and community events dealing with solid waste management, the collection of hazardous materials and paint, the provision of crushed concrete for the use of municipalities, and the provision of special disposal sites and assistance for natural disasters.

Since January 21, 1999, SWANN has regularly billed Jacobson for solid waste collection, transportation, and disposal services at the rate of $14.80 per month. SWANN claims that the sum of $382.29 is due and owing on such billings as of November 1, 2000. Jacobson denies that he utilized the services of SWANN during the period covered by such billings, or at any time. Jacobson claims that he personally collects and transports all of his solid waste to an alternate solid waste landfill owned and operated by the Oglala Lakota Nation. In support of his position, Jacobson produced 13 "receipt[s] of payment" from Oglala Lakota Nation Solid Waste Management in Pine Ridge, South Dakota, bearing dates between April 30, 1999, and January 22, 2001. He also produced a receipt, dated November 23, 1999, from an entity designated as "Solid Waste Mgmt." Some of the receipts describe "bags of trash" or "bags of garbage" in varying or unspecified quantities and further describe amounts paid by Jacobson, presumably for disposal of such items. The receipts also reflect Jacobson's address as "613 N. Ash, Gordon, NE." Although it is not clear from the stipulation of facts whether any of these receipts were ever submitted to SWANN, it is clear that Jacobson has not complied with SWANN's rules and regulations adopted pursuant to § 13-2023. Specifically, Jacobson has not provided the written statement required by SWANN's regulation § 4.05(B), and he has not provided the receipts required by § 4.05(E).

Disposition by District Court

Based upon the foregoing stipulated facts, the district court determined that although Jacobson was a " 'solid waste generator,' " SWANN had no authority to "regulate" Jacobson or his solid waste because Jacobson had taken the steps required by § 13-2020(4) to exempt himself from SWANN's charges by providing evidence that he disposed of his solid waste at an alternate facility. The court further held that a portion of SWANN's rules and regulations requiring specific proof to exempt a solid waste generator from SWANN's charges was unreasonable and therefore invalid. Based upon these determinations, the district court concluded that Jacobson was not liable to SWANN for any fees or charges it sought to collect, and entered judgment in favor of Jacobson. SWANN perfected this timely appeal, which we moved to our docket on our own motion 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

SWANN assigns, restated and consolidated, that the district court erred in (1) construing the Integrated Solid Waste Management Act to limit SWANN's jurisdiction and authority to regulate and (2) granting Jacobson's motion for summary judgment as to SWANN's regulation § 4.05.

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. *J.D. Warehouse v. Lutz & Co.*, 263 Neb. 189, 639 N.W.2d 88 (2002); *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 571 N.W.2d 64 (1997).

[2] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Shirley v. Neth, ante* p. 138, 646 N.W.2d 587 (2002); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

ANALYSIS

Applicable Statutes and Regulations

SWANN derives its authority from the Integrated Solid Waste Management Act (hereinafter the Act), enacted in 1992, in which the Legislature expressly recognized that local governments are "best positioned to develop efficient solid waste management programs." § 13-2002(5). The Act requires each county or municipality to provide for disposal of solid waste generated within its jurisdiction. § 13-2020(1). Under the Act, "[t]he governing body of a county, municipality, or agency may make all necessary rules and regulations governing the use, operation, and control of a facility or system." § 13-2020(4). Section 13-2023 grants express authority to pass such regulations and states in relevant part: "A county, municipality, or agency may, by ordinance or resolution, adopt regulations governing collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste within its solid waste jurisdiction area as necessary to protect the public health and welfare and the environment." It is clear from established case law, as well as from a plain reading of the Act, that a political subdivision such as SWANN is "expressly empowered to establish ordinances regulating the collection and removal of garbage." See *Tracy v. City of Deshler*, 253 Neb. 170, 174, 568 N.W.2d 903, 907 (1997). Accord *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996).

In *Village of Winside v. Jackson*, 250 Neb. at 856, 553 N.W.2d at 480, we held that under the Act as it was then written, "[a] municipality can impose a garbage fee on only those persons that actually use the garbage services provided." We therefore concluded that a village ordinance which imposed a garbage fee on every occupied residence and business, regardless of whether the resident or business owner chose to use the village garbage system, was contrary to the plain language of the Act and thus invalid insofar as it required payment for services which were not used.

In response to *Village of Winside*, a bill was introduced during the 1997 session of the Legislature to amend the language of § 13-2020 in order to "more clearly define when a premises

is served by a solid waste collection system" and to "ensure that the solid waste systems remain viable." Introducer's Statement of Intent, L.B. 135, Natural Resources Committee, 95th Leg., 1st Sess. (February 26, 1997). The amendment, as initially proposed during the committee's hearing, would have allowed subdivisions which owned and operated solid waste systems to charge a flat fee to all residents by reason of the fact that a waste disposal system was present and available for their use. Additional language, however, was later added to provide an opportunity for a waste generator to opt out of the system. Floor Debate, L.B. 495, 95th Leg., 1st Sess. 8906 (May 30, 1997). The final version of the amendment was incorporated into § 13-2020(4) as follows:

> For purposes of the charges authorized by this section, the premises are served if solid waste collection service is available to the premises or if a community solid waste drop-off location is provided, unless the person who would otherwise be subject to such rates or charges proves to the governing body of the county, municipality, or agency that his or her solid waste was lawfully collected and hauled to a permitted facility. Such proof shall be provided by a receipt from a permitted facility, a statement from a licensed hauler, or other documentation acceptable to the governing body of the county, municipality, or agency.

This amendment creates a rebuttable presumption that premises of a solid waste generator located within an area served by a public solid waste collection and disposal system are "served" by such a system. The generator is therefore subject to the system's charges unless the generator takes the steps necessary to obtain an exemption.

On January 21, 1999, SWANN issued Ordinance/Resolution No. 1999-01, which enacted rules and regulations governing disposal and transportation of solid waste within its jurisdiction. The ordinance recited that the rules and regulations promulgated therein were based upon the authority of the Act and the Interlocal Cooperative Act creating SWANN, for the purposes of the following:

A. Identifying those actions, standards and activities necessary to assure effective solid waste handling and disposal of solid waste within the agency jurisdiction;

B. To follow the direction, standards and requirements of state and federal laws as the same may be set from time to time for management of solid waste;

C. To describe the responsibility of persons generating, storing, collecting and transporting solid waste within the jurisdiction of the SWANN agency.

The rules which are at issue in this action provide as follows:

2.06 PERMITTED FACILITY/PERMITTED LANDFILL shall mean a landfill approved by the Director of the Nebraska Department of Environmental Quality and shall include that term as set forth under NEB. REV. STAT. §13-2020 and applicable rules and regulations of the state of Nebraska, or a landfill located in any other state which has been approved by that state's Department of Environmental Quality or equivalent governing agency and which landfill is an approved landfill facility under the laws, rules and regulations of that state, also meeting applicable federal standards as well as the standards adopted by that state.

. . . .

4.04 STORAGE/NUISANCE. No person shall be permitted to store or stockpile solid waste within the limits of any municipality located within the jurisdiction of the Agency, when such solid waste would create a nuisance as described in the Nebraska state law, any city or village ordinance governing nuisances within such jurisdiction, and **no person shall store or stockpile solid waste within the limits of such municipality for a period of fourteen (14) days or more.**

4.05 MUNICIPAL SOLID WASTE ACCOUNT LIABILITY. All solid waste generators within the limits of any municipality located within the jurisdiction of the Agency shall be subject to and liable for the rates and charges established by the Agency for solid waste collection, handling and disposal by the Agency, except as exempted hereinafter by these rules and regulations.

A. *Exemption from Rates and Charges/Alternate Permitted Landfill, Out of State*. Any solid waste generator within the municipal limits may elect to transport and dispose of such generator's solid waste at a permitted facility located outside the state of Nebraska. So long as the solid waste of such solid waste generator is safely and sanitarily transported by the solid waste generator to a permitted landfill located outside of the state of Nebraska, and so long as such solid waste generator shall further comply with these rules and regulations and provide the Agency with a written statement and receipts as hereinafter described, then such solid waste generator shall be exempt from payment of the rates and charges of the Agency for solid waste collection and disposal during the applicable period.

B. *Written Statement, Receipt, Governing Rules*. The solid waste generator desiring to be exempt from the rates and charges of the Agency shall first provide to the Agency a written statement described herein and be governed as follows:

1. The statement shall set forth the full legal name of the solid waste generator and/or person liable for the solid waste account if such solid waste were collected and disposed by the Agency;

2. The statement shall be signed by the solid waste generator;

3. The statement shall set forth the date when the solid waste generator will cease using the services of the Agency and will commence transporting and disposing of all of the generator's solid waste to a permitted landfill or permitted facility located outside the state of Nebraska;

4. The statement shall acknowledge that the solid waste generator is utilizing an alternate landfill facility and is therefore not permitted, licensed or authorized to use or receive services of the Agency for collection, handling or disposal of solid waste generated by such person;

5. The statement shall provide that the solid waste generator acknowledges that any violation of rules and regulations of the Agency or any breach of the rules and regulations of the Agency including the unauthorized use of the

Agency facilities during such period that the statement is in effect, will subject the solid waste generator to liability for the noncompliance fee as hereinafter set forth;

6. The statement shall further provide that the solid waste generator acknowledges the responsibility to provide the Agency with the "receipts" as required from time to time proving the safe and sanitary transportation and disposal of the solid waste generator's solid waste at a permitted facility located outside of the state of Nebraska.

C. *Written Statement Effective Period.* The foregoing written statement may be executed and provided to the Agency at any time, and shall be effective with regard to exemption for rates and charges commencing the next billing period of the Agency. The statement once filed with the Agency shall be deemed to be an election by the solid waste generator to opt out of the Agency's collection and disposal *services*, and the solid waste generator shall be deemed to remain as a *person* opting out of the Agency's services for collection and disposal until such time as the solid waste generator gives written notice that the generator desires to become a customer of the Agency, or the solid waste generator fails to provide the receipts as hereinafter provided.

D. *Rejoining Agency.* In the event that any person shall have elected to "opt out" of the Agency's jurisdiction, and shall thereafter become a customer of the Agency as provided in paragraph 4.05(C), then such person shall not be eligible to again "opt out" for a period of one year after the solid waste generator has rejoined the Agency as a customer of the Agency.

E. *Receipt*. A receipt from a "permitted facility" shall mean a written receipt from the "permitted facility". The "receipt" shall set forth the solid waste generator's name, address, date of disposal, quantity of disposal, type of waste disposed, the name and an address of the "permitted facility" and shall bear the original signature of the authorized agent of the "permitted facility".

The solid waste generator shall submit at least two (2) receipts monthly from the alternate "permitted facility".

> The Agency reserves at all times, the right to reject any receipt or written statement if the same is not prepared and filed with the Agency in accordance with these rules and regulations. Each written statement and receipt shall first be approved by the Agency pursuant to NEB. REV. STAT. §13-2020.

AUTHORITY TO REGULATE

Although Jacobson stipulated that his residence was located within the geographical jurisdiction of SWANN, he contends that the agency's regulatory jurisdiction does not extend to solid waste that is "inside his own home." Brief for appellee at 5. The district court interpreted SWANN's regulatory jurisdiction as extending only to solid waste which is "discarded" and thus "enter[s] the system." It concluded that solid waste generated by Jacobson did not "enter the system" because Jacobson hauled his waste to an alternate facility as permitted by § 13-2020(4) and that therefore SWANN had no regulatory authority over Jacobson or any solid waste generated at his residence. SWANN contends that this interpretation of its regulatory authority over solid waste is overly restrictive. We agree.

[3] As we noted in *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996), the Act is designed to provide a comprehensive scheme to control the collection and disposal of solid waste. The Act permits a municipality to adopt ordinances or regulations governing solid waste within its jurisdiction as necessary to protect the public health and welfare as well as the environment. *Id*. See, also, § 13-2023. In *Tracy v. City of Deshler*, 253 Neb. 170, 175, 568 N.W.2d 903, 907 (1997), we recognized as "well settled" the principle that a municipality has an affirmative duty to supervise and control the collection of garbage within its corporate limits.

This court is guided by the presumption that the Legislature intended a sensible rather than an absurd result. *Spaghetti Ltd. Partnership v. Wolfe, ante* p. 365, 647 N.W.2d 615 (2002). The Act specifically assigns the responsibility of regulation and oversight of solid waste to local governing bodies because the Legislature determined that such bodies were in the best position to develop efficient waste management programs. § 13-2002(5).

To impose on local governments the responsibility to regulate solid waste and then not grant them the authority necessary to fulfill their obligations would lead to an absurd result. Accordingly, we conclude that SWANN's regulatory authority extends to all solid waste generated within its area of jurisdiction. Although § 13-2020(4) provides a means by which a resident or business may avoid paying a service fee to a municipality having regulatory jurisdiction under the Act, it does not alter the power to regulate conferred by the Act.

Validity of Regulations

Having determined that SWANN had authority to regulate solid waste generated at Jacobson's residence, we must now consider whether it exercised such authority in a lawful manner. As a preliminary matter, we note that while Jacobson challenged the validity of §§ 2.06, 4.04, and 4.05(E) of the rules and regulations promulgated by SWANN in January 1999, the judgment of the district court invalidated only portions of § 4.05 and did not address the validity of §§ 2.06 and 4.04. Jacobson did not file a cross-appeal contending that the district court should have also held §§ 2.06 and 4.04 to be invalid, and we therefore do not consider that issue. See *Wasikowski v. Nebraska Quality Jobs Bd., ante* p. 403, 648 N.W.2d 756 (2002).

[4-6] All ordinances are presumed to be valid. *Village of Winside v. Jackson, supra*; *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 660, 515 N.W.2d 390 (1994). However, the power of a municipality to enact and enforce any ordinance must be authorized by state statute. *Village of Winside v. Jackson, supra*; *State v. Austin*, 209 Neb. 174, 306 N.W.2d 861 (1981). As noted by the district court, Jacobson's principal contention is that § 13-2020(4) does not authorize the requirement in SWANN's regulation § 4.05(E) that a solid waste generator submit "at least two (2) receipts monthly from the alternate 'permitted facility' " in order to avoid SWANN's service charges. Where there is a direct conflict between a municipal ordinance and a state statute, the statute is the superior law. *Village of Winside v. Jackson, supra*. However, if the municipal ordinance and state statute in question are not contradictory and can coexist, then both are valid. *Gillis v. City of Madison*, 248 Neb. 873, 540

N.W.2d 114 (1995). A court has a duty to harmonize state and municipal legislation on the identical subject. *Id.*

[7] Section § 13-2020(4) authorizes public entities owning or operating solid waste disposal systems to establish rates or charges for their use, to be paid "by each person whose premises are served by the facility or system." The 1997 amendment to this statute added the following language:

> For purposes of the charges authorized by this section, the premises are served if solid waste collection service is available to the premises or if a community solid waste drop-off location is provided, *unless the person who would otherwise be subject to such rates or charges proves to the governing body of the county, municipality, or agency that his or her solid waste was lawfully collected and hauled to a permitted facility. Such proof shall be provided by a receipt from a permitted facility, a statement from a licensed hauler, or other documentation acceptable to the governing body of the county, municipality, or agency.*

(Emphasis supplied.) 1997 Neb. Laws, L.B. 495. The statute is silent as to the frequency with which such proof must be provided in order to exempt a property owner or occupant from service charges. To that extent, the statute cannot be adequately understood from the plain meaning of its language or when considered in pari materia with related statutes, and it is therefore ambiguous. See *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). 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. *Premium Farms v. County of Holt, supra*; *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002).

The question of how frequently one must provide proof of alternate solid waste disposal in order to avoid liability for charges was specifically discussed during floor debate on the 1997 amendment to § 13-2020(4). The discussion proceeded as follows:

> SENATOR WICKERSHAM: . . . I'm wondering what the duration or the period is to be covered by the receipt or the statement is. For example, if you have weekly billings, do you need to present a weekly receipt? If you have

> monthly billings, do you have to present a monthly receipt? . . .
>
> SENATOR BEUTLER: . . . I believe there is a degree of flexibility in the amendment and it would seem to me that that's been left to the parties to work out what is reasonable on a reasonable basis.
>
> . . . .
>
> SENATOR WICKERSHAM: . . . I would assume that the amendment means that if you have a monthly billing period or a weekly billing period that that is the duration of the receipt . . . .
>
> SENATOR BEUTLER: . . . I would certainly think that a monthly requirement would be reasonable. I don't have knowledge of weekly billings, but certainly . . . requiring it on a monthly basis would seem perfectly reasonable, under this amendment, to me.

Floor Debate, L.B. 495, 95th Leg., 1st Sess., 8907, 8909 (May 30, 1997).

From this, we conclude that although the statute uses the singular form of the word "receipt," the Legislature intended that periodic submissions of proof would be necessary in order to avoid payment to a municipal system serving the premises, and that the frequency of such submissions would be determined under a standard of reasonableness. So construed, § 13-2020(4) and § 4.05 of the SWANN ordinance are not contradictory. The validity of § 4.05 therefore depends upon whether it is a reasonable specification of the general proof requirement set forth in § 13-2020(4).

[8,9] In considering the validity of a regulation, courts generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority, and the burden rests on those who challenge their validity. *Busch v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 623 N.W.2d 672 (2001); *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996). To overturn an ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory. *City of Omaha v. Cutchall*, 173 Neb. 452, 114 N.W.2d 6 (1962). We find no evidence in this stipulated record upon

which we could declare § 4.05 unreasonable or arbitrary and therefore invalid.

As part of a comprehensive scheme to control collection and disposal of solid waste authorized by the Act, § 13-2020(1) requires municipalities to "provide or contract for facilities and systems as necessary for the safe and sanitary disposal of solid waste generated within its solid waste jurisdiction area." With respect to waste generators which utilize its system, SWANN can control the frequency of waste pickup and disposal. Although SWANN cannot require a waste generator to use its system and pay its charges, it is authorized by § 13-2020(4) to require such persons or entities, as a condition of being exempted from liability for such charges, to prove that they are disposing of solid waste through alternate means which are consistent with SWANN's statutory obligation to provide for safe and sanitary disposal of solid waste within its jurisdictional area. Section 4.05 seeks to accomplish this objective by requiring those waste generators electing not to use SWANN's services to provide a written statement that they will use an alternate permitted facility and will not use SWANN's services from and after the date of the statement. Under § 4.05, this election to opt out of SWANN's collection and disposal services is effective until the waste generator either uses SWANN's services or fails to provide proof, consisting of receipts showing that waste is being taken to a permitted facility at least twice monthly.

As noted above, we construe § 13-2020(4) to permit a municipal waste disposal agency to require periodic evidence that a generator not using its system is disposing of waste at an alternate permitted facility on a regular basis. We find nothing in this record upon which we could conclude that requiring such evidence be submitted twice monthly is unreasonable.

We have considered Jacobson's other arguments with respect to the claimed invalidity of § 4.05 and conclude that they are without merit.

CONCLUSION

For the reasons discussed, we conclude that § 4.05 of the rules and regulations adopted by SWANN in Ordinance/Resolution No. 1999-01 is valid. Jacobson's residence is located within

SWANN's jurisdictional area, and he did not comply with lawful regulatory requirements necessary to exempt himself from SWANN's charges for solid waste collection, transportation, and disposal services. Jacobson's charges were stipulated to be $382.29 as of November 1, 2000. The judgment of the district court is reversed, and the cause remanded to the district court for entry of judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
JOHN V. HALTOM, APPELLANT.

653 N.W.2d 232

Filed November 22, 2002. No. S-01-1400.

1. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
2. **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.
3. **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.
4. ____: ____. 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.
5. **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.
6. **Trial: Jury Instructions.** The submission of proposed instructions by counsel does not relieve the parties in an instruction conference from calling the court's

attention by objection to any perceived omission or misstatement in the instructions given by the court.

7. **Criminal Law: Trial: Motions to Suppress: Pretrial Procedure: Appeal and Error.** In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement to preserve the question for review on appeal.
8. **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.
9. **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.
10. **Obscenity: Evidence: Appeal and Error.** The determination of whether evidence is relevant to show contemporary community standards is subject to an abuse of discretion standard of review.
11. **Obscenity: Evidence.** An exhibit of comparable materials is not in and of itself admissible to demonstrate contemporary community standards regarding the material at issue. Availability of similar material by itself means nothing more than that other persons are engaged in similar activities.

Appeal from the District Court for Douglas County, MARY G. LIKES, Judge, on appeal thereto from the County Court for Douglas County, JOSEPH P. CANIGLIA, Judge. Judgment of District Court affirmed.

Andrew M. Ferguson and Joseph M. Acierno, of Ferguson, Chesterman & Acierno, P.C., and John Fahle, of Carter & Fahle, 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.

John V. Haltom appeals the district court's order affirming his conviction and sentence in county court for distributing obscene material. The county court sentenced Haltom to 9 months in jail. At issue is a video depicting a variety of sexual acts. Haltom contends that the county court erred in various respects, including failing to suppress statements and failing to grant a mistrial. He also contends that the trial court erred by instructing the jury

that "prurient" means a tendency to excite lustful ideas or desires, but that lustful desires do not include a normal interest in sex. We affirm.

BACKGROUND

Haltom owns a store known as Dr. John's Lingerie and Novelty Boutique in Omaha, Nebraska. The store carries a variety of merchandise, including adult videos.

The video that is the subject of this appeal was sold on February 6, 2000. The video, entitled "Snatch Patch," features a variety of heterosexual sex acts, including intercourse in a variety of positions, oral-vaginal sex, and oral-penile sex. Some of these scenes involve one woman engaging in sex acts with two men. The video shows ejaculation and spanking. In addition, the video includes scenes involving penile-rectal sex, including a scene in which two males simultaneously penetrate a woman, one vaginally, and the other rectally.

Before trial, the court held a hearing on a motion to suppress statements. Several Omaha police officers testified concerning the day Haltom was arrested. According to the officers, they advised Haltom of his *Miranda* rights. The officers stated that Haltom then told them that he had previous arrests, that he had been in business in other states, and that he was the owner of the store. The officers gave Haltom a citation, but he was not taken to the police station. According to Haltom, the officers did not advise him of his *Miranda* rights before he made the statements and the officers told him that if he cooperated, they would not take him down to the station and book him. The trial court denied the motion to suppress. At trial, Haltom did not object to testimony about his statement that he was the owner of the store.

Haltom also moved to exclude evidence of his prior arrests. During a hearing on the motion, the State agreed not to discuss prior arrests or convictions. At trial, however, Ronald Cole, a sergeant with the Omaha Police Department, was asked about conversations he had had with Haltom. Cole testified: "He stated he was the owner of the establishment. He referenced that he owned a place like this in St. Louis, that he's been arrested several times there." Haltom objected, and the court told the jury to disregard the testimony. Haltom then moved for a mistrial. The

motion was overruled. The record shows that the jury was not given any additional instruction to prevent drawing further attention to the testimony.

The video was played for the jury, and the State rested. Haltom moved for a directed verdict, which was denied.

Haltom presented witnesses who testified about the community standards in Omaha. They expressed opinions that the video was not obscene. Haltom also gave his opinion of the community standards. He testified that his store is oriented to heterosexual adults and that he had not watched the video before trial. He stated that it was a "regular adult video" and that he had sold those types of videos across the country. According to Haltom, most of the videos in his store would portray depictions similar to those in the video.

Before trial, Haltom discussed with the court his intention to offer evidence of comparable materials to show community standards. He mentioned a previous judgment that found him not guilty in an obscenity case in Omaha. The court stated that it would not allow any evidence of comparable materials. At trial, Haltom made an offer of proof for a video of a movie available on pay-per-view at a local hotel. According to Haltom, the content of the movie is comparable to the content of the video. He also offered two videos that were available at another store. The court did not allow any of the videos into evidence. During the offer of proof, there was no discussion of videos that were the subject of a not guilty verdict determination in the other cases. The record contains two videos that bear exhibit stickers from a different proceeding. The videos do not have exhibit stickers indicating that they were marked as exhibits in this case.

The jury was instructed on the definition of "obscene" 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, the jury was instructed that " '[p]rurient' means material having a tendency to excite lustful ideas or desires. However, lustful ideas or desires do not include a normal interest in sex."

Haltom initially proposed a different definition of "prurient" and objected to instructions offered by the State which defined "prurient" as "a tendency to excite lustful thoughts." The court discussed the definition of "prurient" with the attorneys. During the discussion, Haltom's attorney expressed concern that by defining "prurient" in terms of lust, the State was presenting an instruction that would allow a jury to convict even if the material appealed to a normal interest in sex. The court ultimately suggested that the definition be worded to include language about a normal interest in sex. When the court suggested the instruction that was given, Haltom's attorney stated that he thought the instruction was "as close as we can get to the exact words of the Supreme Court." The court then stated that it would give the instruction, and Haltom's attorney stated, "Great." There was no objection to the instruction.

The jury found Haltom guilty. Haltom moved for judgment notwithstanding the verdict. The court overruled the motion. The record does not reflect that a motion for a new trial was filed. The district court affirmed.

ASSIGNMENTS OF ERROR

Haltom assigns that the county court erred in (1) its instruction to the jury on the definition of "prurient interest"; (2) overruling his motion for a mistrial when the jury heard evidence of prior bad acts; (3) refusing to allow evidence of comparable material; (4) denying his motion to suppress statements; and (5) failing to grant his motions to dismiss, for judgment notwithstanding the verdict, and for a new trial.

Haltom also assigned that the court erred by failing to instruct the jury that knowledge of the character or content of the material is an element of the crime. At oral argument, Haltom conceded that the assignment was without merit and withdrew it from consideration. We do not discuss that assignment of error.

STANDARD OF REVIEW

[1] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999); *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998).

[2,3] 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. Haltom*, 263 Neb. 767, 642 N.W.2d 807 (2002); *Tipp-It, Inc. v. Conboy*, 257 Neb. 219, 596 N.W.2d 304 (1999).

[4] An 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

Definition of "Prurient"

Haltom contends that the trial court wrongly instructed the jury on the definition of "prurient" because the instruction states that prurient means a "tendency to excite lustful ideas or desires." The definition also states that lustful desires do not include a normal interest in sex. The State contends that the issue was waived. Haltom offered an alternate instruction, but he agreed to the instruction that was ultimately given without objection.

[5,6] 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. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002); *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999). We have held that the submission of proposed instructions by counsel does not relieve the parties in an instruction conference from calling the court's attention by objection to any perceived omission or misstatement in the instructions given by the court. *Haumont v. Alexander*, 190 Neb. 637, 211 N.W.2d 119 (1973). We explained that "[t]he purpose of the instruction conference is to give the trial court an opportunity to correct any errors being made by it. Consequently, the parties should object to any errors of commission or omission." *Id.* at 641, 211 N.W.2d at 122.

Here, Haltom's attorney submitted proposed instructions and then discussed at length with the court how the jury should be instructed about the definition of "prurient." He expressed concern that the instructions needed to inform the jury that "prurient" did not include a normal interest in sex. When the court agreed and suggested language about a normal interest in sex, Haltom's attorney stated that it was "as close as we can get to the exact words of the Supreme Court." When the court then stated that it would give the instruction, Haltom's attorney stated, "Great." The record shows that Haltom not only failed to object to the instruction that was given, but expressed satisfaction with it. We determine that the issue has been waived, and we do not find plain error.

Motion to Suppress Statements

Haltom contends that statements he made to the police officers were involuntary because the officers said they would not take him downtown and book him if he cooperated. Before trial, the court determined that the State could offer the statements into evidence. Haltom did not object when the statements were offered at trial.

[7] In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement to preserve the question for review on appeal. *State v. Cody*, 236

Neb. 69, 459 N.W.2d 195 (1990). This rule also applies to pretrial determinations about the voluntariness of the statements. *Id*. Because Haltom did not object to the evidence when it was introduced at trial, he has not preserved the question for review and we do not consider it.

Comparable Materials

Haltom contends that he was entitled to present the following comparable materials at trial: a pay-per-view video from a local hotel, two videos sold at another store, and videos from two other trials where he was found not guilty.

Haltom did not mark the two videos that were the subject of not guilty verdicts as exhibits and did not provide an offer of proof for them. Those videos were never offered into evidence, and we do not discuss them on appeal. We do discuss, however, the hotel video and the videos sold at another store.

[8-10] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). 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. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). The determination of whether the evidence is relevant to show contemporary community standards is subject to an abuse of discretion standard of review.

[11] We have stated that "[a]n exhibit of comparable materials is not in and of itself admissible to demonstrate contemporary community standards regarding the material at issue. Availability of similar material by itself means nothing more than that other persons are engaged in similar activities." *Main Street Movies v. Wellman*, 257 Neb. 559, 570, 598 N.W.2d 754, 763 (1999), citing *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974).

Here, the hotel video and the videos sold at another store demonstrate only that other videos are available in the community. This alone does not provide evidence that the videos would not be considered to be obscene in the community. We determine

that the trial court did not abuse its discretion by refusing to allow the videos into evidence.

Motion for Mistrial

Haltom contends that the court should have granted his motion for a mistrial when the jury heard that he had previously been arrested. The decision whether to grant a motion for mistrial is within the discretion of the trial court. See *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999).

Unlike cases where detailed evidence of prior bad acts have the potential to confuse the jury and prejudice it against the defendant, here the jury briefly heard only that Haltom said he had been arrested several times in Missouri. The jury did not hear any details about the arrests or hear whether he had been convicted. The jury was immediately told to disregard the testimony. No further instruction was given to avoid drawing attention to the matter. We determine that the trial court did not abuse its discretion in overruling the motion for a mistrial.

Motion for Judgment Notwithstanding Verdict

Finally, Haltom contends that the court should have granted his motions to dismiss, for judgment notwithstanding the verdict, and for a new trial because no reasonable jury could find beyond a reasonable doubt that the video was obscene. We note that the record does not contain a motion for a new trial, and we do not address that issue. We have viewed the video and determine that under *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), this assignment of error is without merit.

CONCLUSION

We determine that Haltom waived assignments of error concerning the definition of "prurient" and the denial of his motion to suppress statements. We determine that the trial court did not err by refusing evidence of comparable materials and by refusing to grant Haltom's motion for a mistrial. Finally, we determine that the trial court properly overruled Haltom's motion for judgment notwithstanding the verdict. Accordingly, we affirm.

Affirmed.

FRANKIE LEVI COLE, APPELLANT, V. SCOTT ISHERWOOD ET AL., APPELLEES.

653 N.W.2d 821

Filed December 6, 2002. No. S-00-665.

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. **Political Subdivisions Tort Claims Act: Tort Claims Act.** Generally, provisions in the Political Subdivisions Tort Claims Act should be construed in harmony with similar provisions in the State Tort Claims Act.
3. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
4. **Tort Claims Act: Jurisdiction.** The district court has exclusive subject matter jurisdiction over suits under the State Tort Claims Act pursuant to Neb. Rev. Stat. § 81-8,214 (Reissue 1996).
5. **Jurisdiction.** Generally, when subject matter jurisdiction is vested in one judicial tribunal, it cannot simultaneously be exercised in another.
6. **Tort Claims Act: Jurisdiction.** The filing requirements set forth in Neb. Rev. Stat. § 81-8,212 (Reissue 1996) and the final disposition requirements set forth in Neb. Rev. Stat. § 81-8,213 (Reissue 1996) of the State Tort Claims Act are conditions precedent to the commencement of suit, but are not jurisdictional prerequisites for the adjudication of a tort claim against the State.
7. **Jurisdiction: Civil Rights: Prisoners: Case Overruled.** Exhaustion of administrative remedies is not a jurisdictional prerequisite to the commencement of an action pursuant to 42 U.S.C. § 1983 (2000). Rather, a prisoner's failure to exhaust administrative remedies is an affirmative defense which may be raised in a § 1983 action. To the extent that *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999), held that exhaustion of administrative remedies is a jurisdictional component of a § 1983 action, it is overruled.
8. **Actions: Words and Phrases.** A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, CARLSON, and MOORE, Judges, on appeal thereto from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Frankie Levi Cole, pro se.

Don Stenberg, Attorney General, and Jennifer M. Amen for appellees.

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

STEPHAN, J.

Frankie Levi Cole, an inmate, brought an action against various prison employees asserting claims for personal injury and property loss. Defendants successfully demurred to Cole's third amended petition on grounds that the district court lacked jurisdiction and that the petition failed to state a cause of action. The action was dismissed. The Nebraska Court of Appeals affirmed the dismissal, holding the district court lacked subject matter jurisdiction. *Cole v. Isherwood*, 11 Neb. App. 44, 642 N.W.2d 524 (2002). We granted Cole's petition for further review.

I. FACTS

The facts in this case are fully set forth in the opinion of the Court of Appeals and are summarized here. In his original petition filed on July 2, 1999, Cole alleged that defendants refused his request to be transferred to a cell with a nonsmoking cellmate and denied him proper medical attention after two separate altercations with his cellmate. After the first altercation, Cole required surgery on his right thumb, and after the second, he required stitches near his left eye.

Defendants successfully demurred to Cole's initial petition, as well as his first and second amended petitions. Cole then filed his operative third amended petition, which alleges tort claims and violations of 42 U.S.C. § 1983 (2000) and is brought against defendants in their individual capacities for monetary damages and in their official capacities to the extent that prospective injunctive relief might apply. Defendants filed a demurrer asserting that the court lacked jurisdiction over Cole's claims and their persons and that the petition did not state a cause of action. After conducting a telephonic hearing, the district court sustained the demurrer on all grounds and dismissed the petition without articulating its rationale. The court found that it was reasonably unlikely that Cole could amend to correct the grounds stated in the demurrer.

The Court of Appeals affirmed in a published opinion. *Cole v. Isherwood, supra*. The court found that Cole's claims were subject to the Nebraska State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996), because his allegations were brought against state employees based upon alleged actions within the scope of their employment. The State Tort Claims Act provides in relevant part that "[n]o suit shall be permitted . . . unless the State Claims Board has made final disposition of the claim." § 81-8,213. The court noted that Cole filed his initial suit in district court on July 2, 1999. In his third amended petition filed April 3, 2000, Cole alleged that he filed his claim with the State Claims Board on March 31, 1999, and that it was denied on August 11, 1999. *Cole v. Isherwood, supra*. Based upon these facts, the Court of Appeals determined that the district court properly granted the demurrer because when "Cole filed his petition prior to the denial of his claims by the State Claims Board, the district court lacked jurisdiction to hear Cole's claim under the Act." *Id*. at 50, 642 N.W.2d at 530.

The Court of Appeals noted that a question remained as to whether Cole had a valid cause of action under § 1983. Citing *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999), the court found that when a prisoner has requested both monetary damages and injunctive relief with respect to prison conditions under § 1983, the Prison Litigation Reform Act requires that the prisoner exhaust his or her administrative remedies before bringing the action. The Court of Appeals determined that Cole failed to exhaust his remedies because he filed his State Tort Claims Act claim in an untimely manner, and concluded that "[t]herefore, the district court lacked jurisdiction to hear Cole's § 1983 claims and correctly granted the defendants' demurrer . . . ." *Cole v. Isherwood*, 11 Neb. App. 44, 51, 642 N.W.2d 524, 530 (2002).

II. ASSIGNMENTS OF ERROR

In his petition for further review, Cole asserts that the Court of Appeals erred as a matter of law (1) in finding that the district court lacked jurisdiction because final determination by the State Claims Board had not been made prior to initiation of the district court action and (2) in finding that the district court

lacked jurisdiction to hear the § 1983 action because administrative remedies had not been exhausted.

III. 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. *Regier v. Good Samaritan Hosp., ante* p. 660, 651 N.W.2d 210 (2002); *Shirley v. Neth, ante* p. 138, 646 N.W.2d 587 (2002).

IV. ANALYSIS

1. Subject Matter Jurisdiction

Cole argues that the Court of Appeals erred in holding that the district court lacked subject matter jurisdiction over his claims. He generally contends that the filing of a suit in district court prior to final disposition of a claim filed with the State Tort Claims Board does not deprive the district court of subject matter jurisdiction. He further argues that exhaustion of administrative remedies is not a jurisdictional component of a § 1983 action.

(a) State Tort Claims Act

The relevant portion of the State Tort Claims Act provides that no suit can be brought in district court "unless the State Claims Board has made final disposition of the claim." § 81-8,213. Final disposition occurs either when the claims board decides the claim or when the claim is withdrawn. See *id*. The statute specifically states, however, that a claim may be withdrawn only if the board has not acted upon the claim within 6 months. *Id*. From the face of the operative third amended petition, it is apparent that Cole's suit was filed in the district court less than 6 months after the claim was submitted to the claims board and prior to final disposition by that board.

[2] Cole relies upon cases interpreting a separate but similar provision in the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997). See, *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001); *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). In *Keller* and *Millman*, we held that the failure to file or present a claim to the appropriate

political subdivision did not deprive the district court of subject matter jurisdiction. *Id*. See § 13-905. Generally, provisions in the Political Subdivisions Tort Claims Act should be construed in harmony with similar provisions in the State Tort Claims Act. *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994). The provisions in both acts requiring the presentment of claims prior to initiation of actions in the district court are nearly identical. Compare § 81-8,212 with § 13-905 (requiring that claims "shall be filed"). Thus, the rule that the filing or presentment of a claim is not a jurisdictional prerequisite to commencement of suit applies to the State Tort Claims Act, as well as the Political Subdivision Tort Claims Act.

This rule, however, does not fully resolve the question of subject matter jurisdiction in this case. In both *Keller* and *Millman*, the plaintiff wholly failed to file a claim with the applicable governing board. See §§ 81-8,212 and 13-905. In this case, the third amended petition alleges that Cole presented his initial claim to the board on March 31, 1999, thus complying with the initial presentment provision in the State Tort Claims Act. See § 81-8,212. Cole, however, filed suit in the district court on July 2, although the claims board did not finally deny his claim until August 11.

These facts meet the initial presentment requirement of § 81-8,212 but conflict with the requirement of § 81-8,213 that no suit can be brought in district court "unless the State Claims Board has made final disposition of the claim." The issue presented is whether the reasoning of *Keller* and *Millman* applies to these facts. We conclude that it does.

[3,4] Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001); *Falotico v. Grant Cty. Bd. of Equal.*, 262 Neb. 292, 631 N.W.2d 492 (2001). The district court has exclusive subject matter jurisdiction over suits under the State Tort Claims Act pursuant to § 81-8,214. The requirements of § 81-8,213, like the requirements of § 81-8,212, are simply statutory conditions that a plaintiff must follow prior to instigating suit in district court. As we have noted:

> "[S]tatutory conditions or conditions precedent have nothing to do with subject matter jurisdiction of [the trial court]. [Citations omitted.] They deal only with the appropriate conditions set by the legislature as a prerequisite for commencing or maintaining an action. Subject matter jurisdiction is conferred on the [trial court] by the constitution. [Citation omitted.] Whether or not a proper claim has been filed, the [trial court] has jurisdiction of the subject matter."

Millman v. County of Butler, 235 Neb. 915, 922, 458 N.W.2d 207, 212 (1990), quoting *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 357 N.W.2d 548 (1984).

In this case, the statutory condition requiring final disposition by the board prior to instigation of a suit is analogous to the statutory condition requiring the initial presentment of a claim to the Board. In *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 368-69, 417 N.W.2d 757, 766 (1988), we explained the purpose or function of requiring an initial claim against a governing board:

> [T]he written claim required by [the Political Subdivisions Tort Claims Act] notifies a political subdivision concerning possible liability for its relatively recent act or omission, provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made.

Summarized, the Political Subdivisions Tort Claims Act "affords a governmental subdivision a pre-action opportunity, or a period before commencement of a lawsuit, to examine the merits of a tort claim and possibly avoid the expense, time, and varied but frequent rigors of litigation to dispose of a claim." *Millman v. County of Butler*, 235 Neb. at 925, 458 N.W.2d at 214.

This reasoning applies equally to the final disposition requirement in the State Tort Claims Act. Like the requirement of the initial filing of a claim, the final disposition requirement is simply a statutory procedural requirement enacted to benefit the State entity being sued by allowing it an opportunity to adequately examine and investigate the claim prior to commencement of a lawsuit. Thus, although filing a lawsuit prior to final disposition

of the claim by the claims board violates the statutory requirement of § 81-8,213, it does not deprive the district court of its general subject matter jurisdiction to hear the case. See *Millman v. County of Butler, supra*.

[5] The only remaining question is whether the filing of the claim with the board vested the board with subject matter jurisdiction so that the district court could not exercise its general subject matter jurisdiction prior to resolution of the claim. Generally, when subject matter jurisdiction is vested in one judicial tribunal, it cannot simultaneously be exercised in another. See *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). This case, however, does not involve two judicial tribunals. According to § 81-8,211, the State Claims Board, acting on behalf of the State, has authority to "consider, ascertain, adjust, compromise, settle, determine, and allow any tort claim." The plain language of the statute reveals that the claims board is not acting in a judicial manner, but is merely representing the State, one of the parties to the dispute. The filing of a claim with the board therefore cannot divest the district court of its subject matter jurisdiction to hear a tort claim.

[6] In summary, we hold that the filing requirements set forth in § 81-8,212 and the final disposition requirements set forth in § 81-8,213 of the State Tort Claims Act are conditions precedent to the commencement of suit, but are not jurisdictional prerequisites for the adjudication of a tort claim against the State. Accordingly, the Court of Appeals erred in concluding that the district court lacked subject matter jurisdiction to determine Cole's tort claims under the State Tort Claims Act. While defendants may assert an affirmative defense alleging Cole's failure to comply with § 81-8,213, such a defense is not jurisdictional in nature and therefore was not properly raised by defendants' demurrer. See Neb. Rev. Stat. § 25-806(1) (Reissue 1995).

(b) 42 U.S.C. § 1983

The Court of Appeals also concluded that Cole's failure to exhaust his administrative remedies under the State Tort Claims Act caused the district court to lack subject matter jurisdiction to hear his § 1983 claims.

In reaching its conclusion, the Court of Appeals relied upon our decision in *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999). In *Pratt*, a prisoner filed a § 1983 action alleging that prison employees were conspiring to deprive him of his rights under the U.S. Constitution. The prisoner sought both injunctive and monetary relief. The defendant prison employees demurred to the petition, alleging, inter alia, that it failed to state a cause of action and that the district court did not have subject matter jurisdiction.

In *Pratt*, we recognized that the Prison Litigation Reform Act (hereinafter PLRA), adopted in 1996, requires prisoners to exhaust administrative remedies prior to filing actions under § 1983 or any federal law. We found that Pratt had a number of administrative remedies available to him which he had not exhausted prior to filing his § 1983 action. *Id.*, citing Neb. Rev. Stat. §§ 83-4,111 and 83-4,135 through 83-4,139 (Reissue 1999) and 68 Neb. Admin. Code, ch. 2 (1994). After examining the available administrative prison grievance procedures, we stated:

> We note that other remedies are not precluded. In particular, 68 Neb. Admin. Code, ch. 2, § 005.01 (1994), stated: "Claims against the Department involving miscellaneous or tort claims for money damages may be filed pursuant to the State Tort Claims Act." *Thus, prisoners in Nebraska must adhere to and exhaust these specific provisions before bringing a § 1983 claim.*

(Emphasis supplied.) *Pratt v. Clarke*, 258 Neb. at 407, 604 N.W.2d at 826. Our holding in *Pratt* clearly required a prisoner to exhaust his or her administrative remedies under the State Tort Claims Act prior to bringing a § 1983 action. Because Pratt failed to comply with the PLRA by exhausting his administrative remedies, we concluded that the district court lacked subject matter jurisdiction to hear his § 1983 claim.

Since *Pratt* was decided, however, the Eighth Circuit has held that a prisoner's failure to exhaust administrative remedies prior to bringing a § 1983 action does not deprive a court of subject matter jurisdiction. *Chelette v. Harris*, 229 F.3d 684 (8th Cir. 2000). The court in *Chelette* reasoned that the applicable provisions of the PLRA, codified at 42 U.S.C. § 1997e (2000), did not contain the " 'sweeping and direct' " language

necessary to impose a jurisdictional requirement of exhaustion of administrative remedies. 229 F.3d at 687. See § 1997e(a). The court noted that this conclusion was reinforced by other provisions of § 1997e which permit a court to evaluate and dismiss a claim on the ground that it lacks substantive merit even when administrative remedies have not been exhausted. Similar conclusions have been reached by other federal circuit courts. *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000); *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999); *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532 (7th Cir. 1999); *Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998); *Wright v. Morris*, 111 F.3d 414 (6th Cir. 1997).

[7] We find this federal authority persuasive and therefore conclude that exhaustion of administrative remedies is not a jurisdictional prerequisite to the commencement of an action pursuant to § 1983. Rather, a prisoner's failure to exhaust administrative remedies is an affirmative defense which may be raised in a § 1983 action. To the extent that *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999), held that exhaustion of administrative remedies is a jurisdictional component of a § 1983 action, it is overruled. Because we have now determined that exhaustion of administrative remedies is not a jurisdictional component of a § 1983 action, the Court of Appeals was also in error in concluding that the district court lacked subject matter jurisdiction over the § 1983 claims due to Cole's failure to exhaust administrative remedies.

2. Failure to State Cause of Action

The district court also sustained defendants' demurrer on the ground that Cole's petition failed to state a cause of action. Although Cole assigned this disposition as error, the Court of Appeals did not reach the issue because it upheld the sustaining of the demurrer based on lack of subject matter jurisdiction. Because we disagree with the Court of Appeals on this issue, we must examine whether the district court nevertheless properly sustained the demurrer. See *Folgers Architects v. Kerns*, 262 Neb. 530, 633 N.W.2d 114 (2001) (this court upon granting further review may consider assignments of error Court of Appeals did not reach).

[8] A cause of action is judicial protection of one's recognized right or interest, when another, owing a corresponding duty not to invade or violate such right or interest, has caused a breach of that duty. *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). As noted, we determined in *Millman* that the filing or presentment of a claim under the Political Subdivisions Tort Claims Act is not a substantive element of a plaintiff's recovery in a negligence action. Instead, plaintiff's noncompliance with the condition precedent is an affirmative defense that may be raised by the defendant. For the reasons stated in the previous discussion, the final disposition requirement of the State Tort Claims Act is similarly only a condition precedent to the filing of a suit and is not a substantive element of the plaintiff's tort claim. In addition, we agree with those federal courts that have concluded that exhaustion of administrative remedies is merely a condition precedent to the filing of a § 1983 claim and not an element of such claim. See, *Chelette v. Harris*, 229 F.3d 684 (8th Cir. 2000); *Underwood v. Wilson, supra*. Therefore, the demurrer was not properly sustained on the ground that the petition failed to state a cause of action, and the Court of Appeals erred in affirming the sustaining of the demurrer and dismissal of the case.

3. Personal Jurisdiction

As an alternative justification for the dismissal of Cole's action, defendants argue that they were not properly served. The record does not disclose the manner in which service was obtained, and the issue was not specifically addressed by either the district court or the Court of Appeals. Accordingly, we do not address it.

V. CONCLUSION

For the foregoing reasons, we conclude that the Court of Appeals erred in affirming the dismissal of this action. We reverse the decision and remand the cause to the Court of Appeals with directions to reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

Reversed and remanded with directions.

MICHAEL GALLNER, APPELLANT, V. JUDY HOFFMAN, FORMERLY KNOWN AS JUDY GALLNER, APPELLEE.

653 N.W.2d 838

Filed December 6, 2002. No. S-01-773.

1. **Pretrial Procedure.** Generally, the control of discovery is a matter for judicial discretion.
2. **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.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
4. **Child Support: Rules of the Supreme Court: Appeal and Error.** Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
5. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
6. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered.
7. **Modification of Decree: Words and Phrases.** In the context of marital dissolutions, a material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
8. **Child Support: Rules of the Supreme Court.** All orders for child support, including modifications, must include a basic income and support calculation worksheet from the Nebraska Child Support Guidelines.
9. **Modification of Decree: Alimony: Child Support.** Because alimony is not properly considered as income when child support is established, the cessation of alimony cannot be considered a diminution in income when determining whether there has been a material change of circumstances justifying a modification of child support.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed in part, vacated in part, and in part reversed and remanded for further proceedings.

Theodore R. Boecker, Jr., of Sherrets & Boecker, L.L.C., for appellant.

C. Gregg Larson for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Michael Gallner appeals from the June 4, 2001, order of the Douglas County District Court, which order denied Michael's application to modify and reduce his child support obligation for his one child from his marriage to his former wife, appellee, Judy Hoffman, formerly known as Judy Gallner. We affirm in part, vacate in part, and in part reverse and remand for further proceedings.

II. STATEMENT OF FACTS

This is the third appearance of this case on appeal. In *Gallner v. Gallner*, 257 Neb. 158, 595 N.W.2d 904 (1999), inter alia, we reversed a district court's order which permitted the subordination of child support and alimony liens on real property owned by Michael, based on our determination that the district court erred in subordinating the liens without first having been fully advised. The relevant facts and procedural history of this case are outlined in that opinion, and we will not repeat that history here, except as it is relevant to the instant appeal.

Michael and Judy were married January 3, 1982. The parties had one child, born October 6, 1983. The marriage was dissolved by decree dated May 5, 1994. The decree also divided the property, awarded custody of the minor child to Judy, and awarded Judy child support and alimony. According to the decree of dissolution, Michael's alimony obligation ended in approximately June 1999. His obligation to pay child support apparently ended on October 6, 2002, when the parties' child reached the age of majority.

At the time of the dissolution proceedings, Michael was engaged in the private practice of law in Council Bluffs, Iowa, with his brother Sheldon Gallner, a business relationship that

had started in 1976 and had been successful. Michael earned in excess of $300,000 annually for each of the 3 years prior to the dissolution trial. During the dissolution proceedings, however, evidence was adduced to the effect that Michael's business relationship with Sheldon was "tenuous," that the brothers were having "significant problems" with disagreements concerning the operation of the law practice, and that Sheldon had offered Michael a plan to dissolve the law practice.

When awarding child support under the decree, the district court made the following factual findings:

> The Court further finds that the Petitioner, Michael Gallner, has successfully earned in excess of $300,000.00 each of the last three years as an attorney in private practice. The Court notes that testimony indicates that the Petitioner and his brother have encountered serious disputes regarding their law practice and that Petitioner sued his brother some months ago. Despite these facts, the Court finds that the Petitioner has an earning capacity of at least $200,000.00 per year.

Judy is also an attorney. The record from the dissolution proceedings reflects that subsequent to her graduation from law school in 1976, Judy worked as an attorney for the Douglas County Public Defender's office, the Equal Employment Opportunity Commission, the Nebraska Attorney General's office, and the Union Pacific Railroad. In 1984, she took a full-time position with a private law firm, where she worked for approximately 1 year before leaving full-time employment to stay at home and take care of the parties' child. The trial record reflects that the minor child had certain medical problems and required special care.

When addressing the issue of alimony in the dissolution decree, the district court made the following factual findings:

> Regarding [Judy's] ability to earn, the Court notes that she did earn in excess of $40,000.00 in earlier years. However, the Court finds that she has generally earned less than $10,000.00 a year net in recent years. Finally, the Court finds that her ability to earn, in the private practice of law, is probably not more than $20,000.00 a year net at the present time. In making these findings, the Court does take

> into account the special needs of the minor child and the amount of time required of [Judy] for his care.

On July 26, 2000, Michael filed an application to modify his child support obligation downward, asserting material changes in circumstances since the entry of the decree "in that [Michael's] income ha[d] substantially decreased and [Judy's] income ha[d] substantially increased." During discovery, Michael sought, inter alia, detailed, itemized information regarding Judy's living expenses. Judy did not provide all the information Michael sought, and Michael filed a motion to compel. A hearing was held on December 4, 2000. Due to the manner in which the parties argued at the hearing, the substance of the proceedings is not clear. As we understand the record, Judy produced income tax information. The district court found the requests for detailed, itemized expense information to be either not relevant or unduly burdensome. The district court ordered Judy to appear at a deposition. The district court also ruled that Michael could inquire into Judy's financial information during the deposition. The district court ordered Judy to provide Michael with information concerning the child's educational expenses.

Michael's application to modify came on for hearing on April 20, 2001. Four witnesses testified during the hearing, and 28 exhibits were offered into evidence.

During the hearing, Michael presented evidence regarding his claim of material changes in circumstances. Michael testified that his income had decreased since the dissolution of his marriage to Judy due to the dissolution of the private law practice he had shared with Sheldon. Michael offered evidence showing that the firm, Gallner & Gallner, P.C., whose difficulties had been noted at the time of the dissolution, was dissolved in approximately November 1998 and that Michael had started his own private practice. According to Michael's testimony, his earnings were reduced from the range of $400,000 to $500,000 per year to less than $40,000 per year.

Michael claimed an additional material change of circumstances had occurred since the dissolution of the parties' marriage by virtue of the fact that Judy had procured employment at Metropolitan Community College. The evidence indicated that in the fall of 2000, Judy was appointed to the regular faculty of

Metropolitan Community College as a legal assistant instructor, at a salary of $40,379. Evidence also indicated that Judy earned additional income from the private law practice she maintained, but the amount of these earnings is unclear in the record.

On June 4, 2001, the district court entered an order overruling Michael's application to modify his child support obligation. The district court indicated without other explanation that Michael's evidence was not "sufficiently credible" to allow the court to modify his child support obligation. With respect to Judy's income, the district court found no change in Judy's income and indicated its view that Judy's income prior to the proceedings to modify was composed of alimony plus earnings and that subsequent to the termination of alimony, her income was composed solely of her earnings. The district court specifically stated that although Judy's "earnings have increased over the years, her [total] income is not substantially different now as during the time she received alimony, which has since expired." In rendering its decision, the district court did not prepare an income and child support calculation worksheet as mandated under paragraph C of the Nebraska Child Support Guidelines. In further orders, the district court denied Michael's request for attorney fees and awarded Judy $2,500 in attorney fees. Michael appeals.

III. ASSIGNMENTS OF ERROR

On appeal, Michael has assigned 10 errors which we reorder and restate as 4. In summary, Michael claims that the district court erred (1) in failing to permit Michael to gain certain information from Judy through discovery, (2) in denying his application to modify child support, (3) in failing to award Michael attorney fees, and (4) in awarding Judy attorney fees.

IV. STANDARDS OF REVIEW

[1] Generally, the control of discovery is a matter for judicial discretion. *Gallner v. Gallner*, 257 Neb. 158, 595 N.W.2d 904 (1999); *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999).

[2,3] 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. *Crawford v. Crawford*,

263 Neb. 37, 638 N.W.2d 505 (2002); *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Peter v. Peter, supra*.

[4] Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001).

[5] In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

V. ANALYSIS

1. Discovery

Following the filing of his application to modify child support, Michael sought, inter alia, detailed, itemized information regarding Judy's living expenses. Judy produced income tax information. However, Judy objected to certain of Michael's discovery requests, and Michael filed a motion to compel. Following a hearing on December 4, 2000, the district court ordered Judy to provide Michael with information regarding educational expenses of the parties' child, but denied Michael's motion to compel Judy to provide detailed, itemized expense information, concluding the requests were either not relevant or were unduly burdensome. Michael claims that the district court erred in failing to permit him to obtain the additional information he sought.

Generally, the control of discovery is a matter for judicial discretion. *Gallner v. Gallner, supra*; *State ex rel. Acme Rug Cleaner v. Likes, supra.* During the December 4, 2000, hearing, the district court ordered Judy to appear at a deposition. The district court also ruled that Michael could inquire into Judy's financial information during the deposition. Therefore, although the district

court overruled Michael's motion to compel, the district court ruled Michael could depose Judy regarding her financial information, and thus, Michael had access to the information he sought. Based upon our review of the record on appeal, we determine that the district court did not abuse its discretion with regard to its ruling on discovery matters. This assignment of error is without merit, and we affirm the district court's ruling in this regard.

2. Material Change in Circumstances

[6,7] A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered. *Peter v. Peter, supra*; *Noonan v. Noonan, supra.* In the context of marital dissolutions, a material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999).

(a) Material Change: Michael's Law Practice

Michael states that a material change in circumstances has occurred since the entry of the decree in 1994 and asserts that such change is sufficient to justify a reduction in his child support obligation. In support of his assertion, Michael directs our attention to the 1998 dissolution of the private law practice which he had shared with Sheldon, his loss of income from that practice, and the subsequent expense incurred in connection with opening his own law practice. Michael asserts that although the findings in the decree anticipated that Michael's income would decline, it was not anticipated that the decline would be as severe as the facts demonstrated had in fact occurred.

In support of his claim that a material change of circumstances had occurred since the entry of the 1994 decree sufficient to reduce his child support obligation, Michael introduced into evidence his tax returns and the testimony of his accountant. Michael also testified.

We believe the record on appeal shows that Michael's evidence demonstrated without direct contradiction that he had sustained a significant decrease in income beyond that indicated in

the decree. In its June 4, 2001, order, however, the district court stated that Michael's evidence was not "sufficiently credible," and denied Michael's application to modify. The district court denied relief without discussion and without preparing a basic income and child support calculation worksheet.

[8] Paragraph C of the child support guidelines specifically mandates that "[a]ll orders for child support, including modifications, must include a basic income and support calculation worksheet" from the Nebraska Child Support Guidelines. The importance of adhering to this requirement has been repeatedly emphasized by the appellate courts of this state. See, *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001); *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994); *Lawson v. Pass*, 10 Neb. App. 510, 633 N.W.2d 129 (2001); *Laubscher v. Laubscher*, 8 Neb. App. 648, 599 N.W.2d 853 (1999); *State on behalf of Elsasser v. Fox*, 7 Neb. App. 667, 584 N.W.2d 832 (1998). It has been stated that "the trial courts must show the appellate courts, and the parties, that they have 'done the math.' " *Stewart v. Stewart*, 9 Neb. App. 431, 434, 613 N.W.2d 486, 489 (2000). As stated above, no worksheet is included in the district court order at issue in this case.

Given a record which shows without contradiction that Michael experienced a significant decline in income, and given the absence of an explanation of the district court's decision, coupled with the lack of an income and support worksheet, we conclude the district court abused its discretion in denying Michael's application.

(b) Material Change: Judy's Employment

Michael asserts that an additional material change of circumstances occurred subsequent to the entry of the decree in that Judy had procured full-time regular employment with Metropolitan Community College and that such change justifies a modification of his child support obligation. In this regard, we note that the district court determined that Judy's income was unchanged and denied Michael's petition to modify at least in part on this basis. Michael claims on appeal that the district court erred in its determination regarding Judy's income and that such error requires reversal. We agree with Michael that the district court erred as a matter of law in the manner in which it interpreted the Nebraska

Child Support Guidelines and evaluated Judy's income for child support purposes.

In its order of June 4, 2001, the district court noted that Judy's earnings had increased since the entry of the decree, but declined to find that such an increase constituted a material change of circumstances warranting a modification of Michael's child support, because "her income [was] not substantially different now as during the time she received alimony, which has since expired." Such statement by the district court reflects the fact that the district court treated Judy's prior receipt of alimony as an item of income in its assessment of the child support obligation. The district court erred as a matter of law in its interpretation of the Nebraska Child Support Guidelines by including Judy's alimony in its consideration of Judy's income.

[9] Paragraph M of the child support guidelines provides: "Alimony. These guidelines intend that spousal support be determined from income available to the parties after child support has been established." The clear language of paragraph M of the guidelines provides that child support obligations are to be calculated prior to the calculation of alimony. Obviously, in reviewing a party's income for child support purposes, alimony cannot be factored into income if alimony has not yet been determined. See *Kelly v. Kelly*, 2 Neb. App. 399, 510 N.W.2d 90 (1993), *reversed on other grounds* 246 Neb. 55, 516 N.W.2d 612 (1994). It logically follows that because alimony is not properly considered as income when child support is established, the cessation of alimony cannot be considered a diminution in income when determining whether there has been a material change of circumstances justifying a modification of child support. We conclude the district court erred as a matter of law when it determined that Judy's income at the time of the child support modification hearing was not substantially different when such conclusion was based on the erroneous legal reasoning that alimony had been an item of income in calculating child support, which item had been supplanted by Judy's subsequent earnings.

Given the district court's abuse of discretion and error of law, we reverse the district court's order denying Michael's petition for modification and remand the cause for further proceedings consistent with this opinion.

3. Attorney Fees

Finally, Michael assigns as error the district court's denial of his request for attorney fees and the award of attorney fees to Judy. Given our decision above that the district court abused its discretion and committed error as a matter of law in denying Michael's application and our remand of the matter for further proceedings, we vacate the district court's order with regard to both motions for attorney fees. Applications for attorney fees may be made in the proceedings on remand.

VI. CONCLUSION

The district court did not err in its ruling regarding discovery, and such order is affirmed. The district court abused its discretion and erred as a matter of law in analyzing Michael's application for modification of child support. Such errors require reversal, and the matter is remanded for further proceedings regarding Michael's application for modification of child support. The district court's order with regard to both motions for attorney fees is vacated.

Affirmed in part, vacated in part, and in part reversed and remanded for further proceedings.

Utelcom, Inc., appellant, v. Mary Jane Egr, Tax Commissioner of the State of Nebraska, et al., appellees. U.S. Telecom, Inc., appellant, v. Mary Jane Egr, Tax Commissioner of the State of Nebraska, et al., appellees. Ucom, Inc., appellant, v. Mary Jane Egr, Tax Commissioner of the State of Nebraska, et al., appellees.

653 N.W.2d 846

Filed December 6, 2002. Nos. S-01-874 through S-01-876.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review under 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. ____: ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, under the Administrative Procedure Act, will not substitute its factual findings for those of the district court when competent evidence supports those findings.
4. **Administrative Law: Statutes: Appeal and Error.** To the extent the interpretation of statutes and regulations is 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, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent.
5. **Administrative Law.** For purposes of construction, a rule or order of an administrative agency is treated like a statute.
6. ____. Absent anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.
7. ____. A regulation is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.
8. ____. When an agency offers an interpretation of a disputed regulation during litigation that is inconsistent with its prior statements and actions regarding the regulation, the interpretation is not entitled to deference.
9. ____. A court will construe regulations relating to the same subject matter together to maintain a consistent and sensible scheme.
10. ____. It is not within the province of the courts to read a meaning into a regulation that is not there.
11. **Taxes: Corporations: Time.** When a corporate taxpayer is granted an automatic extension for filing its tax return, the 3-year limitation period for claiming a refund begins to run on the date of the extended deadline for filing the return, rather than on the date the taxpayer actually filed its return. Neb. Rev. Stat. § 77-2793(1) (Reissue 1996); 316 Neb. Admin. Code, ch. 33, § 005.01B(3) (1983).

Appeals from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with directions.

William E. Peters, of Peters & Chunka, 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.

In this consolidated appeal, we determine how an automatic extension of time for filing a corporate income tax return affects

the determination of when the 3-year limitation period for claiming a refund begins. Neb. Rev. Stat. § 77-2793(1) (Reissue 1996) requires that a taxpayer file a claim for an income tax refund within 3 years from the time the taxpayer filed its return. However, a department regulation states that "[a] return filed before the due date of the return will be presumed filed on the last day of the filing period." 316 Neb. Admin. Code, ch. 33, § 005.01B(3) (1983).

We must decide if this regulatory presumption applies when a taxpayer, after receiving an extension for filing its return, files before the extended deadline. If the presumption applies, the 3-year period for claiming a refund begins on the date of the extended deadline. If it does not apply, the period begins on the date the taxpayer actually filed its return. The Tax Commissioner determined that the period begins when a return is actually filed and denied the refunds claimed by Utelcom, Inc.; U.S. Telecom, Inc.; and Ucom, Inc. (collectively the taxpayers). The district court agreed, and the taxpayers appealed. We reverse, and remand with directions.

I. FACTUAL BACKGROUND

The facts are not in dispute. The taxpayers were each required to file an income tax return for the 1995 tax year. March 15, 1996, was the taxpayers' original deadline for filing their returns. See, Neb. Rev. Stat. § 77-2768 (Reissue 1996); 316 Neb. Admin. Code, ch. 24, § 006.01 (1998). Each taxpayer, however, was granted a 7-month automatic extension, extending the deadline for filing their 1995 income tax returns to October 15, 1996. The forms granting the extensions to the taxpayers refer to October 15 as being the "Due Date of Return."

Utelcom filed its return on September 19, 1996, and Ucom and U.S. Telcom filed their returns on October 10, 1996. For this appeal, the difference in dates is not relevant. The key fact is that each taxpayer filed its income tax return *before* October 15, 1996. On October 15, 1999—exactly 3 years from the extended deadline for filing their original returns, but more than 3 years from the time they actually filed their original returns—the taxpayers filed amended income tax returns claiming refunds in the collective amount of $568,986 for the 1995 tax year. The Tax Commissioner denied the refunds, stating that the amended tax

returns were not filed within the 3-year period for claiming a refund. The district court agreed with the Tax Commissioner, and the taxpayers appealed.

II. ASSIGNMENT OF ERROR

The taxpayers assign that the district court erred in finding that their amended tax returns claiming a refund were not filed within the 3-year limitation period established by § 77-2793(1).

III. STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review under the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *American Bus. Info. v. Egr, ante* p. 574, 650 N.W.2d 251 (2002); *Capitol City Telephone v. Nebraska Dept. of Rev., ante* p. 515, 650 N.W.2d 467 (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. *Capitol City Telephone v. Nebraska Dept. of Rev., supra*.

[3] An appellate court, in reviewing a district court judgment for errors appearing on the record, under the Administrative Procedure Act, will not substitute its factual findings for those of the district court when competent evidence supports those findings. *Id*.

[4] To the extent the interpretation of statutes and regulations is 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, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Capitol City Telephone v. Nebraska Dept. of Rev., supra*; *Inner Harbour Hospitals v. State*, 251 Neb 793, 559 N.W.2d 487 (1997).

IV. ANALYSIS

1. Statutory and Regulatory Background

Section 77-2793(1) sets out the time period for claiming an income tax refund. It provides that "[a] claim for credit or refund

of an overpayment of any income tax imposed . . . *shall be filed by the taxpayer within three years from the time the return was filed* or two years from the time the tax was paid, whichever of such periods expires later." (Emphasis supplied.) Absent any regulatory gloss, applying § 77-2793(1) is relatively straightforward. Regardless of any "due date," the taxpayer would have 3 years from the date it filed its return to file a claim for a refund. The taxpayer's deadline for filing, original or extended, would be irrelevant. Thus, if a corporate taxpayer filed its return on March 10, 2000, it would have until March 10, 2003, to claim a refund. That its original filing deadline was March 15, 2000, would be irrelevant. Likewise, if under an extension, the taxpayer filed its return on October 10, 2000, it would have until October 10, 2003, to claim a refund.

This straightforward application of § 77-2793(1), however, is inconsistent with the Internal Revenue Code (I.R.C.), resulting in a potential trap for the unwary taxpayer. See *Hamacher v. Director of Revenue*, 779 S.W.2d 565 (Mo. 1989). Like § 77-2793(1), I.R.C. § 6511(a) (2000) provides:

> Claim for credit or refund of an overpayment of any tax . . . in respect of which tax the taxpayer is required to file a return *shall be filed by the taxpayer within 3 years from the time the return was filed* or 2 years from the time the tax was paid, whichever of such periods expires the later . . . .

(Emphasis supplied.) But unlike the Nebraska income tax statutes, I.R.C. § 6513(a) (2000) explicitly sets up a presumed filing date: "[A]ny return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day." Thus, under the I.R.C., if the taxpayer filed on March 10, 2000, the taxpayer would have a presumed filing date of 3 years from March 15, 2000. As a result, under the I.R.C., the taxpayer would have until March 15, 2003, to claim a federal refund. In contrast, under a straightforward application of § 77-2793(1), the same taxpayer would have only until March 10, 2003, to claim a Nebraska refund.

The regulation at issue—316 Neb. Admin. Code, ch. 33, § 005.01B(3)—was adopted by the Nebraska Department of Revenue (the Department) apparently to ensure that the discrepancy between § 77-2793(1) and I.R.C. would not arise. It

provides that "[a] return filed before the due date of the return will be presumed filed on the last day of the filing period." Unfortunately, the language of § 005.01B(3) is not precise. The regulation fails to specify what is meant by "due date" or by "the last day of the filing period," and it does not explain how an extension affects the presumption it sets out.

Here, the dispute stems from this imprecision. The parties agree that if a taxpayer files its return before the original deadline for filing, § 005.01B(3) applies, and it is presumed that the taxpayer filed on the original deadline. The parties disagree whether the same analysis applies when a taxpayer is granted an extension for filing its return and files before the extended deadline. The taxpayers argue that § 005.01B(3) applies when a taxpayer files before an extended deadline, just as it does when a taxpayer files before its original deadline. Under this view, the taxpayers' amended tax returns were timely because they filed them within 3 years of the October 15, 1996, extended deadline. The Department argues that § 005.01B(3) applies only when a taxpayer files its return before the original deadline. Under this view, the taxpayers' amended returns were untimely because they were filed more than 3 years after the taxpayers actually filed their original 1995 returns.

The court found the Department's interpretation of § 005.01B(3) to be more persuasive. The court concluded that the regulatory presumption in § 005.01B(3) applies only if the taxpayer filed before its "due date." Thus, the key question for the court was the meaning of "due date." Noting that the concept of a "due date" is only introduced in the Department's regulations, the court looked to other regulations and determined that the regulatory scheme draws a distinction between due date and the expiration of the period of an extension. The court concluded that "due date" as used in § 005.01B(3) most clearly referred to March 15, 1996, and that October 15, 1996, was not a "due date," but the expiration of an extension period. Because we conclude that the court incorrectly construed § 005.01B(3), we reverse, and remand with directions.

2. Interpretation of § 005.01B(3)

[5-7] For purposes of construction, a rule or order of an administrative agency is treated like a statute. *Stratbucker Children's*

Trust v. Zoning Bd. of Appeals, 243 Neb. 68, 497 N.W.2d 671 (1993); *Dozler v. Conrad*, 3 Neb. App. 735, 532 N.W.2d 42 (1995). Absent 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). A regulation is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous. *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998).

Section 005.01B(3) does not clarify what effect an extension has on the presumption it sets out. It uses the term "due date," but within the context of the regulation, that term could reasonably be construed to mean only the original deadline for filing a return or to include the extended deadline for filing a return. Accord *Conoco v. Dept. of Revenue & Finance*, 477 N.W.2d 377 (Iowa 1991) (holding that "due date" could reasonably be construed as meaning original filing date or date to which extension is granted). Moreover, it is unclear if "the last day of the filing period" or "due date" is the term that controls the answer to this case. In fact, the regulation reads as if the two terms have the same meaning. Thus, § 005.01B(3) is ambiguous and open for construction.

(a) Deference to Be Given to
Department's Interpretation

As an initial matter, we must determine what level of deference to give to the Department's interpretation of § 005.01B(3). Generally, we give deference to an agency's interpretation of its own regulations. See *Capitol City Telephone v. Nebraska Dept. of Rev., ante* p. 515, 650 N.W.2d 467 (2002). We do not give an agency deference, however, if the interpretation it has given to its regulation is plainly erroneous or inconsistent. *Id.*

[8] Here, the Department is proposing an interpretation of § 005.01B(3) that is inconsistent with how it has previously advised taxpayers. When the taxpayers in this case requested their extensions, they were sent notices telling them the requests had been granted. The notices have a section labeled "Due Date of Return." The date on this section is October 15, 1996. This indicates that when it sent the notices to the taxpayers, the

Department did not draw the distinction it now does between a "due date" and additional time to file a return. When an agency offers an interpretation of a disputed regulation during litigation that is inconsistent with its prior statements and actions regarding the regulation, the interpretation is not entitled to deference. See *Drake v. F.A.A.*, 291 F.3d 59 (D.C. Cir. 2002). See, also, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987) ("[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view"). Accordingly, we give no deference to the Department's interpretation of § 005.01B(3).

(b) Effect of Regulatory Scheme

[9] A court will construe statutes relating to the same subject matter together to maintain a consistent and sensible scheme. See *Gottsch Feeding Corp. v. State*, 261 Neb. 19, 621 N.W.2d 109 (2001). The same rule applies in interpreting regulations. The court found the remainder of the regulatory scheme supported the Department's interpretations. We disagree and conclude that the regulatory scheme supports the taxpayers' interpretation of § 005.01B(3).

In determining the meaning of "due date," the district court relied primarily on 316 Neb. Admin. Code, ch. 24, §§ 006.01 and 007.02C (1998). The first sentence of § 006.01 provides that "[t]he due date for Nebraska Corporation Income Tax Return, Form 1120N, is the 15th day of March following the close of the calendar year." This language appears to support the Department's argument that the "due date" referred to in § 005.01B(3) is a taxpayer's original deadline for filing its return. The first sentence of § 007.02C provides that "[i]f an extension of time for payment of a tax is granted, the tax shall be paid on or before the expiration of the period of the extension . . . ." While § 007.02C does not involve the filing of a tax return, it does, as noted by the district court, suggest that "the expiration of the period of the extension" and a "due date" are different.

However, another regulation suggests that March 15 is not the only possible "due date." The procedure for filing a corporate

extension is set out in 316 Neb. Admin. Code, ch. 24, § 007.01 (1998), which provides:

> A corporate taxpayer may obtain an automatic extension of seven months for filing its return, provided that Form 7004N is filed on or before the prescribed due date for the return and provided that the amount of tentatively computed tax liability is paid on or before *the original due date for filing the corporation income tax return.*

(Emphasis supplied.) Presumably, the original deadline for filing an income tax return is the "original due date," and the use of that term suggests not only that other types of due dates exist, but that the Department knows how to draw a distinction between the "original due date" and other types of "due dates."

Moreover, § 006.01 (the same section that states the due date for filing is March 15) provides that "[t]he corporate taxpayer shall pay the entire amount of tax on or before the prescribed due date, *without regard to any extension granted for filing the return*." (Emphasis supplied.) Similarly, the second sentence of § 007.02C (the same regulation that suggests a distinction between a "due date" and the "expiration of the period of the extension") provides that "[i]nterest will be due on the tax payment from the original date prescribed for payment until the date the payment was actually made, *regardless of any extension of time*." (Emphasis supplied.) The italicized language in both of these regulations suggests the Department knew how to use language that would limit the effect of an extension.

The Department used this limiting language in other regulations—that an extension would have no effect—but did not do so in § 005.01B(3), which shows that the Department intended the presumption in § 005.01B(3) to include extended deadlines. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). In *Creighton St. Joseph Hosp.*, we were asked to decide whether the filing fee for an appeal from a county board of equalization to the Nebraska Tax Equalization and Review Commission was a jurisdictional requirement. We noted that in other appeal statutes, the Legislature had used explicit and clear language to establish that a filing fee was jurisdictional, but that in the statute in question, the Legislature had not used the same or similar language. We

concluded that the other statutes demonstrated that the Legislature knew how to make a filing fee jurisdictional and that its failure to include similar language demonstrated its intent not to make the filing fee a jurisdictional requirement.

If the Department did not want § 005.01B(3) to apply to extended deadlines, it could have adopted the term "original due date" from § 007.01 and used it in § 005.01B(3) instead of just "due date." In the alternative, it could have adopted the language in § 007.02C and clarified that the "due date of the return" and "the last day of the filing period" as used in § 005.01B(3) would be determined without "regard to any extension of time." Just as in *Creighton St. Joseph Hosp.*, the absence of this language in § 005.01B(3) indicates that the Department did not intend to exclude extended deadlines from the regulation's scope.

(c) Department's Counterarguments

The Department makes two arguments in support of its interpretation of § 005.01B(3). First, the Department argues that we should construe § 005.01B(3) so that it is consistent with federal law. In construing the income tax statutes, the Legislature has instructed us that any terms used "shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required." Neb. Rev. Stat. § 77-2714 (Reissue 1996). By analogy, the Department argues that we should construe the terms in its regulations relating to income tax so that they are consistent with terms used in the I.R.C. Regardless of whether this is a correct rule of regulatory interpretation, it does not benefit the Department in this case.

[10] As noted above, I.R.C. § 6513(a), like § 005.01B(3), presumes that "any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day." Unlike § 005.01B(3), however, I.R.C. § 6513(a) explicitly clarifies that "the last day prescribed for filing the return . . . shall be determined without regard to any extension of time granted the taxpayer." Thus, under the I.R.C., "a claim for refund must be filed within three years of either the due date (without regard to any extension of time) or the filing date, whichever is later." *Foster v. United States*, 221 F. Supp. 291, 296 (S.D.N.Y. 1963),

affirmed 329 F.2d 717 (2d Cir. 1964). This is the interpretation that the Department now urges us to give to § 005.01B(3). But it is not within the province of the courts to read a meaning into a regulation that is not there. See *Shaul v. Lang*, 263 Neb. 499, 640 N.W.2d 668 (2002). If the Department wanted the federal rule, I.R.C. § 6513(a) provided it with a clear and unambiguous model for adopting the rule. Instead of tracking the federal language, the Department chose to use the language it did, which shows that it did not intend for § 005.01B(3) to have the same meaning as the I.R.C.

Second, the Department argues that the taxpayers' interpretation of § 005.01B(3) would make the regulation invalid because it would lengthen the time for claiming a refund beyond the 3-year limitation imposed by § 77-2793(1). This argument is inconsistent with the Department's position that § 005.01B(3) applies when a taxpayer files before its original deadline for filing. In effect, the Department claims that it cannot adopt a regulation that would presume a taxpayer filed on its extended deadline, *because that would allow the taxpayer to claim a refund more than 3 years after it actually filed*. But at the same time, it suggests that it can adopt a regulation that would presume a taxpayer filed on its original deadline, *even though that would allow the taxpayer to claim a refund more than 3 years after it actually filed*. The distinction is nonsensical. If the statutory language allows the Department to do the former, nothing bars it from doing the latter.

V. CONCLUSION

[11] We hold that under § 005.01B(3), when a corporate taxpayer is granted an automatic extension for filing its tax return, the 3-year limitation period for claiming a refund begins to run on the date of the extended deadline for filing the return, rather than on the date the taxpayer actually filed its return. As a result, the taxpayers had until October 15, 1999, to claim their refunds for the 1995 tax year. The taxpayers met this deadline, and the district court erred in affirming the decision of the Tax Commissioner. Accordingly, we reverse, and remand with directions that the district court enter a judgment reversing the decision of the Tax Commissioner.

REVERSED AND REMANDED WITH DIRECTIONS.

LLOYD SOUKOP, DOING BUSINESS AS LLOYD'S USED CARS, APPELLANT, V. CONAGRA, INC., A NEBRASKA CORPORATION, AND ITS SUBSIDIARY, PEAVEY GRAIN COMPANY, INC., APPELLEES.

653 N.W.2d 655

Filed December 6, 2002. No. S-01-910.

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. **Statutes: Legislature: Intent: Time.** In noncriminal cases, substantive statutes are generally not given retroactive effect unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded for further proceedings.

Galen E. Stehlik, of Lauritsen, Brownell, Brostrom, Stehlik, Thayer & Myers, for appellant.

Kristopher J. Covi, of McGrath, North, Mullin & Kratz, P.C., for appellees.

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

MCCORMACK, J.

NATURE OF CASE

In 1998, Neb. Rev. Stat. § 2-4403 (Reissue 1997) was amended to provide to a "public grain warehouse or public grain warehouse operation" the same protection from public or private nuisance lawsuits already afforded to a "farm or farm operation." See § 2-4403 (Cum. Supp. 2002). The issue raised in this case is whether the 1998 amendment applies retroactively to a private nuisance action instituted against a grain elevator in 1997.

BACKGROUND

On March 14, 1997, Lloyd Soukop, doing business as Lloyd's Used Cars (Soukop), filed a private nuisance action against ConAgra, Inc., and Peavey Grain Company, Inc. (collectively Peavey), in the district court for Hall County. Soukop is the owner

of a used car business in Grand Island. Approximately one block from Soukop's business is a grain elevator operated by Peavey. Soukop alleged that Peavey's grain elevator discharged grain dust, chaff, and other materials into the air and that these materials settled onto his used car inventory. As a result, Soukop alleged that he incurred expenses to keep his used cars clean and suffered from a loss of sales and diminished profits. He sought damages and injunctive relief. In its answer, Peavey denied that its activities constituted a private nuisance and also asserted several affirmative defenses.

On June 4, 2001, Peavey filed a motion for summary judgment, arguing that it was entitled to judgment as a matter of law under the Nebraska Right to Farm Act, Neb. Rev. Stat. §§ 2-4401 to 2-4404 (Reissue 1997 & Cum. Supp. 2002). On July 10, the district court granted Peavey's motion. In its order, the district court determined that § 2-4403 (Cum. Supp. 2002), as amended by L.B. 1193 in 1998, governed the dispute. The court found that the grain elevator was built in 1936 and that Peavey had never been the defendant in a nuisance action or received a written complaint since it assumed control of the elevator in 1975. The court found that Soukop had been a landowner in the vicinity of the elevator since 1967, but did not begin his used car business at his present location until 1981. The court also found that there was no evidence to suggest that the grain elevator's activities constituted a nuisance prior to a change in the use of Soukop's land in 1981. Thus, the district court concluded that Peavey was entitled to judgment as a matter of law under § 2-4403 of the Nebraska Right to Farm Act. Soukop appealed the district court's decision, and we moved the case to our docket on our own motion.

ASSIGNMENTS OF ERROR

Soukop maintains, rephrased and consolidated, that the district court erred in applying § 2-4403 retroactively.

STANDARD 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. *American Fam. Mut. Ins. Co. v. Hadley, ante* p. 435, 648 N.W.2d 769 (2002).

ANALYSIS

The Nebraska Right to Farm Act was enacted by the Legislature in 1982. In 1998, the Legislature passed L.B. 1193, which amended § 2-4403 of the act. As a result of this amendment, § 2-4403 currently states the following, with the language added by L.B. 1193 underlined:

> A farm or farm operation <u>or a public grain warehouse or public grain warehouse operation</u> shall not be found to be a public or private nuisance if the farm or farm operation <u>or public grain warehouse or public grain warehouse operation</u> existed before a change in the land use or occupancy of land in and about the locality of such farm or farm operation <u>or public grain warehouse or public grain warehouse operation</u> and before such change in land use or occupancy of land the farm or farm operation <u>or public grain warehouse or public grain warehouse operation</u> would not have been a nuisance.

The amendment to § 2-4403 became effective July 15, 1998, more than 1 year after Soukop filed his action against Peavey. The district court nonetheless concluded that the amended version of § 2-4403 applied to Soukop's case and barred Soukop from proceeding with his nuisance action against Peavey. Soukop argues that his action is instead governed by the pre-1998 version of § 2-4403, which shields only a "farm or farm operation" from a nuisance action. Therefore, Soukop contends that Peavey's grain elevator is not protected from being found to be a nuisance, and the district court erred in granting summary judgment in Peavey's favor. There is no dispute that Peavey's grain elevator is a "public grain warehouse or public grain warehouse operation" and is not a "farm or farm operation" as those terms are defined in § 2-4402.

[2] In noncriminal cases, substantive statutes are generally not given retroactive effect unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively. *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). See, also, *Abboud v. Papio-Missouri*

River NRD, 253 Neb. 514, 571 N.W.2d 302 (1997) (legislative act operates only prospectively and not retrospectively unless legislative intent and purpose that it should operate retrospectively is clearly disclosed); *Vervaecke v. State*, 247 Neb. 707, 529 N.W.2d 779 (1995) (Wright, J., dissenting), quoting *State v. City of Kearney*, 49 Neb. 337, 70 N.W. 255 (1897) (law will not be given retrospective operation, unless that intention has been manifested by most clear and unequivocal expression). Thus, the 1998 amendment to § 2-4403 does not govern the action filed by Soukop in 1997 unless the Legislature clearly disclosed its intent that it should operate retroactively.

In *Abboud v. Papio-Missouri River NRD, supra*, we considered whether an amended statute applied retroactively. Without referring to the legislative history, we found express language in the amended statute indicating the Legislature's intent that the amended statute apply retroactively. Conversely, in *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992), and *In re Interest of J.M.N.*, 237 Neb. 116, 464 N.W.2d 811 (1991), we declined to give retroactive application to amended statutes because no language in the amended statutes clearly evidenced such intent on the part of the Legislature. See, also, *Vervaecke v. State, supra*; *Wheelock & Manning OO Ranches, Inc. v. Heath*, 201 Neb. 835, 272 N.W.2d 768 (1978) (legislative acts given retroactive application because of language in acts disclosing such intent); *State v. Von Dorn*, 234 Neb. 93, 449 N.W.2d 530 (1989); *Retired City Civ. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys.*, 199 Neb. 507, 260 N.W.2d 472 (1977); *Dell v. City of Lincoln*, 170 Neb. 176, 102 N.W.2d 62 (1960); *State ex rel. City of Grand Island v. Union Pacific R. R. Co.*, 152 Neb. 772, 42 N.W.2d 867 (1950); *School District of Omaha v. Adams*, 151 Neb. 741, 39 N.W.2d 550 (1949) (legislative acts contained no language indicating retroactive application was intended; therefore, acts applied prospectively only).

The common thread of each of the above-cited cases is that an inquiry as to whether the Legislature intended retroactive application of a statute began and ended with an examination of the words on the face of the statute. The reviewing courts in the above-cited cases declined to give the statutes retroactive effect absent any express language in the statute or related provisions

to the contrary. A similar analysis of § 2-4403, as amended in 1998, leads us to conclude that the Legislature did not clearly disclose an intent to apply the amended statute retroactively. L.B. 1193 merely inserted the language "public grain warehouse or public grain warehouse operation" within the statute. Had the Legislature intended to apply the statute retroactively, it could have included language in the legislative bill stating that the statute applied to nuisance lawsuits against public grain warehouses arising prior to its enactment. The Legislature did not do so. Thus, we conclude that the district court erred in finding that the amended version of § 2-4403 governed Soukop's action. Under the pre-1998 version of § 2-4403, nothing precludes Soukop from maintaining his action against Peavey and the district court erred in granting judgment in favor of Peavey as a matter of law.

CONCLUSION

A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. L.B. 1193, which amended § 2-4403 in 1998, contains no language evidencing an intent that it should be applied retrospectively. Thus, Soukop's action is governed by the version of § 2-4403 in effect at the time he filed his action. Under that statute, Peavey was not entitled to judgment as a matter of law. The judgment of the district court is reversed, and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

JoAnn Brandon, Personal Representative of the Estate of Teena Brandon, deceased, appellant, v. The County of Richardson, Nebraska, and Charles B. Laux, Richardson County Sheriff, appellees.

653 N.W.2d 829

Filed December 6, 2002. No. S-01-1158.

1. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.
2. **Political Subdivisions Tort Claims Act: Judgments: Appeal and Error.** In an action brought pursuant to the Political Subdivisions Tort Claims Act, or in a bench trial of an action at law, the factual findings by the trial court will not be disturbed on appeal unless they are clearly wrong.
3. **Wrongful Death: Damages.** In an action for wrongful death of a child, recoverable damages include parental loss of the child's society, comfort, and companionship.
4. **Wrongful Death: Damages: Words and Phrases.** The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection.
5 **Wrongful Death: Damages.** When a child is wrongfully killed, a parent's investment in that child of money, affection, guidance, security, and love is destroyed.
6. ____: ____. Parental loss is not limited to or necessarily dependent upon deprivation of the child's monetary contribution toward parental well-being.
7. ____: ____. Damages for loss of society must be determined upon a consideration of the facts of each case.
8. ____: ____. There is no exact fiscal formula for determination of damages recoverable for loss of society, comfort, and companionship, a loss which is not subject to some strict accounting method based on monetary contributions, past or prospective.
9. ____: ____. Because it is impossible to generalize the extent to which persons enjoy each other's companionship and society, the value of such highly personal relationships must be decided on a case-by-case basis.
10. **Wrongful Death: Parent and Child: Damages.** Because the parent-child relationship has intrinsic value, once a parent-child relationship is proved to exist, destruction of that relationship through the wrongful death of the child entitles the parent, who is the surviving next-of-kin, to damages. Evidence regarding the quality and extent of the parent-child relationship may then be utilized in determining the amount of those damages.
11. **Wrongful Death: Damages.** Damages for loss of society are not necessarily dependent on the personal qualities of the child.
12. **Damages: Appeal and Error.** An award of damages may be set aside as inadequate when, and not unless, it is so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.

13. **Damages.** If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record.
14. **Damages: Appeal and Error.** On appeal, the fact finder's determination of damages is given great deference.
15. **Damages: Mental Distress.** In awarding damages for mental anguish, the fact finder must rely upon the totality of the circumstances surrounding the incident; the credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the discretion of the fact finder.
16. **Damages: Mental Distress: Appeal and Error.** An appellate court is reluctant to interfere with the judgment of the fact finder in awarding damages for mental anguish, where the law provides no precise measurement.

Appeal from the District Court for Richardson County: ORVILLE L. COADY, Judge. Affirmed.

Herbert J. Friedman, of Friedman Law Offices, David S. Buckel, of Lambda Legal Defense and Education Fund, Inc., and John Stevens Berry, of Berry, Kelley & Reiman, for appellant.

Richard L. Boucher and Kim K. Sturzenegger, of Boucher Law Firm, for appellees.

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

GERRARD, J.

NATURE OF CASE

JoAnn Brandon (JoAnn) appeals from the judgment of the district court awarding damages in the amount of $98,223.20 for negligence, wrongful death, and intentional infliction of emotional distress in connection with the murder of JoAnn's daughter Teena Brandon (Brandon) and the events leading up to Brandon's death. JoAnn contends that the damages awarded by the district court are insufficient and constitute clear error.

BACKGROUND

On December 31, 1993, Brandon, Lisa Lambert, and Phillip Devine were found murdered in Lambert's rural Humboldt farmhouse in Richardson County, Nebraska. John L. Lotter and Thomas M. Nissen, also known as Marvin T. Nissen, were convicted of the murders. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), and *State v. Nissen*, 252 Neb. 51, 560

N.W.2d 157 (1997). JoAnn brought an action against Richardson County and Sheriff Charles B. Laux for negligence, wrongful death, and intentional infliction of emotional distress in connection with Brandon's murder and the events leading up to her death. JoAnn also brought a civil rights action against Lotter, Nissen, and Laux in federal court; the federal court dismissed the claims against Laux. See *Brandon v. Lotter*, 976 F. Supp. 872 (D. Neb. 1997), *affirmed* 157 F.3d 537 (8th Cir. 1998).

In the state court case, the district court dismissed JoAnn's second amended petition based on the defendants' demurrer alleging that the petition did not state a cause of action. We reversed that determination. See *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997) (*Brandon I*). The case proceeded to trial. See *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001) (*Brandon II*). The evidence adduced at the trial is summarized in *Brandon II* and will not be repeated here. The district court found the county negligent and awarded economic damages (funeral expenses) of $6,223.20 and noneconomic damages of $80,000. However, the district court reduced the damage award on the negligence claim by 85 percent for the intentional torts of Lotter and Nissen, and by 1 percent for the negligence of Brandon. The district court denied recovery on the intentional infliction of emotional distress claim and awarded "nominal damages" for loss of society, comfort, and companionship. See *id*. JoAnn appealed. We reversed the judgment of the district court and remanded the cause, stating as follows:

> We affirm the district court's determination that the county had a duty to protect Brandon, its finding that the county was negligent in failing to discharge that duty, and its finding that Brandon suffered predeath pain and suffering damages in the amount of $80,000.
>
> We reverse the district court's allocation of 85 percent of the predeath pain and suffering damages to the intentional torts of Lotter and Nissen as Nebraska's comparative negligence law does not allow for allocation of damages to the acts of intentional tort-feasors. We also reverse the district court's determination that Laux's conduct during the December 25, 1993, interview was not extreme and outrageous. We further reverse the district court's award of

> "nominal damages" for loss of society, comfort, and companionship and its finding that Brandon was 1 percent contributorily negligent.
>
> We therefore remand this cause to the district court (1) for a determination of whether JoAnn has proved that Brandon suffered emotional distress so severe that no reasonable person should be expected to endure it and, if so, whether Laux's conduct was a proximate cause of any such distress; (2) to award damages for intentional infliction of emotional distress if JoAnn has proved both that Brandon suffered severe emotional distress and that Laux's conduct was a proximate cause of that distress; and (3) for a determination of the amount of damages for loss of society.
>
> Upon remand, the district court shall not reduce the award of $80,000 for Brandon's predeath pain and suffering or reduce any additional amounts that may be awarded for loss of society or intentional infliction of emotional distress by allocating a percentage of the damage to intentional acts on the part of Lotter and Nissen. Further, as there is no evidence to support a finding of negligence on the part of Brandon, the district court shall not reduce any damages awarded to JoAnn due to any acts of Brandon.

Brandon II, 261 Neb. at 670-71, 624 N.W.2d at 629.

After remand, the district court made additional factual findings based upon the record from the previous trial. The district court found damages for JoAnn in the amount of $7,000 on the claim of intentional infliction of emotional distress. The district court examined the evidence regarding loss of society and determined, in essence, that the testimony offered by Brandon's family regarding their relationship with her was not consistent with their conduct during the undisputed sequence of events that preceded Brandon's death. The district court awarded damages for loss of society in the amount of $5,000. The district court added these awards to the damages awarded at the previous trial and entered judgment in the amount of $98,223.20. JoAnn appeals.

ASSIGNMENTS OF ERROR

JoAnn assigns that the district court erred in finding (1) on the wrongful death claim, that JoAnn's loss of society, comfort,

and companionship amounted to $5,000 in damages and (2) on the intentional infliction of emotional distress claim, that the severe emotional distress caused by Laux's extreme and outrageous conduct amounted to $7,000 in damages.

STANDARD OF REVIEW

[1,2] The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001). In an action brought pursuant to the Political Subdivisions Tort Claims Act, or in a bench trial of an action at law, the factual findings by the trial court will not be disturbed on appeal unless they are clearly wrong. *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001).

ANALYSIS

Loss of Society

We turn first to JoAnn's argument that the award of $5,000 on the wrongful death claim, as damages for loss of society, was clearly wrong.

[3-6] This court has consistently recognized that in an action for wrongful death of a child, recoverable damages include parental loss of the child's society, comfort, and companionship. *Brandon II*, citing *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998). The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection. *Brandon II.* When a child is wrongfully killed, a parent's investment in that child of money, affection, guidance, security, and love is destroyed. *Id.*, citing *Reiser, supra*. Destruction of such value is recognized whether the child is a minor or an adult. *Id*. Parental loss is not limited to or necessarily dependent upon deprivation of the child's monetary contribution toward parental well-being. *Id*.

[7-9] Damages for loss of society must be determined upon a consideration of the facts of each case. *Id*. There is no exact fiscal formula for determination of damages recoverable for loss of

society, comfort, and companionship, a loss which is not subject to some strict accounting method based on monetary contributions, past or prospective. *Id.* Because it is impossible to generalize the extent to which persons enjoy each other's companionship and society, the value of such highly personal relationships must be decided on a case-by-case basis. *Brandon II.*

[10] Because the parent-child relationship has intrinsic value, once a parent-child relationship is proved to exist, destruction of that relationship through the wrongful death of the child entitles the parent, who is the surviving next-of-kin, to damages. *Id.*, citing *Reiser, supra*. Evidence regarding the quality and extent of the parent-child relationship may then be utilized in determining the amount of those damages. *Id.*

[11] In reversing the district court's first award of "nominal damages," we stated in *Brandon II*, 261 Neb. at 665-66, 624 N.W.2d at 626:

> JoAnn testified that she had a close relationship with Brandon. [Brandon's sister, Tammy] Schweitzer testified that she and Brandon had a close relationship with JoAnn because "we had nobody but each other." Brayman, Brandon's aunt, testified that Brandon "loved her mom dearly and she let her mother know that she loved her." Brandon spent every Christmas with her family.
>
> Although JoAnn often "didn't know what to say" when Brandon began experiencing her sexual identity crisis, JoAnn and Brandon did discuss the issue. JoAnn also attended counseling with Brandon. Even after Brandon began presenting herself as a man, Brandon would call JoAnn, stop by to see her, or leave a rose in the door for her. Brandon spoke to JoAnn nearly every day on the telephone after the rapes occurred. Brandon was interested in becoming a commercial artist, and Brandon told JoAnn that she wanted to come back to Lincoln and "get her life back."
>
> The record in the present case shows that a relationship between JoAnn and Brandon did indeed exist. The county does not assert that there was no relationship between JoAnn and Brandon. The county asserts that the award of "nominal damages" was reasonable because JoAnn's relationship with Brandon was "strained and undeveloped"

> due to Brandon's legal troubles and gender identity disorder. Brief for appellee at 23. However, Brandon's personal problems are relevant only to the extent that they impacted her relationship with JoAnn. Damages for loss of society are not necessarily dependent on the personal qualities of the child. We have previously recognized that "[w]e will not enter into a discussion in which we compare the relative accomplishments of deceased children in wrongful death actions." *Caradori v. Fitch*, 200 Neb. 186, 194, 263 N.W.2d 649, 655 (1978). See, also, *Brahatcek v. Millard School District*, 202 Neb. 86, 273 N.W.2d 680 (1979).
>
> The county's argument addresses the extent and quality of the relationship between JoAnn and Brandon, not whether such relationship existed. Contrary to the county's assertion, the parent-child relationship has intrinsic value, even if that relationship is less than perfect. A parent-child relationship may exist in spite of any personal problems the child might have, as the record in this case demonstrates. In recognizing the "intrinsic value of the relationship between parent and child," as we did in *Reiser v. Coburn*, 255 Neb. 655, 664, 587 N.W.2d 336, 342 (1998), we conclude that an award of $0 for the loss of Brandon's society, comfort, and companionship sustained by JoAnn as a result of Brandon's death bears no reasonable relationship to the evidence and shocks the conscience. The award of $0 on JoAnn's loss of society claim is therefore inadequate as a matter of law.

After remand, the district court attempted to calculate the intrinsic value of Brandon's relationship with her family. The district court acknowledged the facts set forth above and our holding in *Brandon II*. The district court relied on evidence that, according to the district court, demonstrated that while a parent-child relationship might have existed, "[n]o <u>real</u> society existed and there is no evidence or reason to believe in its future development."

The district court noted testimony indicating that Brandon had been sexually abused by an uncle starting when Brandon was about 6 or 7 years of age and continuing until Brandon was 14. The district court also noted that JoAnn later became aware of the sexual abuse, but nonetheless testified that Brandon had a

"happy" childhood. The district court contrasted Schweitzer's testimony that she and Brandon were "open with [their] mother" and " '[t]here was always honesty and trust between the three of us,' " with Schweitzer's admission that she had been sexually abused by the same uncle and that she had witnessed Brandon being sexually abused, but that Schweitzer and Brandon agreed not to say anything about it.

The district court also noted that while Brandon was afraid of Nissen and Lotter, "[t]here is plenty of evidence that [Brandon] chose not to go home in the face of her fear and danger." Brandon thought it would be safer to stay with Lambert than to return home. The district court observed that although Brandon had been raped on Christmas Eve, Brandon did not go to her family on Christmas Day, nor did any members of Brandon's family go to her. The district court generally found that prior to the rape, the relationship between Brandon and the members of her family had become strained and distrustful and that Brandon had isolated herself from her family.

[12-14] Given our standard of review and the record with which we are presented, further recitation of which would serve no useful purpose, we cannot say the district court's determination of damages for loss of society was clearly wrong. An award of damages may be set aside as inadequate when, and not unless, it is so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. See *Holden v. Wal-Mart Stores*, 259 Neb. 78, 608 N.W.2d 187 (2000). If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record. *Id.* On appeal, we give the fact finder's determination of damages great deference. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

While the district court concluded, as it was required to do, that the parent-child relationship in this case had intrinsic value, the district court examined the record and concluded that the objective evidence of " ' "love, affection, care, attention, companionship, comfort, and protection" ' " in that relationship did not necessarily match the testimony in that regard. See *Reiser v. Coburn*, 255 Neb. 655, 662, 587 N.W.2d 336, 341 (1998). While

this does not mean that there is no relationship for which compensation can be awarded, see *Brandon II*, it is certainly relevant to the amount of damages to be awarded, particularly given the lack of an " 'exact fiscal formula for determination of damages recoverable for loss of society, comfort, and companionship.' " *Reiser*, 255 Neb. at 663, 587 N.W.2d at 341. After a thorough review of the record, we conclude that the trier of fact in this case made a determination that is supported by competent evidence and is not clearly wrong.

Intentional Infliction of Emotional Distress

The district court awarded $7,000 for Brandon's damages resulting from Laux's liability for intentional infliction of emotional distress. JoAnn alleges that these damages are insufficient and clearly wrong.

The district court acknowledged that Laux's conduct was intentional and so outrageous and extreme that it was intolerable and that Laux's conduct was itself "very strong" evidence of Brandon's mental suffering. See *Brandon II*. However, the district court relied on witnesses who saw or spoke to Brandon after her interview with Laux and testified regarding Brandon's apparent emotional state. Lana Tisdel testified that when Brandon came out of the room where Laux had interviewed Brandon, Brandon described Laux as a "fuckin' asshole" and was "[p]retty upset." Linda Gutierres testified that Brandon returned to Gutierres' house after the interview and generally described Brandon as being as upset and scared as Brandon had been before the interview. JoAnn spoke to Brandon on the telephone after the interview and testified, generally, that Brandon was scared of Laux and did not want to talk to him again, but that Brandon's fears were focused primarily on Lotter and Nissen.

In other words, the district court found that although Brandon was upset and afraid during the time between her interview with Laux and her death, Brandon's emotions were affected primarily by Nissen and Lotter and the mental anguish resulting from the rape and threat to her life. Laux's conduct, considered discretely by the district court, was not found to have caused substantial emotional distress.

[15,16] In awarding damages for mental anguish, the fact finder must rely upon the totality of the circumstances surrounding the incident; the credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the discretion of the fact finder. See *Woitalewicz v. Wyatt*, 229 Neb. 626, 428 N.W.2d 216 (1988). This court is reluctant to interfere with the judgment of the fact finder in awarding damages for mental anguish, where the law provides no precise measurement. See *Bishop v. Bockoven, Inc.*, 199 Neb. 613, 260 N.W.2d 488 (1977). In this case, the district court's award of damages bears a reasonable relation to the evidence and is not clearly wrong. Given the great deference that the fact finder's determination of damages is given on appeal, see *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000), JoAnn's assignment of error is without merit.

CONCLUSION

For the foregoing reasons, we conclude that the district court's determination of damages is supported by competent evidence and is not clearly wrong. The district court judgment, in the amount of $98,223.20, is affirmed.

AFFIRMED.

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