THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 23, 2004 and JUNE 23, 2005

IN THE

Supreme Court of Nebraska

VOLUME CCLXIX

PEGGY POLACEK

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

2007

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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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DURING THE PERIOD OF THESE REPORTS

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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

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

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
FRANK E. GOODROE . . . . . State Court Administrator[1]
JANICE WALKER . . . . . Acting State Court Administrator[2]
JANICE WALKER . . . . . State Court Administrator[3]

[1]Until March 30, 2005
[2]As of March 31, 2005
[3]As of May 13, 2005

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer	Paul W. Korslund	Beatrice
		Daniel Bryan, Jr.	Auburn
		Johnson, Vicky L.	Wilber
Second	Cass, Otoe, and Sarpy	George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
		David K. Arterburn	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	J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Richard J. Spethman	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
		J Russell Derr	Omaha
		James T. Gleason	Omaha
		Thomas A. Otepka	Omaha
		Marlon A. Polk	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	Columbus
		Alan G. Gless	Seward
		Michael Owens	Aurora
		Mary C. Gilbride	Wahoo
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Darvid D. Quist	Blair
		John E. Samson	Fremont
		William Binkhard	Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Robert B. Ensz	Wayne
		Patrick G. Rogers	Norfolk
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Ronald D. Olberding	Burwell
		Mark D. Kozisek	Ainsworth
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James Livingston	Grand Island
		Teresa K. Luther	Grand Island
Tenth	Adams, Harlan, Kearney, Phelps, and Webster	Stephen Illingworth	Hastings
		Terri Harder	Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell	McCook
		John P. Murphy	North Platte
		Donald E. Rowlands II	North Platte
		James E. Doyle IV	Lexington
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson	Chadron
		Robert O. Hippe	Gering
		Brian Silverman	Alliance
		Randall L. Lippstreu	Gering
		Kristine R. Cecava	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	Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd Hutton	Papillion
		Max J. Kelch	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	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
		Craig Q. McDermott	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
		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	C. Matthew Samuelson	Blair
		Kurt Rager	Dakota City
		Douglas Luebe	Hartington
		Kenneth Vampola	Fremont
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
		Kent D. Turnbull	North Platte
		Carlton E. Clark	Lexington
		Edward D. Steenburg	Ogallala
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James T. Hansen	Chadron
		G. Glenn Camerer	Gering
		Thomas H. Dorwart	Sidney
		James M Worden	Gering

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

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

WORKERS' COMPENSATION COURT AND JUDGES

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

ATTORNEYS
Admitted Since the Publication of Volume 268

ALETA SUE ALLEN
LINDA FAYE ALLEN
THOMAS CAMPBELL ANSCHUTZ
CHRISTOPHER STEPHEN BARTLING
STEPHANIE DAWN BECKWITH
ROBERT SCOTT BEHM
AMY RENEE BEHNKE
ELIZABETH ANNE BENINATO
JENNIFER JANET BROWNING
JASON MARIO BRUNO
TABITHA JAYNE CAMPBELL
ANDREW JAMES CARAFELLI
SARAH LURAE CARSTENSEN
DIANA WATEROUS CENTORINO
LEONIKA ROSE CHARGING
JEFFREY ALAN COATS
TRACI NICHOL COPPLE
AMY CHRISTINE CRAWFORD
CASEY DWIGHT DUNCAN
RICARDO ENRIQUEZ
ANDREW SCOTT EPSTEIN
CHRISTOPHER CLEMENT FAIRCHILD
JOSEPH PATRICK FLYNN
JONATHAN ERIC FRIESEN
JOCELYN WALSH GOLDEN
SCOTT RYAN GROPP
ROBERT ANDREW HARRIS
JULIE ANN HAVERLY
KELLY MELISSA HENRY-TURNER
STARLET JOY JAPP
NANCY S. JOHNSON
LEAH ELIZABETH JOSEPH
MICHAEL ADAM KAUFMAN
BRENDAN MICHAEL KELLY
COURTNEY ANNE KLEIN-FAUST
DANIELLE LYNN KUHLMAN
LINDSAY LEE LAMBERT
ANN MARY LANDIS
EMILY RAECHEL LANGDON
LARISSA NATASHA LANIGAR
JOVAN WAYNE LAUSTERER
DOUGLAS R. LEDERER
BRAD JASON LEE
ROBERT PING LUNG LI
JEFFREY SCOTT MAKOVICKA
RENEE LYNN MATHIAS
LIANE ELISE ADELE MEERKATZ
MARK ANDREW MENDENHALL
PAULETTE MERRELL
JAY WARNER MEZ
MATT EVAN MORRISSEY
THOMAS JOSEPH MORRISSEY
LESLIE KRISTIN NEUHAUS
CANDICE JO NOVAK
THOMAS JOSEPH O'BRIEN
ALISHA KRISTINE PARKS
STEVEN LEE PIER
JONATHAN VERNERS REHM
ARI DAVID RIEKES
CORY J. ROONEY
ERIC MATTHEW SAGEHORN
JOHN ANDREW SHARP
AMY ROSALEE SKALKA
MOLLY BETH SMITH

NEIL HOWARD SMITH
GEORGE WILLIAM SMITS
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CRAIG DAVID STEIN
KEVIN J. STUDER
MICHAEL CHARLES STUMO
VALERIE NICOLE TEAL
JENNIFER MARY THIEL
DANA RENE ULRICH
KAYLA MICHELLE VANCANNON
KEVIN RICHARD WARREN
NATHAN RYAN WATSON
JUDITH ANN WELLS
KELLIE NICOLE WELLS
JONATHAN PATRICK IRVIN
WENDT
SHERMAN PHILLIP WILLIS
BRYAN SCOTT WITHERWAX
ALEXANDER WYATT WRIGHT
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No. S-02-1307: **State v. Wiese**. Petition for further review reversed and remanded for further proceedings. Stephan, J.

No. S-03-262: **Lorimer v. Good Samaritan Health Sys**. Petition for further review affirmed. Per Curiam.

No. S-03-849: **24th & Dodge Ltd. Part. v. First National Bank**. Affirmed. Gerrard, J. Miller-Lerman, J., not participating.

No. S-03-940: **Hemsley v. Nava**. Affirmed. Connolly, J.

No. S-03-957: **Peterson v. Ohio Casualty Group**. Reversed and remanded for further proceedings. Miller-Lerman, J.

No. S-03-1031: **State v. Gochanour**. Affirmed. Hendry, C.J. Stephan, J., dissenting. Gerrard and Miller-Lerman, JJ., join in this dissent.

No. S-03-1219: **Pinnacle Bank v. Linsco Private Ledger**. Reversed and remanded with directions. Miller-Lerman, J. Stephan, J., not participating.

No. S-03-1230: **Dunson v. Metro Area Transit**. Affirmed. Miller-Lerman, J.

No. S-03-1249: **Lane v. Chapin**. Reversed and vacated, and cause remanded with directions. Miller-Lerman, J. Hendry, C.J., and Connolly, J., not participating.

No. S-03-1299: **Calhoun v. Calhoun**. Appeal dismissed. McCormack, J.

Nos. S-04-010, S-04-011: **In re Trust of Rosenberg**. Affirmed. McCormack, J. Wright, J., participating on briefs.

No. S-04-160: **Nesiba v. State Patrol**. Affirmed. McCormack, J. Wright, J., not participating.

No. S-04-665: **State v. Harris**. Affirmed. Gerrard, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-03-800: **Mumin v. T-Netix Telephone Co**. Summarily affirmed pursuant to rule 7A(1).

No. S-03-1303: **State v. Beeder**. Appeal dismissed. See *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999).

No. S-04-645: **State v. Aldaco**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-700: **Grooves, Inc. v. Nebraska Liquor Control Comm**. Stipulation allowed; appeal dismissed, each party to pay own costs.

No. S-04-706: **In re Interest of Rachel B. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-04-803: **Hughes v. Motor Club Underwriters**. Stipulation allowed; appeal dismissed.

No. S-04-812: **State ex rel. Counsel for Dis. v. Heavey**. Motion of relator to dismiss formal charges sustained.

No. S-04-917: **State ex rel. Counsel for Dis. v. Wintroub**. Motion of relator to dismiss formal charges at relator's costs sustained.

No. S-04-1003: **State v. Sanders**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. S-04-1018, S-04-1019: **State v. Perkins**. Motions of appellee for summary affirmance sustained; judgments affirmed. See rule 7B(2).

No. S-04-1045: **Zannini v. Ameritrade Holding Corp**. Motion of appellants to dismiss appeal sustained; appeal dismissed.

No. S-04-1055: **State v. Russell**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-04-1067: **State ex rel. Counsel for Dis. v. Meissner**. Motion of relator to dismiss this matter sustained; matter dismissed.

No. S-04-1073: **State v. Frickel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-1093: **State v. Kern**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-04-1099: **State v. Harris**. Appeal dismissed. See rule 7D(1).

No. S-04-1323: **State ex rel. Counsel for Dis. v. Sutton**. Motion of relator to dismiss without prejudice sustained.

No. S-04-1324: **State v. Vela**. Appeal dismissed for lack of a final, appealable order. See rule 7B(1).

No. S-04-1332: **State v. Mata**. Appeal dismissed. See rule 7B(1).

No. S-04-1457: **State v. Franke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7A(1); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004).

No. S-05-061: **State ex rel. Counsel for Dis. v. Coe**. Request of relator to withdraw motion for temporary suspension sustained; application withdrawn.

No. S-05-163: **State ex rel. Counsel for Dis. v. Gilroy**. Respondent suspended from the practice of law in the State of Nebraska until further order of the court.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. S-02-854: **Pioneer Chem. Co. v. City of North Platte**, 12 Neb. App. 720 (2004). Petition of appellant for further review sustained on December 15, 2004.

No. A-03-098: **Knittel v. State**. Petition of appellant for further review overruled on December 15, 2004.

No. A-03-121: **Guenther v. Praest**. Petition of appellee for further review overruled on April 20, 2005.

Nos. A-03-200 through A-03-203: **State v. Evans**. Petitions of appellant for further review overruled on April, 20, 2005.

No. S-03-262: **Lorimer v. Good Samaritan Health Sys**. Petition of appellant for further review sustained on January 12, 2005.

No. A-03-291: **Edquist v. City of Bellevue**. Petition of appellee for further review overruled on December 15, 2004.

No. A-03-326: **State v. Gilpin**. Petition of appellant for further review overruled on February 16, 2005.

No. S-03-354: **Smeal Fire Apparatus Co. v. Kreikemeier**, 13 Neb. App. 21 (2004). Petition of appellant for further review sustained on March 30, 2005.

No. A-03-378: **Stevens v. Dakota Title & Escrow Co**. Petition of appellant for further review overruled on February 9, 2005.

No. A-03-460: **Pope v. Nebraska Bd. of Parole**. Petition of appellants for further review overruled on April 13, 2005.

No. A-03-544: **State v. Bruna**, 12 Neb. App. 798 (2004). Petition of appellant for further review overruled on January 20, 2005.

No. S-03-618: **Dyer v. Neth**. Petition of appellant for further review dismissed on December 22, 2004, as having been improvidently granted.

No. A-03-631: **State v. Loy**. Petition of appellant for further review overruled on January 20, 2005.

No. A-03-733: **State v. Gonzales**. Petition of appellant for further review overruled on December 15, 2004.

No. A-03-764: **Smith v. Smith**. Petition of appellant for further review overruled on May 11, 2005.

No. S-03-800: **Mumin v. T-Netix Telephone Co.**, 13 Neb. App. 188 (2004). Petition of appellant for further review sustained on February 16, 2005.

No. A-03-804: **Maas v. Sodoro, Daly**. Petition of appellee for further review overruled on June 8, 2005.

No. A-03-915: **Rayburn v. Darrell Bruns Constr**. Petition of appellant for further review overruled on March 23, 2005.

No. A-03-922: **Whitfield v. Sanders**. Petition of appellant for further review overruled on April 27, 2005.

No. A-03-962: **Savery v. Savery**. Petition of appellant for further review overruled on June 8, 2005.

Nos. A-03-974, A-03-1460: **Arias v. Arias**. Petitions of appellant for further review overruled on January 12, 2005.

No. A-03-1014: **State v. Bringus**. Petition of appellant pro se for further review overruled on December 29, 2004.

No. A-03-1079: **Lucas v. Anderson Ford**, 13 Neb. App. 133 (2004). Petitions of appellant for further review overruled on February 9, 2005.

No. A-03-1138: **In re Interest of Marisa R**. Petition of appellant for further review overruled on January 20, 2005.

No. A-03-1185: **State v. Pickard**. Petition of appellant for further review overruled on December 22, 2004.

No. A-03-1191: **State v. Morales**. Petition of appellant for further review overruled on March 30, 2005.

No. A-03-1191: **State v. Morales**. Petition of appellant pro se for further review overruled on March 30, 2005.

No. A-03-1198: **Haythorn Land & Cattle Co. v. Kingsley Cattle Co**. Petition of appellant for further review overruled on June 8, 2005.

No. A-03-1201: **Wiese v. American Fam. Mut. Ins. Co**. Petition of appellant for further review overruled on June 8, 2005.

No. A-03-1282: **State v. Clinebell**. Petition of appellant for further review overruled on December 22, 2004.

No. A-03-1288: **State v. Gunter**. Petition of appellant for further review overruled on May 16, 2005, as untimely filed.

No. A-03-1346: **State v. Sparr**, 13 Neb. App. 144 (2004). Petition of appellant for further review overruled on January 20, 2005.

No. A-03-1363: **State v. Purdy**. Petition of appellant for further review overruled on January 12, 2005.

No. A-03-1366: **State v. Seffron**. Petition of appellant for further review overruled on May 11, 2005.

No. A-03-1387: **Schwarck v. Schwarck**. Petition of appellant for further review overruled on December 15, 2004.

No. A-03-1462: **State v. Harper**. Petition of appellant for further review overruled on December 22, 2004.

No. A-04-023: **State v. Guzman-Gomez**, 13 Neb. App. 235 (2005). Petition of appellant for further review overruled on March 23, 2005.

No. S-04-028: **In re Interest of Shelby L**. Petition of appellant for further review sustained on March 9, 2005.

No. S-04-028: **In re Interest of Shelby L**. Petition of appellees for further review sustained on March 9, 2005.

No. A-04-029: **In re Interest of Jersey S**. Petition of appellant for further review overruled on February 24, 2005.

No. A-04-048: **State v. Siebrass**. Petition of appellant for further review overruled on January 26, 2005.

No. A-04-052: **State v. Rouse**, 13 Neb. App. 90 (2004). Petition of appellee for further review overruled on January 12, 2005.

Nos. A-04-061 through A-04-063: **Rushmore Borglum Ministry v. Washington Cty. Bd. of Equal**. Petition of appellee for further review overruled on April 13, 2005.

No. A-04-083: **State v. White**. Petition of appellee for further review overruled on April 20, 2005.

No. A-04-097: **Snyder v. Auto America Fleet & Lease Outfit**. Petition of appellant for further review overruled on April 20, 2005.

No. A-04-110: **Todd Harless Electric v. Baldwin**. Court treats the petition of appellant for writ of certiorari as a petition for further review and overrules same on January 28, 2005, as untimely filed.

No. A-04-143: **State v. Cutler**. Petition of appellant for further review overruled on June 8, 2005.

No. A-04-172: **In re Interest of Virginia L. et al**. Petition of appellant for further review overruled on March 9, 2005.

No. A-04-172: **In re Interest of Virginia L. et al**. Petition of appellee Timothy W. for further review overruled on March 9, 2005.

No. A-04-186: **Hatch v. Hatch**. Petition of appellant for further review overruled on March 9, 2005.

No. A-04-199: **Darnall Ranch v. Banner Cty. Bd. of Equal**. Petition of appellant for further review overruled on May 18, 2005.

No. A-04-211: **Blodgett-McDeavitt v. University of Nebraska**. Petition of appellant for further review overruled on January 20, 2005.

No. S-04-250: **In re Interest of Devin W. et al.**, 13 Neb. App. 392 (2005). Petition of appellee State for further review sustained on May 11, 2005.

No. A-04-277: **Biberos v. George Risk Indus**. Petition of appellant for further review overruled on February 9, 2005.

No. A-04-317: **State v. McCroy**. Petition of appellant pro se for further review overruled on February 8, 2005, as filed out of time.

No. A-04-321: **Shafer v. Sunset Motors**. Petition of appellant for further review overruled on January 20, 2005.

No. A-04-347: **State v. Ziegenbein**. Petition of appellant for further review overruled on February 24, 2005.

No. A-04-370: **Hajny v. Ag Processing**. Petition of appellant for further review overruled on May 25, 2005.

No. A-04-385: **In re Interest of Elizabeth S**. Petitions of appellees for further review overruled on February 9, 2005.

Nos. A-04-397, A-04-398: **State v. Williamson**. Petitions of appellant for further review overruled on December 29, 2004.

No. A-04-451: **State v. Casas**. Petition of appellant for further review overruled on February 24, 2005.

No. A-04-470: **In re Interest of Aquisha S. et al**. Petition of appellant for further review overruled on February 8, 2005, as filed out of time.

No. A-04-479: **Davis v. Davis**. Petition of appellant for further review overruled on January 26, 2005.

No. A-04-484: **In re Interest of E.M.**, 13 Neb. App. 287 (2005). Petition of appellant for further review overruled on March 30, 2005.

No. A-04-520: **In re Guardianship & Conservatorship of KC F**. Petition of appellant for further review overruled on May 11, 2005.

No. A-04-532: **Henke v. Guerrero**, 13 Neb. App. 337 (2005). Petition of appellant for further review overruled on April 27, 2005.

No. A-04-544: **State v. Krayenhagen**. Petition of appellant for further review overruled on January 12, 2005.

No. A-04-546: **State v. Heise**. Petition of appellant for further review overruled on May 26, 2005, for lack of jurisdiction.

No. S-04-547: **State v. Rice**. Petition of appellant for further review sustained on February 9, 2005.

No. A-04-548: **State v. Lopez**. Petition of appellant for further review overruled on January 26, 2005.

No. A-04-552: **In re Interest of Andre V**. Petition of appellant for further review overruled on February 24, 2005.

No. A-04-557: **State v. Goodrum**. Petition of appellant for further review overruled on April 20, 2005.

No. A-04-575: **Milliken v. Premier Indus.**, 13 Neb. App. 330 (2005). Petition of appellee for further review overruled on April 20, 2005.

No. A-04-586: **In re Interest of Emily H. et al**. Petition of appellant for further review overruled on March 9, 2005.

No. A-04-630: **State v. Charles**, 13 Neb. App. 305 (2005). Petition of appellant for further review overruled on March 30, 2005.

No. A-04-637: **In re Interest of Danielle S**. Petition of appellant for further review overruled on April 13, 2005.

No. A-04-653: **In re Guardianship & Conservatorship of April E**. Petition of appellant for further review overruled on April 13, 2005.

No. A-04-674: **State v. Caudillo**. Petition of appellant for further review overruled on December 22, 2004.

No. A-04-680: **In re Interest of Elizabeth S**. Petition of appellants and appellee Linda M. for further review overruled on February 9, 2005.

No. A-04-688: **State v. Lawver**. Petition of appellant for further review overruled on May 25, 2005.

No. A-04-691: **State v. Smith**, 13 Neb. App. 404 (2005). Petition of appellant for further review overruled on April 27, 2005.

No. A-04-692: **State v. Schmader**. Petition of appellant for further review overruled on April 27, 2005.

No. A-04-701: **State v. Schmader**, 13 Neb. App. 321 (2005). Petition of appellant for further review overruled on April 13, 2005.

No. S-04-723: **Merrill v. Griswold's, Inc**. Petition of appellant for further review sustained on April 20, 2005.

No. A-04-727: **State v. Campos**. Petition of appellant for further review overruled on January 20, 2005.

No. A-04-733: **Lencki v. Omaha Public Schools**. Petition of appellant for further review overruled on May 25, 2005.

No. A-04-751: **State v. Cardona**. Petition of appellant for further review overruled on April 20, 2005.

No. A-04-794: **State v. Svoboda**, 13 Neb. App. 266 (2005). Petition of appellant for further review overruled on February 14, 2005, as filed out of time.

No. A-04-809: **Hall v. Thurber**. Petition of appellant for further review overruled on December 15, 2004.

No. A-04-810: **State v. Iromuanya**. Petition of appellant for further review overruled on December 15, 2004.

No. A-04-859: **In re Interest of Willie P**. Petition of appellant for further review overruled on June 8, 2005.

No. A-04-860: **State v. Rickman**. Petition of appellant for further review overruled on February 9, 2005.

No. A-04-872: **State v. Cuddeford**. Petition of appellant for further review overruled on January 20, 2005.

No. A-04-882: **State v. Swift**. Petition of appellant for further review overruled on February 9, 2005.

No. A-04-888: **State v. Mayo**. Petition of appellant for further review overruled on February 14, 2005, as filed out of time.

No. A-04-891: **State v. Welch**. Petition of appellant for further review overruled on December 15, 2004.

No. A-04-904: **Pofahl v. Clarke**. Petition of appellant for further review overruled on February 9, 2005.

No. A-04-905: **State v. Witmer**. Petition of appellant for further review overruled on February 9, 2005.

No. A-04-908: **State ex rel. Wagner v. Caswell, Bell & Hillison**. Petition of appellants for further review overruled on March 16, 2005.

No. A-04-911: **Pawlak v. Drivers Mgmt., Inc**. Petition of appellant for further review overruled on April 13, 2005.

No. A-04-925: **State v. Rickert**. Petition of appellant for further review overruled on February 16, 2005.

No. A-04-950: **State v. Onouye**. Petition of appellant for further review overruled on May 18, 2005.

No. A-04-956: **Tyler v. Schmidt**. Petition of appellant for further review overruled on April 13, 2005.

No. A-04-968: **State v. Shade**. Petition of appellant for further review overruled on April 27, 2005.

No. A-04-969: **State v. Colangelo**. Petition of appellant for further review overruled on December 22, 2004.

No. A-04-975: **State v. Jones**. Petition of appellant for further review overruled on April 1, 2005, as filed out of time.

No. A-04-977: **Moore v. Witthoff**. Petition of appellant for further review overruled on May 25, 2005.

Nos. A-04-1001, A-04-1002: **State v. McCardle**. Petition of appellant for further review overruled on June 8, 2005.

No. A-04-1004: **In re Application A-18174**. Petition of appellants for further review overruled on December 15, 2004.

No. A-04-1012: **State v. Smothers**. Petition of appellant for further review overruled on March 16, 2005.

No. A-04-1022: **State v. Stott**. Petition of appellant for further review overruled on May 11, 2005.

No. A-04-1031: **State v. Buggs**. Petition of appellant for further review overruled on April 20, 2005.

No. A-04-1033: **Pratt v. State Patrol**. Petition of appellant for further review overruled on April 27, 2005.

No. A-04-1051: **State v. McSwine**. Petition of appellant for further review overruled on February 9, 2005.

No. A-04-1058: **State v. Lamp**. Petition of appellant for further review overruled on March 23, 2005.

No. A-04-1059: **Kubik v. Ensz**. Petition of appellant for further review overruled on April 13, 2005.

No. A-04-1074: **State v. Kelly**. Petition of appellant for further review overruled on June 8, 2005.

No. A-04-1106: **State v. Robinson**. Petition of appellant for further review overruled on March 30, 2005.

No. A-04-1107: **Crofutt v. State Patrol**. Petition of appellant for further review overruled on February 24, 2005.

No. A-04-1116: **State v. Uden**. Petition of appellant for further review overruled on April 13, 2005.

No. A-04-1180: **Blair v. Richardson**. Petition of appellant for further review overruled on January 20, 2005.

No. A-04-1194: **State v. Hauck**. Petition of appellant for further review overruled on May 11, 2005.

No. A-04-1221: **Norris-Sykes v. Sykes**. Petition of appellant for further review overruled on February 23, 2005, as untimely filed.

No. A-04-1231: **State v. Dixon**. Petition of appellant for further review overruled on April 20, 2005.

No. A-04-1262: **State v. Smith**, 13 Neb. App. 477 (2005). Petition of appellant for further review overruled on June 8, 2005.

No. A-04-1309: **State v. Goings**. Petition of appellant for further review overruled on May 11, 2005.

No. A-04-1359: **Dyer v. Health & Human Servs**. Petition of appellant for further review overruled on February 16, 2005.

No. A-04-1371: **State v. Jenkins**. Petition of appellant for further review overruled on April 13, 2005.

No. A-04-1423: **State v. Herngren**. Petition of appellant for further review overruled on April 20, 2005.

No. A-05-047: **Martin v. Board of Parole**. Petition of appellant for further review overruled on June 8, 2005.

No. A-05-067: **Martinez v. Douglas County**. Petition of appellant for further review overruled on May 18, 2005.

No. S-05-098: **Frain v. Portsche**. Petition of appellant for further review sustained on April 27, 2005.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY R. BENZEL, APPELLANT.

689 N.W.2d 852

Filed December 23, 2004. No. S-02-1492.

1. **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.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **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 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. The defendant must also 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.
5. **Effectiveness of Counsel: Proof: Presumptions.** 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. In determining whether trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
6. **Effectiveness of Counsel: Proof.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
7. **Postconviction: Evidence: Witnesses.** In an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence

and questions of fact, including witness credibility and the weight to be given a witness' testimony.

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.

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

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jeffrey R. Benzel, pro se.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HENDRY, C.J., WRIGHT, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ., and INBODY and MOORE, Judges.

MILLER-LERMAN, J.

I. NATURE OF CASE

Jeffrey R. Benzel was convicted by a jury in 1984 of the first degree murder of Terry Atkinson, the attempted first degree murder of Kim Christensen, use of a firearm to commit a felony, and possession of a firearm by a felon. Although we reversed for resentencing, Benzel's convictions were otherwise affirmed on appeal to this court. *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985), *overruled on other grounds, State v. Kuehn*, 258 Neb. 558, 604 N.W.2d 420 (2000). After an evidentiary hearing, the district court for Hall County denied Benzel's motion for postconviction relief on December 4, 2002. Benzel appeals.

II. STATEMENT OF FACTS

The facts of the underlying case were described in this court's opinion in the direct appeal as follows:

> The evidence reveals the defendant admitted shooting the decedent, Terry Atkinson, with a .357 Magnum on December 12, 1983. According to Lorene Golle, the defendant's girl friend, she, the defendant, and a friend had gone to the Atkinson-Christensen house on December [12] to purchase drugs. Prior to going, Lorene informed the defendant she had already paid Kim Christensen, the decedent's girl friend, for the drugs the preceding Friday night, December 9, although

she admitted in court she actually had not. En route to the house on December 12, the defendant told Lorene, "If I don't get what we came here for, someone's going to get dropped."

When Lorene and the defendant entered the house, Lorene asked to use the bathroom and borrow a brush. Kim showed her to the bathroom and asked what had happened to Lorene, as she appeared to have been beaten around the face. Kim left the bathroom as the defendant approached, wanting to talk to Lorene. The defendant entered, shut the door, and then Kim heard "a racket" in the bathroom, with Lorene shouting and some banging against the walls.

Terry came from the living room and twice told Lorene and the defendant to leave. The defendant grabbed Lorene and started pushing her toward the front door. Before pushing Lorene out, the defendant said he wanted to talk to Kim about being paid for the drugs. After Lorene left, Kim testified the defendant turned, grabbed her, and pointed a gun at her head, which prompted Terry to go to his bedroom where he kept a shotgun. The defendant followed and tried to kick the bedroom door in. When he could not, he returned to the living room, again grabbed Kim and put the gun to her head. He then told her, "Do you want to see something go on here? Do you want to see something happen, huh?" and then, "Better yet," and pointed the gun straight out in the direction of the bedroom, and said, "If your old man comes out and does what I think he's doing, he's going to be a dead man." As the decedent returned from the bedroom, defendant shot him in the mouth, and the victim fell to the floor.

The defendant then stood 5 or 6 feet from Kim, with his legs spread and both hands on the gun straight out "like that," as she crouched by the living room sofa. She heard the gun click and saw it (the cylinder) go around. She heard three more clicks and saw the defendant "looking at the gun like this," and then he ran from the house.

The defendant claims that only after the decedent returned to the living room with the shotgun leveled at him did he pull his gun and shoot the decedent in self-defense.

State v. Benzel, 220 Neb. 466, 468-70, 370 N.W.2d 501, 506 (1985).

At trial, Benzel denied having put a gun to Christensen's head or attempting to shoot her. Benzel also testified that at the time he shot Atkinson, Benzel was standing near the front door on his way out of the house rather than sitting next to Christensen on the sofa, as Christensen had testified. On direct appeal, Benzel raised issues regarding sufficiency of the evidence, jury selection, prosecutorial misconduct, and sentencing. This court rejected most of Benzel's arguments and affirmed his convictions but vacated his sentence on the attempted murder count and remanded the cause for resentencing on that count.

Benzel filed a motion for postconviction relief on September 3, 1993. Benzel subsequently made various amendments to the motion, and a hearing was held and evidence adduced on Benzel's third amended motion on September 27 and 28, 2001, and April 2, 2002. During the postconviction hearing, leave was granted for Benzel to further amend his motion. Benzel's fourth amended motion for postconviction relief, the operative motion in this case, was filed November 18, 2002. In the motion, Benzel made various claims of ineffective assistance of counsel at trial and on direct appeal, including: failure to investigate, consult with, retain, and utilize expert testimony; failure with respect to various jury instructions; failure to challenge various evidentiary rulings; failure to challenge prosecutorial misconduct; failure to challenge the credibility of various witnesses for the prosecution; and failure to challenge errors in the sentence enhancement proceedings.

At the postconviction evidentiary hearing, Benzel presented testimony of witnesses to support his assertion that trial counsel failed to properly investigate and use expert testimony. Dr. Robert Bux, a medical examiner, testified that he had reviewed the autopsy report, autopsy photographs, and relevant portions of the testimony and evidence from the original trial. Based on this review, he opined that the bullet traveled through Atkinson's head from front to back, going slightly right to left and slightly downward. Bux also opined that at the time Benzel shot Atkinson, Benzel was standing, which was consistent with Benzel's testimony at trial, rather than sitting, as Christensen had testified. However, Bux also testified that there were various additional questions he would have wanted answered by the witnesses in order to determine what occurred and that he did not know various

factors which might have been relevant to such a determination, including the location and position of Atkinson's body, the dimensions of the room, and where bullet fragments were found. Bux conceded on cross-examination that if more information were developed, his opinion might change.

Following Bux's testimony, the State called Dr. Jerry Jones, a pathologist, as a witness. Jones testified that he also had reviewed the autopsy report and relevant evidence and testimony from the trial. Contrary to Bux's testimony, Jones opined that the evidence was consistent with Christensen's testimony and was inconsistent with Benzel's testimony. Jones also testified that the person in the best position to opine on the bullet trajectory would be the pathologist who directly observed the angles at autopsy and that an opinion formed without such observation involves speculation. Jones noted that the pathologist who performed the autopsy had died before the original trial.

Benzel presented testimony regarding the gun he had used to shoot Atkinson. Benzel testified at trial and at the postconviction hearing that he had disposed of the gun shortly after the shooting. The gun had not been recovered by the time of the postconviction hearing. In the postconviction proceeding, Benzel presented the deposition of Lucien Haag, a criminalist. Haag had reviewed various documents and materials from the trial, including depositions, testimony, police reports, photographs, and physical evidence. Haag testified regarding various examinations he would have conducted upon the gun used by Benzel if it had been recovered. He stated that such tests could have provided information relevant to the case, including information either supporting or refuting Christensen's assertion that the gun had misfired when Benzel attempted to shoot her after the gun had properly fired when Benzel shot Atkinson. Haag also noted that the examination of additional ammunition to determine if it was degraded would be helpful. Without having examined the gun, he opined that assuming the gun were fully loaded, it was very unlikely to have several misfires following a successful fire. Haag was asked, "Now, can you tell me without an examination of the gun itself, and maybe perhaps the cartridges of the gun, can an opinion be stated within a reasonable degree of certainty that a revolver misfired?" Haag replied, "No, no."

At the postconviction hearing, the State presented the testimony of Mark Bohaty, a State Patrol officer assigned to firearms examinations. Bohaty had reviewed Haag's deposition and the testimony of various trial witnesses. Bohaty opined that it was possible that Benzel's gun could have had several misfires following a single successful firing, as Christensen had testified at trial. He described a number of reasons that such an event could have occurred. At Benzel's original trial, another State Patrol firearms examiner had given similar testimony regarding how a gun might misfire after a successful fire.

Benzel also presented the postconviction testimony of a private investigator who testified regarding investigative work that was not done that he believed would have been helpful in Benzel's case. Benzel's original trial counsel and Benzel himself also testified at the postconviction hearing regarding the manner in which trial counsel conducted Benzel's defense.

The State presented testimony at the postconviction hearing in addition to the testimony of Jones and Bohaty. Bradley Brush, a Grand Island police officer who investigated the shooting in 1983, testified regarding the investigation that was undertaken at that time. Brush's investigation included the observation of scarring on the ceiling tile of the Atkinson-Christensen house and debris from the scarring which had fallen on the kitchen counter. Brush also testified that within the year preceding the postconviction hearing, he had returned to the house where the shooting had occurred to take a measurement of the ceiling height and to retrieve material from the ceiling tile. A forensic chemist testified that material found on a bullet recovered from the scene of the shooting matched material taken from the kitchen ceiling.

Following the evidentiary hearings, the parties submitted briefs to the district court. On December 4, 2002, the court entered an 85-page opinion and order rejecting Benzel's claims and denying postconviction relief. The court made various findings in rejecting Benzel's claims. These included a finding that the physical evidence did not support Benzel's description of the shooting and was consistent with Christensen's testimony. The court also noted that the gun Benzel used to shoot Atkinson had not been retrieved and that Benzel's expert at postconviction stated that it would have been important to examine the gun before being able to

opine whether the condition of the gun supported the testimony of either Benzel or Christensen. The court concluded that, even assuming that trial counsel's failure to investigate and present expert testimony was deficient performance, Benzel had not shown prejudice caused by such failure because he failed to demonstrate a reasonable probability that the result of the trial would have been different had such testimony been presented. The court rejected each of Benzel's claims relating to jury instructions because either the instructions given were correct statements of law or Benzel had not shown prejudice caused by the giving or the omission of any instruction. The court rejected each of Benzel's claims relating to evidentiary issues because either the evidentiary ruling was correct or Benzel failed to show prejudice caused by admission of the evidence. The court rejected Benzel's claims relating to prosecutorial misconduct and examination of prosecution witnesses because Benzel failed to show prejudice resulting from these events or counsel's alleged deficiencies. Finally, the court concluded that Benzel could not properly challenge his prior convictions in the sentence enhancement proceeding. Having rejected Benzel's claims, the court denied postconviction relief. Benzel appeals the denial.

III. ASSIGNMENTS OF ERROR

In a brief prepared by counsel, Benzel asserts that the district court erred in denying postconviction relief and failing to find that trial and direct appeal counsel had provided ineffective assistance in the following respects: (1) failing to "investigate, consult with, retain, and utilize expert testimony"; (2) failing to ensure that the jury was properly instructed; (3) failing to challenge certain evidentiary rulings; (4) failing to challenge prosecutorial misconduct; and (5) failing to challenge the credibility of key prosecution witnesses.

In a supplemental pro se brief, Benzel asserts that the district court erred in (1) ruling that Benzel could not challenge the constitutionality of prior convictions used in the sentence enhancement phase of the trial and failing to consider Benzel's challenges to such prior convictions, (2) failing to find that trial counsel provided ineffective assistance by failing to challenge prior convictions used in sentence enhancement, and (3) failing

to find that trial counsel provided ineffective assistance in examining witnesses.

IV. STANDARDS OF REVIEW

[1] 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. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

[3] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003).

V. ANALYSIS

1. Ineffective Assistance of Counsel

Most of Benzel's assignments of error relate to the district court's rejection of his various claims of ineffective assistance of counsel. We will therefore first set forth the standards regarding claims of ineffective assistance of counsel which are applicable to all such assignments of error and then separately analyze each of Benzel's claims.

[4] In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden 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. The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case. *McHenry, supra*. The two prongs of this test,

deficient performance and prejudice, may be addressed in either order. *Id*.

[5,6] 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. *Id*. In determining whether trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. *Id*. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *Id*.

(a) Failure to Investigate and to Utilize Expert Testimony

Benzel's first claim of ineffective assistance of counsel is that trial counsel failed to adequately investigate in order to develop and utilize expert testimony that would have been helpful to his defense. We agree with the district court's determination that Benzel has failed to establish prejudice with respect to this claim.

Benzel's main argument with respect to expert testimony is that counsel could have presented expert testimony that would have supported his version of the events surrounding his shooting of Atkinson and would have discredited Christensen's testimony regarding such events. Both Christensen and Benzel testified at trial, and although their stories were similar in certain respects, they differed in respects that were potentially relevant to whether Benzel was acting in self-defense and whether Benzel attempted to shoot Christensen. In summary, Christensen testified that Benzel was seated next to her on the living room couch when he shot Atkinson, who was standing in the bedroom door. In contrast, Benzel testified that he was heading toward the front door to leave the house when Atkinson raised his shotgun to his shoulder and that Benzel thereafter shot Atkinson. Christensen testified that after Benzel shot Atkinson, he turned the gun on her and tried to shoot her but that the gun did not fire. Benzel denied attempting to shoot Christensen.

At the postconviction hearing, Benzel presented expert testimony referred to above which, he asserted, supported his story and disproved Christensen's story. Such testimony concerned, inter alia, the trajectory of the bullet that killed Atkinson and the

functioning of the gun. Benzel asserted that trial counsel was ineffective for having failed to adequately investigate and discover such expert evidence and for having failed to present it at trial.

The district court determined that Benzel failed to show that he was prejudiced by trial counsel's purported failure to discover and present such expert testimony. After hearing the evidence, the court discounted the reliability of the expert evidence Benzel presented at the postconviction hearing. The court noted that the opinion of Benzel's expert pathologist regarding the trajectory of the bullet was based solely on a review of autopsy reports and photographs and testimony presented at the original trial and that the expert relied on his own speculation rather than the findings of the pathologist who conducted the autopsy. The court also noted that Benzel's expert testified only that the misfiring of the gun when Benzel allegedly attempted to shoot Christensen was "highly improbable." The expert conceded that the gun itself would need to be examined to better support either version of events, but Benzel had disposed of the gun after the shooting and it had never been found. The court further noted that the State presented expert testimony at the postconviction hearing regarding bullet trajectory which supported Christensen's story and contradicted Benzel's and that both at trial and at the postconviction hearing, the State presented expert testimony that various circumstances could have caused the gun to misfire as Christensen had described. The court noted the "powerful and overwhelming evidence of [Benzel's] guilt" that was presented at trial and concluded that Benzel had failed to show prejudice due to trial counsel's purported failure to develop and present expert testimony.

[7] Benzel argues, inter alia, that it was not appropriate for the district court to weigh the credibility of the expert testimony he presented in the postconviction hearing, that instead the court should have decided that such evidence should be presented to a jury in a new trial, and that the jury should have been allowed to give whatever weight it chose to the testimony. However, we have held that in an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony. *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004). Therefore, it was not

inappropriate for the district court to assess the credibility and weight of the expert testimony presented in this postconviction evidentiary hearing. Furthermore, the district court considered such testimony in the context of determining whether failure to develop such testimony and present such evidence constituted ineffective assistance of counsel. A defendant claiming ineffective counsel must demonstrate, inter alia, a reasonable probability that but for counsel's deficient performance the result of the proceeding would have been different. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). The district court in this case examined the expert testimony presented by Benzel in the postconviction evidentiary hearing and appropriately determined that the expert testimony was not of a nature that would have caused a different result. We find no error in the district court's determination that Benzel failed to establish prejudice resulting from trial counsel's failure to develop and present such evidence, and we therefore reject this claim of ineffective assistance of counsel.

(b) Failure to Ensure That Jury
Was Properly Instructed

Benzel asserts that the district court erred in rejecting his claims that trial counsel was ineffective for failing to properly challenge certain jury instructions and for failing to ensure that other instructions were given. Specifically, Benzel asserts that the trial court gave erroneous jury instructions regarding self-defense, malice, and flight, as well as an erroneous step instruction. He also asserts that the trial court failed to charge the jury regarding criminal intent. We conclude that the district court in this postconviction action did not err in rejecting Benzel's claims of ineffective counsel because either the instructions given were correct statements of law or the giving or failure to give the instructions at issue did not prejudice Benzel's defense.

(i) Self-Defense Instruction

Benzel argued that the self-defense instruction given at trial was erroneous because it did not instruct on when the duty to retreat attaches and because it did not define the phrase "deadly force." The district court in this postconviction action noted that the self-defense instruction given at trial mirrored the language of NJI Crim. 14.33 in effect at the time of the trial. The court concluded

that the instruction correctly stated the law with respect to the duty to retreat. The court further determined that the omission of a definition of "deadly force" was not prejudicial to Benzel because the jury obviously did not believe Benzel's story about self-defense.

(ii) Malice Instruction

Benzel argued that instruction No. 7 defining "malice" was erroneous because it used a definition no longer used by Nebraska courts. He also argued that the trial court erred in failing to include malice as an element of second degree murder. The district court in this postconviction action concluded that although the definition of "malice" given by the trial court was no longer included in the current pattern jury instruction, the previous version of the instruction had not been held to be incorrect and that the definition given at trial was a correct statement of law. The court also noted that because Benzel was convicted of first degree murder, it could be assumed the jury followed the step instruction and did not consider the charge of second degree murder, and that therefore, any misstatement regarding the second degree murder instruction was not prejudicial to Benzel. The court similarly rejected Benzel's claims regarding error in the manslaughter instruction because it could be assumed that the jury did not consider the charge of manslaughter.

(iii) Flight Instruction

Benzel argued that the trial court improperly instructed the jury on flight because the instruction improperly shifted the burden to Benzel to explain his reasons for departure. The postconviction court rejected Benzel's claim because the instruction given at trial was a correct statement of law.

(iv) Step Instruction

Benzel argued that the trial court erred in giving a step instruction on first degree murder, second degree murder, and manslaughter because the jury should have been allowed to consider the lesser offenses before rejecting the charge of first degree murder. The postconviction court concluded that the step instruction as given was not erroneous and cited recent cases including *State v. Myers*, 258 Neb. 300, 315, 603 N.W.2d 378, 390 (1999), in which we stated, "Step instructions which require consideration

of the most serious crime charged before consideration of lesser-included offenses are not erroneous."

(v) Criminal Intent Instruction

Benzel asserts that the trial court erred in failing to give NJI Crim. 14.11 or a similar instruction on criminal intent. The post-conviction court determined that the failure to instruct on criminal intent was not prejudicial to Benzel, because Benzel's defense was that his shooting of Atkinson was intentional but justified as self-defense and Benzel had not asserted at trial or on appeal that the shooting was not intentional.

(vi) Resolution

We have examined each of Benzel's arguments related to jury instructions and determine that the district court did not err in ruling that Benzel has failed to establish his claims of ineffective assistance of counsel with respect to these jury instruction issues. Defense counsel is not ineffective for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). In this regard, we note that we have stated that a defendant convicted of first degree murder could not have been prejudiced by error in the instructions on second degree murder and manslaughter because under a step instruction, the jury would not have reached the issues of second degree murder and manslaughter. *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002). We agree with the district court's determinations that certain of the jury instructions questioned by Benzel correctly stated the law and were not misleading and that therefore trial counsel was not ineffective for failing to object to such instructions. We also agree that Benzel has not established that he was prejudiced by the giving or failure to give any of the questioned jury instructions. The district court therefore did not err in rejecting these claims of ineffective assistance of counsel.

(c) Failure to Challenge Evidentiary Rulings

Benzel asserts that the district court erred in rejecting his claims that trial counsel provided ineffective assistance by failing to properly challenge various evidentiary rulings. Such evidentiary rulings related to the testimony of (1) Francis Fastenau, a neighbor of

Atkinson and Christensen; (2) Benzel's girl friend, Lorene Golle, regarding her broken ribs; (3) police Capt. Gene Watson, regarding statements made by Benzel's friend, Joe McCarthy; and (4) State Patrol Investigator Chris Blubaugh, regarding Golle's veracity as an informant.

(i) Francis Fastenau

After Benzel left the Atkinson-Christensen house, Christensen ran to Fastenau's house. At Fastenau's house, Christensen placed a 911 emergency dispatch call. Fastenau was called to testify and was asked to recount what Christensen had said on the 911 call. Fastenau testified that Christensen told the 911 operator that Benzel had put a gun to her head and had attempted to shoot her. Benzel claimed during postconviction proceedings that a tape recording of the 911 call revealed that Christensen did not say this.

Benzel argued that counsel was ineffective for failing to assign error on appeal to the trial court's overruling of Benzel's hearsay objection to Fastenau's testimony. He also argued that counsel should have objected on a "best evidence" basis because the 911 tape was the best evidence of what Christensen said to the 911 operator. The postconviction court concluded that Fastenau's testimony was admissible because Christensen's statement to Fastenau was an excited utterance. Although it concluded that the trial court had erred by giving an erroneous limiting instruction to the jury in which it stated that the testimony could be used only for the purpose of supporting Christensen's testimony, the postconviction court found no prejudice to Benzel from the erroneous limiting instruction because it benefited Benzel, presumably because the jury was instructed to not consider Fastenau's testimony as substantive proof that Benzel had done what Christensen said he had done. The postconviction court also concluded that the best evidence rule was inapplicable to Fastenau's testimony because the State was not attempting to prove the contents of the 911 tape but instead was attempting to prove what Christensen had said to Fastenau.

(ii) Lorene Golle

Benzel argued that trial counsel was ineffective for failing to object to certain testimony given by Benzel's girl friend, Golle. At one point during her testimony, Golle was asked a question

about Benzel's consumption of alcohol on the night of the shooting. After responding to the question, Golle added, "My ribs were broke so I wanted to drink." Benzel argued that trial counsel should have objected to this testimony as prior bad act evidence because it characterized Benzel as a violent person. See Neb. Rev. Stat. § 27-404(2) (Reissue 1995). The postconviction court determined that Benzel failed to show how this testimony was prejudicial to him. We agree that the testimony was not prejudicial to Benzel and further that such testimony was not "prior bad act evidence" because, although Golle said that her ribs were broken, she did not state that Benzel had broken her ribs.

(iii) Capt. Gene Watson

Benzel claimed trial counsel was ineffective for failing to object to certain testimony by a police officer regarding statements made by a friend of Benzel's, McCarthy, who was with Benzel and Golle when they went to the Atkinson-Christensen house. McCarthy waited in the car when Benzel and Golle went into the house. Watson, of the Grand Island Police Department, testified at trial that he talked to McCarthy a few hours after the shooting and that when he asked McCarthy whose idea it was to go to the house, McCarthy said that it was Benzel's idea. McCarthy testified at trial that he had no recollection regarding whose idea it was to go to the house. Benzel argued that a limiting instruction should have been given in connection with Watson's testimony and that the jury should have been instructed to use such testimony only to impeach McCarthy. He also argued that in its closing argument, the prosecution urged the jury to use Watson's testimony as substantive evidence that it was Benzel's idea to go to the house. In analyzing Benzel's assignment of error relative to the admission of Watson's testimony, we are aware that ordinarily, the erroneous admission of evidence in a criminal case is considered prejudicial unless the State proves the error was harmless. See *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003). Further, as we read the district court's order, it appears that the postconviction court was aware of this principle as it considered Benzel's assignment of error relative to the admission of evidence as it pertained to the adequacy of counsel. The postconviction court concluded that although the admission of Watson's

testimony may have been erroneous, Benzel failed to show prejudice because the evidence against Benzel was so compelling that a conviction would have resulted even without the testimony.

(iv) State Patrol Investigator Chris Blubaugh

Benzel claimed that direct appeal counsel provided ineffective assistance by failing to appeal the trial court's sustaining the State's objection to certain testimony Benzel wished to elicit from Blubaugh, a State Patrol investigator. Blubaugh testified that Golle had contacted him after being jailed in connection with the Atkinson shooting incident and that she sought to gain release from jail in exchange for providing information. He testified that he had known Golle for a few years prior to the shooting and that contacts during that time involved Golle's exchanging information for help with her legal problems. On cross-examination, defense counsel attempted to ask Blubaugh whether Golle made a "habit" of contacting the authorities to try to help her get out of trouble. The trial court upheld the State's objection. The postconviction court concluded that Benzel failed to show prejudice because he failed to establish what Blubaugh would have testified and how such testimony would have helped his defense.

(v) Resolution

We agree with the district court's determination that with respect to each of these issues, Benzel failed to show prejudice from counsel's alleged deficient performance and that with respect to Golle's testimony regarding her broken ribs, such testimony was not "prior bad act evidence." We therefore conclude that the district court did not err in rejecting these claims of ineffective assistance of trial and appellate counsel.

(d) Failure to Challenge Prosecutorial Misconduct

Benzel asserts that the district court erred in rejecting his claims that counsel provided ineffective assistance by failing to effectively challenge various instances of prosecutorial misconduct. The alleged prosecutorial misconduct included (1) making inappropriate statements during closing argument, (2) eliciting McCarthy's testimony for the sole purpose of later discrediting it, and (3) making inappropriate remarks during its opening statement.

(i) Closing Argument

Benzel asserted that in closing argument, the prosecutor made various expressions of personal opinion. He argues that such statements included an inappropriate "expert" opinion to the effect that Atkinson's teeth deflected the bullet and changed its path. The postconviction court concluded that Benzel failed to show prejudice because the prosecutor's closing argument did not unduly mislead or influence the jury. The court noted that the prosecutor prefaced his remarks by stating that such remarks were not evidence and need not be accepted by the jury if they were not supported by the evidence.

(ii) Joe McCarthy's Testimony

At trial, the prosecution elicited testimony from McCarthy to the effect that it was Golle's idea to go to the Atkinson-Christensen house. Benzel asserted that the prosecution's sole purpose in eliciting this testimony was to later impeach McCarthy with Watson's testimony that McCarthy told Watson that it was Benzel's idea to go to the Atkinson-Christensen house. Benzel argued that this sequence amounted to prosecutorial misconduct. Similar to its determination with respect to counsel's purported failure to challenge the evidentiary ruling on Watson's testimony, the postconviction court determined that Benzel failed to show prejudice because the evidence against Benzel was so compelling that conviction would have resulted even without the testimony that it was Benzel's idea to go to the house.

(iii) Opening Statement

In its opening statement, the State said that "there are some witnesses that will be presented that have had an opportunity to talk to . . . Benzel. Close, personal friends of him [sic] have talked to him since the incident and so forth." Benzel argued that this statement was an inappropriate remark suggesting that McCarthy and Golle had contrived with Benzel in preparing his defense. Benzel also asserted that the prosecution made statements to the effect that Benzel had been to the Atkinson-Christensen house before the night of the shooting but that such statements were contrary to the evidence. At the close of the State's evidence, defense counsel moved for mistrial based on the prosecutor's opening statement. The motion was overruled, and the issue was

not raised on appeal. Benzel argued that appellate counsel was ineffective for failing to raise the issue on appeal. The postconviction court concluded that Benzel failed to show prejudice in light of the fact that prior to opening statements, the court had instructed the jury that comments made in opening statements were not to be considered as evidence.

(iv) Resolution

We agree with the district court's rulings with respect to each of these issues, including the ruling that Benzel failed to establish prejudice from counsel's alleged deficient performance. We therefore conclude that the district court did not err in rejecting these claims of ineffective assistance of trial and appellate counsel.

(e) Failure to Challenge Credibility of Key Witnesses

Benzel asserts that the district court erred in rejecting his claims that trial counsel provided ineffective assistance by failing to properly challenge the testimony of key prosecution witnesses including Christensen, Golle, and McCarthy. Benzel asserts, inter alia, (1) that the audiotape of Christensen's 911 call should have been used to confront Christensen with the fact that during the call she did not make the statements that Fastenau claimed to have heard, (2) that Christensen should have been asked questions about Atkinson's behavior before the shooting which Benzel asserts would have shown that Atkinson was the aggressor, and (3) that other evidence could have been used to discredit certain testimony by Golle and by McCarthy. The district court in this postconviction action generally determined that counsel made reasonable tactical and strategic decisions to not pursue the lines of questioning suggested by Benzel and noted that such questioning may have led to information adverse to Benzel.

In determining whether trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. See *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *Id*. The district court did not err in its determination that trial counsel made reasonable strategic decisions to not pursue the lines of questioning suggested by Benzel in this

postconviction proceeding. We therefore conclude that the district court did not err in rejecting these claims of ineffective assistance of counsel.

2. Use of Prior Conviction to Enhance Sentence

Benzel asserts various challenges to a prior conviction which was used to enhance his sentence in the present case and argues that trial counsel did not effectively challenge use of the prior conviction in the sentence enhancement proceeding. The district court noted that because the record established that Benzel was represented by counsel at the time of the prior conviction, the conviction was not subject to challenge in the sentence enhancement proceeding. The court further noted that trial counsel had attempted unsuccessfully to challenge use of the prior conviction at the enhancement proceeding and had unsuccessfully raised the issue in the direct appeal.

[8] 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. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004). Issues regarding the use of prior convictions were previously litigated and decided in favor of the State in Benzel's direct appeal wherein we stated that any objections to the validity of prior convictions, other than effective assistance of counsel or waiver thereof, should have been raised in the direct appeal of such prior convictions. See *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985), *overruled on other grounds, State v. Kuehn*, 258 Neb. 558, 604 N.W.2d 420 (2000).

In the present appeal, Benzel makes various arguments regarding the validity of a prior conviction, including an argument regarding the constitutionality of the statute which formed the basis of his prior conviction. To the extent that Benzel's arguments in this proceeding are the same as those he presented in his direct appeal, the present postconviction action cannot be used to secure an additional review of the same issues. See *Perry, supra*. To the extent Benzel's arguments raise new issues regarding the validity of his prior conviction, our statement in the direct appeal, that objections to the validity of prior convictions are to be raised in the direct appeal of such prior convictions, applies equally to such new arguments. See *Benzel, supra*. Therefore Benzel could

not properly have used such arguments to challenge his prior conviction in the sentence enhancement proceeding and because such challenges would have been inappropriate, counsel was not ineffective for any failure to raise such challenges. The district court in this postconviction action did not err in rejecting Benzel's claims regarding use of the prior conviction to enhance his sentence and counsel's purported failure to challenge such use.

VI. CONCLUSION

The district court did not err in rejecting Benzel's postconviction claims of ineffective assistance of counsel and his claims relating to the validity of a prior conviction used to enhance his sentence. We therefore affirm the district court's order denying Benzel's motion for postconviction relief.

AFFIRMED.

CONNOLLY and STEPHAN, JJ., not participating.

JEFF SWOBODA, APPELLEE, V. VOLKMAN PLUMBING AND EMCASCO INSURANCE COMPANY, APPELLANTS.

690 N.W.2d 166

Filed December 23, 2004. No. S-04-593.

1. **Workers' Compensation: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation.** A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court.
5. **Workers' Compensation: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Reissue 2004), is not synonymous with wages, but includes

eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.

6. ____: ____. For purposes of workers' compensation, repetitive trauma injuries are tested under the statutory definition of accident, as opposed to occupational disease.
7. **Workers' Compensation: Proof.** Three elements must be demonstrated in order to prove that a workers' compensation injury is the result of an accident: (1) The injury must be unexpected or unforeseen, (2) the accident must happen suddenly and violently, and (3) the accident must produce at the time objective symptoms of injury.
8. **Workers' Compensation: Words and Phrases.** For purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force, but, rather, the element is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment.
9. **Workers' Compensation: Time: Proof: Words and Phrases.** For purposes of the Nebraska Workers' Compensation Act, the time of an accident is sufficiently definite if either the cause is reasonably limited in time or the result materializes at an identifiable point.
10. **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 Workers' Compensation Court. Affirmed as modified.

Jenny L. Panko and Brenda S. Spilker, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellants.

Edward F. Pohren, of Dwyer, Smith, Grimm, Gardner, Lazer, Pohren, Rogers & Forrest, L.L.P., for appellee.

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

STEPHAN, J.

Jeff Swoboda sought workers' compensation benefits for injuries allegedly arising out of and in the course of his employment with Volkman Plumbing. Swoboda sought benefits for injuries to his head and neck resulting from an accident on April 21, 2000, and for injuries to both shoulders allegedly resulting from repetitive trauma. The trial judge found that the head and neck injuries were compensable, but concluded that Swoboda had failed to prove a work-related accident and resulting injuries to his

shoulders. A review panel of the compensation court reversed in part, and remanded for further proceedings. Volkman Plumbing and its insurance carrier, EMCASCO Insurance Company (collectively Volkman), 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).

FACTS

Swoboda began working at Volkman Plumbing in Norfolk, Nebraska, in 1990. He was initially employed as a plumber's helper but soon became a foreman. His duties included overhead ceiling work, which involved heavy lifting. He regularly performed such overhead activities for at least 3 or 4 hours a day, and sometimes for an entire shift.

On April 21, 2000, Swoboda sustained an injury to his head and neck when he struck his head on a sprinkler head while climbing a ladder. Swoboda sought medical treatment for the injury and was off work from May 1 until September 9, 2000. He initially returned to work without restrictions. However, Swoboda continued to experience chronic headaches and pain, and in March 2002, specifically due to the neck injury, his physician imposed physical restrictions of "no overhead work or prolonged cervical flexion." In April, his physician opined that there was no ongoing treatment that would significantly improve Swoboda's symptoms and concluded that he had a 5-percent permanent partial impairment of the body as a whole. A second physician had earlier made the same assessment, noting that Swoboda suffered "persistent myofascial symptoms and functional deficit." The trial court concluded that as a result of this injury, Swoboda had sustained a 45-percent loss in earning capacity.

Swoboda also claimed compensation for work-related injuries to both shoulders. Swoboda went on a fishing trip to Canada over the Labor Day weekend of 2001. He is right handed, and holds a fishing pole in his right hand while reeling with his left. Swoboda slept in a tent while on the fishing trip. One morning when he awoke, he experienced extreme pain and was unable to move his left arm. When he returned to Nebraska, he made an appointment with Dr. Gregory Nunez for September 6, 2001. Prior to the fishing

trip, Swoboda had experienced aching in his right shoulder and "a little" pain in his left shoulder. In his words, he had had "problems with both shoulders for [years]" and his left shoulder had "hurt for a [year] or two."

After examining Swoboda, Nunez ordered an MRI and referred him to Dr. Terry Schwab, an orthopedic surgeon, who began treating him on September 20, 2001. A report of an MRI performed on the left shoulder on September 12, 2001, indicated a "full thickness tear" in the supraspinatus tendon adjacent to an area of calcification. After his first examination of Swoboda, Schwab noted his disagreement with this diagnosis. Schwab's initial diagnosis was "[p]artial rotator cuff tear/tend[o]nitis left shoulder with calcific tend[o]nitis." During his second office visit, Swoboda told Schwab that he was surprised that his left shoulder was injured because his right shoulder "had been the one that had bothered me." Schwab thereafter began treating Swoboda's right shoulder as well.

On October 10, 2001, Dr. Dean Wampler reviewed Swoboda's medical records and opined:

> Overhead work duties are the most likely cause for . . . Swoboda's underlying shoulder problem. [O]nce advanced degenerative disease and tendon thinning are present, relatively minimal activities can result in tendon tear. I believe . . . Swoboda's supraspinatus tear occurred during his fishing trip from a change in activities or different shoulder stress of sleeping on the ground.

(Emphasis in original.)

Due to his shoulder injuries, Swoboda was off work from September 21 through October 7, 2001. He returned to work briefly, but then experienced additional problems with his left shoulder on November 9, and did not return to work thereafter. On November 20, Schwab performed an arthroscopy of Swoboda's left shoulder with subacromial decompression. His postoperative diagnosis was "[c]alcific tendon, rotator cuff tendonitis, left shoulder." The rotator cuff was observed during surgery and, contrary to the initial diagnosis, "showed no tears throughout its entirety." On December 5, 2001, Schwab performed an arthroscopy of Swoboda's right shoulder with subacromial decompression. His postoperative diagnosis was "[c]alcific rotator cuff tendonitis

of the right shoulder," and no tears were noted. Schwab opined that Swoboda's bilateral shoulder problems were caused by the overhead work he did in the course of his employment.

Following trial, a single judge of the compensation court found that as a result of the April 21, 2000, accident, Swoboda was temporarily totally disabled from May 1 through September 9, 2000, and "thereafter sustained a 45 percent loss in earning capacity," entitling him to workers' compensation benefits. With respect to the alleged shoulder injuries, the court determined that there was a conflict in the opinions of Schwab and Wampler regarding causation. It further found that Swoboda had failed to prove that the injuries to his shoulders occurred "suddenly and violently" because there was no particular incident at work that had caused him pain. The court concluded that Volkman was entitled to a credit for benefits it voluntarily paid to Swoboda for his right shoulder injury against amounts it owed Swoboda for the April 2000 injuries to his head and neck.

Swoboda timely appealed to a three-judge review panel of the compensation court, and Volkman cross-appealed. The review panel interpreted the trial court's order as citing two grounds as a basis for its conclusion that Swoboda failed to show compensable injuries to his shoulders: (1) that there was a conflict in the medical evidence as to causation and (2) that the injuries did not occur suddenly and violently because they did not manifest at work. The review panel concluded that the opinions of Schwab and Wampler were not in conflict because the rotator cuff tear referred to by Wampler was subsequently proved by Schwab's surgery not to exist, leaving both physicians in agreement that the shoulder problems were caused by Swoboda's work activities. The panel thus determined that the trial judge's finding with respect to conflicting evidence on medical causation was clearly erroneous and should be reversed and the cause remanded

> for the trier of fact to determine whether the reversal by the panel of this factual finding serves, in and of itself, to sway the fact finder's ultimate conclusion on medical causation. In other words, it remains for the fact finder to weigh and assess the evidence on causation.

With respect to the requirement that a compensable accident involving repetitive trauma occurs "suddenly and violently," the

review panel determined, contrary to the findings of the single judge, that "the record clearly establishes that [Swoboda] satisfied this element relative to both upper extremities." The review panel held that Swoboda was not required "to identify a specific event or activity that occurred at work that caused him to stop working." The panel determined that the "record does not support a finding that Swoboda's injury did not occur at an identifiable point in time" and that the "evidence is also uncontroverted that [Swoboda] sought medical treatment and missed work."

The review panel also concluded that the Workers' Compensation Court lacked jurisdiction to award a credit against liability on a compensable claim for payments made on a noncompensable claim. Finally, it concluded that there was sufficient evidence to support the trial court's finding that Swoboda suffered a 45-percent loss of earning capacity as a result of the April 2000 injury.

ASSIGNMENTS OF ERROR

Volkman assigns, restated, that (1) Swoboda failed to meet the requirements of a repetitive trauma accident with regard to his left and right shoulder conditions, (2) the review panel erred in reversing the trial court's decision regarding Swoboda's left and right shoulder injuries on the basis that there was not a dispute as to medical causation, (3) it was entitled to a credit against amounts owed for the April 2000 injury for indemnity and medical payments voluntarily made on the noncompensable shoulder injuries, and (4) the trial court erred in awarding Swoboda a 45-percent loss of earning power for the injuries sustained in the April 2000 accident.

STANDARD OF REVIEW

[1] Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004).

[2,3] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong. *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003); *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004); *Veatch v. American Tool, supra*.

ANALYSIS

Head and Neck Injuries

[4,5] Volkman does not contest the compensability of the head and neck injuries which Swoboda sustained in the accident in April 2000, but contends that the compensation court erred in determining that Swoboda sustained a 45-percent loss of earning capacity as a result of such injuries. A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002); *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001). Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Reissue 2004), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted. *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003); *Frauendorfer v. Lindsay Mfg. Co., supra*.

Volkman argues that Swoboda continued to work as a plumber after the 2000 accident and was able to perform his duties until after the 2001 shoulder injuries. The record reflects that Swoboda returned to work without restrictions after the 2000 accident. However, there is also evidence in the record that Swoboda continued to suffer pain while performing his work duties after the 2000 accident. In addition, his physician eventually restricted

Swoboda's ability to do overhead work as a result of his head and neck injuries. Two physicians also essentially opined that no further treatment could alleviate his symptoms. Because Swoboda's work as a plumber involved substantial overhead activities and there is evidence that he was not qualified to perform many other work functions, we conclude that there is competent evidence in the record to support the trial court's finding of a 45-percent loss of earning capacity.

Bilateral Shoulder Injuries

After noting what he perceived as a conflict in the medical evidence on the issue of whether the degenerative condition of Swoboda's shoulders was caused by the heavy overhead work required by his employment with Volkman Plumbing, the trial judge stated:

> The Court has reviewed in detail the medical evidence concerning causation, and the Court finds by a preponderance of the evidence that [Swoboda] has failed to prove that he sustained an accident and injury as defined by § 48-151(2) to his left and right shoulders and arms that arose out of and in the course and scope of his employment on September 6, 2001. *Specifically, the Court finds that* [*Swoboda*] *failed to prove an accident that happened "suddenly and violently producing at the time objective symptoms."*

(Emphasis supplied.) The review panel noted that the conflict in medical evidence served "as at least one basis for [the trial judge's] rejecting [Swoboda's] claim" and concluded that the finding by the trial judge was clearly erroneous because "the opinions of both Dr. Wampler and Dr. Schwab are uniform as to the cause of [Swoboda's] shoulder injuries." In assigning error to this determination, Volkman does not contend that the medical opinions were in conflict, but, rather, argues that this issue was not a basis for the trial court's determination that the injuries were not compensable. Volkman contends that the trial court's determination was based solely upon its finding that Swoboda failed to show he met the suddenly and violently element of a repetitive trauma claim.

While we agree with the review panel that the medical causation evidence is not in conflict, we also agree with Volkman

that the conflict perceived by the trial judge was not the basis for denial of Swoboda's claim. As we read the award, compensation was denied because the trial judge specifically found that Swoboda did not prove an accident which happened suddenly and violently and produced objective symptoms. We therefore accept Volkman's argument that this is the sole dispositive issue as to whether Swoboda is entitled to workers' compensation for his shoulder injuries.

[6,7] For purposes of workers' compensation, repetitive trauma injuries are tested under the statutory definition of accident, as opposed to occupational disease. See *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003) (citing cases). The Nebraska Workers' Compensation Act defines an accident as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Neb. Rev. Stat. § 48-151(2) (Cum. Supp. 2002). Three elements must be demonstrated in order to prove that a workers' compensation injury is the result of an accident: (1) The injury must be unexpected or unforeseen, (2) the accident must happen suddenly and violently, and (3) the accident must produce at the time objective symptoms of injury. *Dawes v. Wittrock Sandblasting & Painting, supra*. Only the second of these elements is at issue in this case.

[8,9] In considering the "suddenly and violently" element of accidental injury in the context of repetitive trauma injuries, we have recognized that given the nature of the human body, not all injuries are caused instantaneously and with force, but may nevertheless be sudden and violent, even though they have been building up for a considerable period of time and do not manifest themselves until they cause the employee to be unable to continue his or her employment. *Dawes v. Wittrock Sandblasting & Painting, supra*; *Sandel v. Packaging Co. of* America, 211 Neb. 149, 317 N.W.2d 910 (1982). Thus, for purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force, but, rather, the element is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment. *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999); *Frank v. A & L Insulation*, 256 Neb. 898,

594 N.W.2d 586 (1999). The time of an accident is sufficiently definite " 'if *either* the cause is reasonably limited in time *or* the result materializes at an identifiable point.' " (Emphasis omitted.) *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. at 556, 667 N.W.2d at 193; *Sandel v. Packaging Co. of America, supra*.

This disjunctive test is consistent with general principles of workers' compensation. In his treatise, Professor Larson explains the concept of "time-definiteness" with respect to an accidental injury as "applying to either the cause or the result." 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 50.01 at 50.02 (2000). Professor Larson states that the necessary "suddenness" of the accident may be found either in a sudden cause, such as a relatively brief exposure to toxic fumes, or in a sudden result, such as a sudden collapse on a particular day after repeated exposure to a work trauma. *Id.* Understood in this light, our test allows the requisite suddenness to be found if either the cause of an accident is sudden, i.e., occurring within a reasonably limited time, or if the effect or result of the accident is sudden, i.e., occurring at an identifiable point in time. Volkman argues on appeal that Swoboda failed to meet either of these tests and thus did not prove an accident occurring suddenly and violently.

Volkman reads *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), to require that the identifiable point in time at which the result of an accident materializes must occur during working hours in order for there to be a compensable accidental injury. It argues that as to Swoboda's left shoulder injury, "[t]here was never any work event requiring him to miss work and seek treatment. Rather, he suffered the disabling left shoulder symptoms during the fishing trip . . . ." Brief for appellants at 20. With respect to Swoboda's right shoulder, Volkman argues that there was never a point where his injury manifested at work and prevented him from doing work activities.

This argument reads too much into *Dawes*. In that opinion, we simply stated that "Dawes seriously injured his back in October 1999 and stopped work to seek medical treatment." *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. at 531, 667 N.W.2d at 177. *Dawes* does not hold that the identifiable point in time at which the injurious result of repetitive trauma materializes must fall within the employee's working hours in

order to be compensable, and we decline to impose such a requirement here. There is no logical reason to condition compensability upon the worker being "on the clock" at the identifiable point in time when an injury resulting from work-related trauma materializes. Thus, the fact that Swoboda's shoulder injury materialized at a point in time when he was engaged in recreational activities unrelated to his work does not in and of itself defeat his claim for compensation. The record reflects that Swoboda sought medical treatment for his left shoulder as soon as he returned from the fishing trip.

Volkman also argues that because Swoboda did not stop work and seek medical treatment for his right shoulder, the injury was not compensable. In *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999), an employee undergoing a functional capacity evaluation for an unrelated injury mentioned to his physician that he was experiencing problems with his right shoulder. We found this sufficient to meet the requirement that an employee seek medical treatment for the condition for which he seeks compensation. Thus, although Swoboda did not initially make an appointment with his doctor in connection with his right shoulder injury, the record reflects that he sought medical treatment for that injury as well as the injury to his left shoulder. Within a short time thereafter, he discontinued his employment.

For these reasons, we agree with the review panel that the record conclusively establishes that Swoboda's bilateral shoulder injuries, which were the result of repetitive work-related trauma, materialized at an identifiable point after which he sought medical treatment and discontinued his employment. Because this satisfies the disjunctive test for whether accidental injury occurs suddenly and violently, we need not consider whether the cause of such injuries is reasonably limited in time. See *Dawes v. Wittrock Sandblasting & Painting, supra.*

CREDIT

[10] Volkman assigns error to the determination by the review panel that the trial judge lacked jurisdiction to award Volkman a credit against its liability on the compensable head and neck injury claim for amounts which it voluntarily paid on the right shoulder injury claim before the trial judge determined that such

claim was not compensable. 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. *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002); *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 628 N.W.2d 677 (2001). Because we determine that all of Swoboda's injuries were compensable, the issue of whether the trial court had jurisdiction to order the credit is moot, and we therefore do not address it.

CONCLUSION

The review panel did not err in affirming the trial judge's finding that Swoboda sustained a 45-percent loss of earning capacity as a result of the April 21, 2000, accident in which he sustained injuries to his head and neck. The review panel correctly determined that the trial judge erred in finding that Swoboda failed to prove that his shoulder injuries were caused by an accident occurring suddenly and violently within the meaning of the Nebraska Workers' Compensation Act. Because we conclude that resolution of the latter issue establishes that the bilateral shoulder injuries are compensable, we modify the judgment of the review panel by directing that upon remand to the trial judge, the only issues remaining for resolution are those pertaining to the workers' compensation benefits which Swoboda is to be awarded for the shoulder injuries.

AFFIRMED AS MODIFIED.

24TH & DODGE LIMITED PARTNERSHIP, APPELLANT, V. ACCEPTANCE INSURANCE COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.

690 N.W.2d 769

Filed January 7, 2005. No. S-02-447.

1. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot

assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.

2. ____: ____. In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.
3. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of the inferior court.
4. **Real Estate: Mortgages: Liens: Security Interests: Title.** Pursuant to Neb. Rev. Stat. § 76-276 (Reissue 2003), a mortgagee's status is that of a lienholder. Under this theory, the mortgagee is regarded as owning a security interest in real estate only and the mortgagor retains both the legal title and right of possession.
5. **Real Estate: Mortgages: Security Interests: Title.** Pursuant to Neb. Rev. Stat. § 76-276 (Reissue 2003), although title and possession remain in the mortgagor, mortgagees may create a security interest in rents arising from real estate.
6. **Contracts: Security Interests.** Pursuant to Neb. Rev. Stat. § 52-1705 (Reissue 2004), a security interest in rents may be enforced by the recovery of rents as part of the enforcement of an assignment of rents instrument.
7. **Mortgages: Foreclosure.** A mortgagee in possession before foreclosure must not only account for rents and profits received, but also for rents which the mortgagee could have received with reasonable diligence.
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. **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.
10. **Actions: Equity: Foreclosure: Trusts: Deeds: Sales.** A party may bring an action in equity to set aside a foreclosure sale conducted under a power of sale in a trust deed.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

James D. Sherrets and Theodore R. Boecker, Jr., of Sherrets & Boecker, L.L.C., for appellant.

Patrick B. Griffin, of Kutak Rock, L.L.P., for appellees Acceptance Insurance Company and Acceptance Insurance Companies.

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

McCormack, J.

NATURE OF CASE

The appellant, 24th & Dodge Limited Partnership (24th & Dodge), brought an action for wrongful declaration of default and wrongful foreclosure by the appellees, Acceptance Insurance Company, a Nebraska corporation (Nebraska Acceptance); Acceptance Insurance Companies, a Delaware corporation doing business in Nebraska (Delaware Acceptance); and John J. Jolley, Jr., trustee. The appellees demurred to 24th & Dodge's third amended petition (petition). The demurrer was sustained, and after 24th & Dodge elected to stand on its petition, the district court for Douglas County dismissed the petition with prejudice.

BACKGROUND

In November 1995, Delaware Acceptance loaned 24th & Dodge approximately $9,747,548.33. The loan was secured by a deed of trust encumbering real property commonly known as the 24th & Dodge building, which is located in Omaha, Nebraska, and by an assignment of rents from that property. In September 1996, the aforementioned loan was refinanced and Nebraska Acceptance acquired an interest in the property pursuant to an amendment to the deed of trust.

On an unidentified date, Nebraska Acceptance declared 24th & Dodge in default of its loan obligation. Jolley, as trustee, recorded a notice of default and an amended notice of default with the Douglas County register of deeds. A notice of sale indicating the property would be sold on June 4, 2001, was then published. Delaware Acceptance, through Jolley as trustee, asserted that the outstanding balance of the loan was $8,777,526.92, which included a principal balance of $8,766,877.50. A temporary restraining order was sought by 24th & Dodge to halt the foreclosure, but the request was denied and the property was sold at the trustee's sale for $12 million.

Subsequently, 24th & Dodge brought suit against the appellees alleging the wrongful foreclosure of the 24th & Dodge property. In its petition, 24th & Dodge alleged that it was not in default of its loan obligation at the time of Jolley's notice of default. It alleged that Delaware Acceptance had collected the

rents from First National Bank of Omaha (tenant) under the assignment of rents and further that such rents satisfied the monthly principal payment. Alternatively, 24th & Dodge alleged that if it was in default of its loan obligation, any actual or technical noncompliance with the loan arose out of the negligence or misconduct of Delaware Acceptance and Nebraska Acceptance by failing to collect all rents owed by the tenant under the assignment of rents. Finally, 24th & Dodge asserted that pursuant to Neb. Rev. Stat. § 76-1006(2) (Reissue 2003), the appellees were required to give notice of the outstanding balance on the underlying loan obligation, including unpaid principal and interest. It is 24th & Dodge's claim that the appellees failed to disclose the accurate amount owing, which prevented it from curing any technical or actual default.

The appellees demurred to 24th & Dodge's petition, claiming that the petition does not state facts sufficient to constitute a cause of action. On January 10, 2002, the district court sustained the demurrer without providing legal reasoning or discussion of the court's rationale. Although given leave to amend, 24th & Dodge elected to stand on its petition. On March 28, the district court entered an order dismissing the case with prejudice. On April 22, 24th & Dodge filed this appeal, 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).

ASSIGNMENT OF ERROR

The sole assignment of error by 24th & Dodge is that the district court erred in failing to find that its petition stated facts sufficient to constitute a cause of action.

STANDARD OF REVIEW

[1] In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Butler Cty. Sch. Dist. No. 502 v. Meysenburg*, 268 Neb. 347, 683 N.W.2d 367

(2004); *Harsh International v. Monfort Indus.*, 266 Neb. 82, 662 N.W.2d 574 (2003).

[2,3] In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004); *Rodehorst v. Gartner*, 266 Neb. 842, 669 N.W.2d 679 (2003). 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. *Kubik v. Kubik, supra*.

ANALYSIS

Mortgagee's Failure to Collect Rent

In its petition, 24th & Dodge alleged that Delaware Acceptance and Nebraska Acceptance wrongfully foreclosed the mortgage because Delaware Acceptance and Nebraska Acceptance failed to "recover sums owed to 24th & Dodge by the tenant . . . which such sums Delaware Acceptance and Nebraska Acceptance were obligated to recover by virtue of their acting upon an assignment of rents."

[4-6] In Nebraska, a mortgagee's status is that of a lienholder. See Neb. Rev. Stat. § 76-276 (Reissue 2003). Under this theory, the mortgagee is regarded as owning a security interest in real estate only and the mortgagor retains both the legal title and right of possession. *Id.* See, also, Restatement (Third) of Property: Mortgages § 4.1 (1997). Although title and possession remain in the mortgagor, mortgagees may create a security interest in rents arising from real estate. § 76-276. The security interest may be enforced by the recovery of rents as part of the enforcement of an assignment of rents instrument. Neb. Rev. Stat. § 52-1705 (Reissue 2004).

[7] There is little Nebraska case law regarding the collection of rents under an assignment of rents agreement. We have, however, made it clear that a mortgagee in possession before foreclosure must not only account for rents and profits received, but also for rents which the mortgagee could have received with reasonable diligence. *Hays v. Christiansen*, 105 Neb. 586, 181 N.W. 379 (1921). See, also, *Kemp v. Small*, 32 Neb. 318, 49 N.W. 169

(1891); *Comstock v. Michael*, 17 Neb. 288, 22 N.W. 549 (1885) (superseded by statute on other grounds).

In the present case, 24th & Dodge has not alleged that Delaware Acceptance and Nebraska Acceptance were in possession of the mortgaged property. Rather, 24th & Dodge alleges that they "were obligated to recover [the rents] by virtue of their acting upon an assignment of rents for the subject property." Brief for appellant at 9. Thus, the issue presented is whether a mortgagee who acts upon the assignment of rents without taking actual possession of the mortgaged property must account for rents which could have been collected from the tenant.

There is no case law cited by 24th & Dodge which supports its position that a mortgagee becomes obligated to account for rents merely by acting upon an assignment of rents. In *In re Olick*, 221 B.R. 146 (Bankr. E.D. Pa. 1998), the U.S. Bankruptcy Court for the Eastern District of Pennsylvania addressed a claim that debtors were entitled to certain credits and offsets based upon the mortgagee's failure to collect rents and otherwise manage the mortgaged property pursuant to its alleged responsibilities under an assignment of rents agreement. The *In re Olick* court concluded that the mortgagee was not obligated to collect rents. The relevant portion of the *In re Olick* opinion is set forth below:

> Our research reveals that the cases most supportive of the Debtors' theory concern the duties of mortgagees-in-possession. Mortgagees-in-possession are held to be *quasi* trustees, with a duty to collect and account for rents. . . . "The mortgagee in possession has a duty to collect the rents and profits which accrue during his occupancy and apply them to the mortgage debt. . . . Moreover, the mortgagor is entitled to an accounting from his mortgagee who has taken possession . . . .". . .
>
> . . . In the present case, however, the Debtors have not met their burden of showing that [the creditor, National Penn Bank (NPB),] should be held to this high standard since they failed to establish that NPB was a mortgagee-in-possession. To explain, a creditor becomes a mortgagee-in-possession when it takes actual possession and control over a debtor's property. . . . In the present case, however, the record is devoid of evidence that NPB took actual

> possession of the Commercial Property. NPB exercised its rights under the assignment of rents by sending the tenant a letter demanding the payment thereof, and, upon the tenant's noncompliance, NPB garnished the rent. By sending the demand letter to the tenant, NPB was deemed to have taken constructive possession of the property . . . thus permitting NPB to collect the rents, but the applicable case law appears to require a creditor to take actual possession to achieve the status of mortgagee-in-possession.

(Citations omitted.) (Emphasis omitted.) 221 B.R. at 156-57.

We agree with the *In re Olick* court that in order for a mortgagee to become accountable for rents under an assignment of rents, the mortgagee must be in actual possession of the mortgaged property, as opposed to merely collecting rents under an assignment of rents. This view is not only consistent with our holding in *Hays v. Christiansen*, 105 Neb. 586, 181 N.W. 379 (1921), it is also consistent with case law from other jurisdictions and secondary sources. See, *U.S. Fid. & Guar. v. Old Orchard Plaza*, 284 Ill. App. 3d 765, 773, 672 N.E.2d 876, 882 (1996) ("[p]ossession means 'physical possession of the mortgaged real estate to the same extent to which the mortgagor, absent the foreclosure, would have been entitled to physical possession' "); *Prince v. Brown*, 856 P.2d 589 (Okla. App. 1993) (explaining mortgagee who receives rents does not become mortgagee in possession unless he has also entered into continued physical possession and exercises exclusive operating control of property); 54A Am. Jur. 2d *Mortgages* § 213 (1996) (defining possession as exclusive actual control over property to exclusion of mortgagor); 55 Am. Jur. 2d, *supra*, § 1319 (stating general rule that one who takes possession of property as mortgagee must account for rents).

There is no allegation in the present case that Delaware Acceptance and Nebraska Acceptance were in actual possession of the physical property to the exclusion of 24th & Dodge. Consequently, we conclude that Delaware Acceptance and Nebraska Acceptance had no duty to collect rents after exercising their rights under the assignment of rents. Therefore, 24th & Dodge's allegation that Delaware Acceptance and Nebraska

Acceptance were negligent in their failure to collect rents under the assignment of rents did not state a cause of action.

§ 76-1006

Next, 24th & Dodge argues that the appellees failed to give proper notice of the outstanding balance on the underlying loan obligation as required by § 76-1006. According to 24th & Dodge, § 76-1006(2)(b) required Jolley, as trustee, "to provide a statement of the amount of the entire unpaid principal sum secured by the trust deed, together with interest and a per diem [rate]." Brief for appellant at 17.

Section 76-1006(1) sets out what the notice of default must contain. In *Gilroy v. Ryberg*, 266 Neb. 617, 628, 667 N.W.2d 544, 555 (2003), we stated:

> Every notice of default, regardless of the type of property secured by the trust deed, must identify "the trust deed by stating the name of the trustor named therein and giving the book and page or computer system reference where the same is recorded and a description of the trust property, containing a statement that a breach of an obligation for which the trust property was conveyed as security has occurred, and *setting forth the nature of such breach* and of [the trustee's] election to sell or cause to be sold such property to satisfy the obligation."

(Emphasis in original.) In contrast, the additional procedural requirements set forth in § 76-1006(2) apply to the foreclosure by trustee's sale of trust property used in farming operations by the borrower outside of any incorporated city.

In *Gilroy*, we rejected the argument that the requirements in § 76-1006(2) were subsumed in the requirements of § 76-1006(1). In reaching that conclusion, we noted that had the Legislature intended the requirements in § 76-1006(2) to be incorporated into the requirements in § 76-1006(1), it would have been unnecessary for it to set out the additional requirements in § 76-1006(2) for trust deeds on agricultural property. *Id.*

[8] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Mitchell v. French, 267 Neb. 656, 676 N.W.2d 361 (2004); *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004). The language of § 76-1006(2) clearly states that it applies to property used for farming which is not located within an incorporated city. The property involved in the present dispute was a building located in downtown Omaha and leased to a commercial tenant. As such, it did not fall within the parameters of § 76-1006(2). Because § 76-1006(2) was inapplicable, it was only necessary for the appellees to comply with the requirements set forth in § 76-1006(1). That section does not require a mortgagee to set forth the outstanding loan obligation in the notice of default. Therefore, we find that 24th & Dodge's argument on this issue is without merit.

DEMURRER

[9] At issue in this case is whether 24th & Dodge's petition alleged facts sufficient to withstand the appellees' demurrer. The petition of 24th & Dodge predated the recent enactment of the Nebraska Rules of Pleading in Civil Actions. Therefore, in order to survive the appellees' demurrer, the petition needed to contain "a statement of the facts constituting the cause of action." Neb. Rev. Stat. § 25-804(2) (Reissue 1995) (repealed by 2002 Neb. Laws 876, operative January 1, 2003). 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. *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003).

[10] The petition of 24th & Dodge alleged that its property was wrongfully foreclosed upon by the appellees. Nebraska has recognized that a party may bring an action in equity to set aside a foreclosure sale conducted under a power of sale in a trust deed. *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003). Here, 24th & Dodge claims that the sale was wrongful, but does not seek to set aside the sale in equity. Rather, it claims that it has a common-law action for damages suffered as a result of the alleged wrongful foreclosure of its property. This court has not, as yet, recognized a common-law action for wrongful foreclosure. It is unnecessary, however, for us to determine whether we would recognize such an action in this case because here, based

on a careful examination of the petition, we determine that 24th & Dodge has not alleged facts upon which we would recognize a cause of action for wrongful foreclosure.

CONCLUSION

For the reasons set forth above, we determine that 24th & Dodge's claim that Delaware Acceptance and Nebraska Acceptance were negligent in their failure to collect rents under the assignment of rents did not state a cause of action because Delaware Acceptance and Nebraska Acceptance were not in actual possession of the mortgaged property. We further determine that § 76-1006(2), and specifically the requirement therein that the notice of default set forth the amount of the unpaid principal sum, is inapplicable for the reasons set forth in this opinion. We finally determine as a matter of law that the facts set forth in 24th & Dodge's petition, if proved, do not state a cause of action for wrongful foreclosure. Because 24th & Dodge exercised its right to stand on its petition after being given an opportunity to amend, we conclude the district court did not err in sustaining the appellees' demurrer and in dismissing the action. The district court's dismissal of the petition is, therefore, affirmed.

AFFIRMED.

LUKE A. KELLOGG, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLEES.

690 N.W.2d 574

Filed January 7, 2005. No. S-03-603.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Actions: Pleadings.** In determining whether a complaint states a cause of action, a court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences, and sweeping legal conclusions cast in the form of factual allegations.
3. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief.

4. **Pleadings.** A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.
5. **Motions to Dismiss: Pleadings.** Attachments to the complaint become a part of the complaint, and the court may consider those documents in ruling on a motion to dismiss.
6. **Constitutional Law: Civil Rights: Jurisdiction: States.** The states have concurrent jurisdiction to entertain actions under 42 U.S.C. § 1983 (2000); however, as a result of the Supremacy Clause found in U.S. Const. art. VI, federal law is controlling, and state courts are required to follow federal precedent when hearing actions brought under § 1983.
7. **Actions: Administrative Law: Jurisdiction: Civil Rights: Prisoners.** The exhaustion requirement of 42 U.S.C. § 1997e(a) (2000) is not jurisdictional, and prisoners are required to exhaust available administrative remedies before bringing an action under 42 U.S.C. § 1983 (2000).
8. **Administrative Law.** The exhaustion requirement of 42 U.S.C. § 1997e(a) (2000) is an affirmative defense.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, INBODY, and MOORE, Judges, on appeal thereto from the District Court for Johnson County, DANIEL BRYAN, JR., Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Sue Ellen Wall, of Wall Law Office, for appellant.

Luke A. Kellogg, pro se.

Jon Bruning, Attorney General, and Linda L. Willard for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellant Luke A. Kellogg is currently committed to the Nebraska Department of Correctional Services (DCS) and, at all times relevant hereto, was incarcerated at the Tecumseh State Correctional Institution. On February 21, 2003, Kellogg filed a complaint in the district court for Johnson County against the DCS and the following DCS employees, individually and in their official capacities: Harold W. Clarke, Randy Kohl, Frank Hopkins, Mike Kenney, Dallen Johnsen, and Richard Elliott (collectively appellees). In his complaint, Kellogg alleged that

appellees had violated his constitutional and statutory rights and privileges under Neb. Rev. Stat. § 20-148 (Reissue 1997); title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12131 to 12165 (2000 & Supp. I 2001); and 42 U.S.C. § 1983 (2000). Appellees filed a motion to dismiss. Following a hearing, the district court sustained appellees' motion and dismissed Kellogg's complaint without leave to replead.

Kellogg appealed to the Nebraska Court of Appeals. Appellees filed a motion for summary affirmance under Neb. Ct. R. of Prac. 7B(2) (rev. 2001), in which they acknowledged having been served individually and officially. The Court of Appeals granted the motion and summarily affirmed without an opinion the district court's order of dismissal. Kellogg filed a petition for further review which this court granted.

For the reasons explained below, we determine that Kellogg has abandoned his purported claim under § 20-148 and that his ADA claim has been rendered moot. With regard to Kellogg's § 1983 claim, we conclude that Kellogg's complaint is sufficient to state a cognizable claim and in particular that, contrary to appellees' assertion on appeal, Kellogg has sufficiently alleged that he has exhausted his available administrative remedies. We therefore determine that the district court erred in dismissing Kellogg's complaint and that the Court of Appeals erred in affirming the order of the district court. Accordingly, we reverse the decision of the Court of Appeals 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.

STATEMENT OF FACTS

On February 21, 2003, Kellogg filed a complaint against appellees. As we read the complaint, Kellogg alleges that appellees violated his rights under § 20-148 (generally pertaining to deprivation of constitutional and statutory rights, privileges, or immunities); title II of the ADA (generally prohibiting discrimination in denial of benefits by public entity due to disability); and § 1983 (generally providing for civil action to enforce civil rights). In support of these three claims, Kellogg has made a variety of allegations, some of which we summarize. Kellogg claims

to suffer from multiple sclerosis, "chronic urinary retention," and "hypospadious [sic]." Kellogg alleges that appellees have subjected him to "bodily harm" due to their "arbitrariness," "negligence," and "deliberate indifference" concerning Kellogg's medical conditions. He further alleges that due to these conditions, he has been unable to provide a urine sample within the given time period required to comply with the DCS' drug testing program. Kellogg alleges that appellees have discriminated against him by failing to provide him with reasonable accommodations to meet his alleged disabilities. In this regard, Kellogg claims that he had requested and been denied accommodation in the form of a blood test as an alternative to providing a urine sample.

Kellogg further alleges that due to his inability to provide a urine sample to permit him to comply with the drug testing requirement, and, pursuant to Drug Offender Classification Policy Directive 00-013 (DOC rules), he has been classified as a drug offender and disciplined several times therefor. The "discipline" imposed includes suspension of visitation and telephone privileges. Kellogg also alleges he has lost "good time." Finally, Kellogg alleges that he "has exhausted available administrative remedies pursuant to Title 42 U.S.C.A. §§1997(e) [sic]." For relief, Kellogg seeks, inter alia, a temporary restraining order, injunctive and declaratory relief, restoration of good time, restoration of telephone and visitation privileges, and $1.5 million in compensatory damages.

Because this action was filed after January 1, 2003, it is governed by the new rules for notice pleading, which apply to all "civil actions filed on or after January 1, 2003." See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004). In response to Kellogg's complaint, appellees filed a motion to dismiss, claiming that the court lacked jurisdiction and that Kellogg's complaint failed to state a claim for relief. See Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) and (6) (rev. 2003). On April 16, 2003, a hearing was held in district court on appellees' motion to dismiss. In an order filed April 24, the district court determined, inter alia, that Kellogg had stated no claims for which he might be entitled to relief and dismissed Kellogg's action without leave to replead.

Kellogg appealed the district court's order to the Court of Appeals. On appeal, Kellogg claimed essentially that the district

court erred in dismissing his ADA and § 1983 claims. On October 24, 2003, appellees moved for summary affirmance of the district court's order. On April 15, 2004, without opinion, the Court of Appeals sustained the motion.

Kellogg filed a petition for further review, which this court granted. During oral argument before this court, the parties advised the court that during the pendency of appellate proceedings, Kellogg had been seen by a urologist and had been transferred from the Tecumseh State Correctional Institution to another DCS facility. The court was further advised that Kellogg's good time had been restored, his visitation privileges had been restored, and he had been "accommodated" with regard to his participation in the drug testing program.

ASSIGNMENT OF ERROR

In his petition for further review, Kellogg assigns two errors that we restate as one. Kellogg claims the Court of Appeals erred in sustaining appellees' motion for summary affirmance of the district court's order dismissing his complaint.

STANDARDS OF REVIEW

[1-3] As discussed above, this action was filed on February 21, 2003, and thus, we apply the new rules for notice pleading. See rule 1. This court has not previously discussed the standard of review for a motion to dismiss filed under rule 12(b). Because the new rules are modeled after the Federal Rules of Civil Procedure, we look to the federal decisions for guidance. See, similarly, *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003). As do the federal appellate courts, we will and do hereby review a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. See *Maki v. Allete, Inc.*, 383 F.3d 740 (8th Cir. 2004). See, also, *Pogge v. American Farm Mut. Ins. Co.*, 13 Neb. App. 63, 688 N.W.2d 634 (2004). We are, however, " 'free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.' " See *Farm Credit Services v. American State Bank*, 339 F.3d 764, 767 (8th Cir. 2003) (quoting *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868 (8th Cir. 2002)). Complaints should

be liberally construed in the plaintiff's favor and " 'should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Rucci v. City of Pacific*, 327 F.3d 651, 652 (8th Cir. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

ANALYSIS

[4,5] Kellogg's complaint was dismissed by the district court pursuant to rule 12(b)(1) and (6). As a preliminary matter, we note that a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes. Neb. Ct. R. of Pldg. in Civ. Actions 10(c) (rev. 2003). Thus, although we are limited in our review to the allegations contained in the complaint and any reasonable inferences that may be drawn therefrom, *Maki v. Allete, Inc., supra*, attachments to the complaint become a part of the complaint, and the court may consider those documents in ruling on a motion to dismiss, *Witzke v. Femal*, 376 F.3d 744 (7th Cir. 2004).

Taking the complaint and its attachments together, we turn to an assessment of the substance of Kellogg's claims as alleged in his complaint and we analyze his arguments on appeal.

With regard to his purported claim under § 20-148, we note that in his appeal before the Court of Appeals, Kellogg did not assign as error the district court's dismissal of his purported claim under § 20-148. By not challenging the district court's ruling as it related to § 20-148, Kellogg has abandoned this claim on appeal and we need not address Kellogg's claim under § 20-148. See *Egan v. Stoler*, 265 Neb. 1, 653 N.W.2d 855 (2002).

With regard to Kellogg's claim under title II of the ADA, we note that during oral argument the parties advised the court that during the pendency of these proceedings, Kellogg has been "accommodated" regarding his purported disability, in that he has been seen by a urologist and that, notwithstanding the persistence of DOC rules, Kellogg's visitation privileges have been restored. We also understand Kellogg's good time has been restored. We determine that the claim under title II of the ADA had been rendered moot. See *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004). As a result, we make no further comment on Kellogg's claim based upon title II of the ADA.

With regard to Kellogg's claim under § 1983, we note that in support of their successful motion for summary affirmance, appellees argue on appeal that Kellogg failed to state a claim and failed to exhaust his administrative remedies before bringing his § 1983 action and that therefore, his complaint was properly dismissed by the district court. On further review before this court, Kellogg argues that the Court of Appeals erred in affirming the district court's dismissal of his § 1983 claim. We determine that Kellogg has stated a cognizable claim under § 1983 and that, as discussed below in detail, his allegations of exhaustion meet the requirements of the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a) (2000), and case law thereunder.

[6] Although the states have concurrent jurisdiction to entertain § 1983 actions, as a result of the Supremacy Clause found in U.S. Const. art. VI, federal law is controlling, and state courts are required to follow federal precedent when hearing actions brought under § 1983. *Cole v. Loock*, 259 Neb. 292, 609 N.W.2d 354 (2000); *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999), *disapproved on other grounds, Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004). With regard to exhaustion, we note that "[o]rdinarily, plaintiffs pursuing civil rights claims under 42 U.S.C. § 1983 need not exhaust administrative remedies before filing suit in court." See *Porter v. Nussle*, 534 U.S. 516, 523, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002). However, as stated in *Porter v. Nussle* and previously recognized by this court in *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002), pursuant to the PLRA, § 1997e(a), prisoners are required to exhaust administrative remedies before bringing an action under § 1983. In *Pratt v. Clarke*, 258 Neb. 402, 406, 604 N.W.2d 822, 825 (1999), *overruled on other grounds, Cole v. Isherwood, supra*, we described this requirement and stated as follows:

> On April 26, 1996, the [PLRA] was signed into law. Prior to the adoption of the PLRA, 42 U.S.C. § 1997e(a) (1994) granted district courts discretion to require a prisoner to exhaust administrative remedies, and a district court's dismissal for failure to exhaust was reviewed only for an abuse of discretion. See *Irwin v. Hawk*, 40 F.3d 347 (11th Cir. 1994). The PLRA now requires, inter alia, that prisoners

> exhaust administrative remedies prior to filing actions under § 1983 or any federal law. Specifically, 42 U.S.C. § 1997e(a) (Supp. III 1997) states: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." As stated in *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998), "Congress enacted this mandatory exhaustion requirement in section 1997e(a) as part of the PLRA's effort to curtail frivolous and abusive prisoner litigation."

See, also, *Porter v. Nussle*, 534 U.S. at 524 (stating "exhaustion in cases covered by § 1997e(a) is now mandatory").

[7] We have previously recognized in a prisoner case that exhaustion of administrative remedies is not a jurisdictional prerequisite to the commencement of an action pursuant to § 1983. See *Cole v. Isherwood, supra*. In this regard, we observe that numerous federal courts of appeals have examined the issue of whether the language of § 1997e(a) should be read as indicating a jurisdictional bar rather than as a mere codification of administrative exhaustion requirements. The vast majority of federal appellate courts, both before and after the filing of the U.S. Supreme Court opinion in *Porter v. Nussle*, have concluded that the exhaustion requirement of § 1997e(a) is not jurisdictional. See, e.g., *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004); *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204 (10th Cir. 2003); *Richardson v. Goord*, 347 F.3d 431 (2d Cir. 2003); *Casanova v. Dubois*, 289 F.3d 142 (1st Cir. 2002); *Ray v. Kertes*, 285 F.3d 287 (3d Cir. 2002); *Ali v. District of Columbia*, 278 F.3d 1 (D.C. Cir. 2002); *Curry v. Scott*, 249 F.3d 493 (6th Cir. 2001); *Chelette v. Harris*, 229 F.3d 684 (8th Cir. 2000), *cert. denied* 531 U.S. 1156, 121 S. Ct. 1106, 148 L. Ed. 2d 977 (2001); *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999), *cert. denied* 532 U.S. 1065, 121 S. Ct. 2214, 150 L. Ed. 2d 208 (2001); *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999), *cert. denied* 528 U.S. 1074, 120 S. Ct. 787, 145 L. Ed. 2d 664 (2000), *overruled on other grounds, Booth v. Churner*, 532 U.S. 731, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001). We do not read *Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002), as treating § 1997e(a) as

jurisdictional, and, therefore, we continue to adhere to our holding in *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002), that the exhaustion requirement of § 1997e(a) is not jurisdictional. To the extent that the recent case of *Mumin v. T-Netix Telephone Co.*, 13 Neb. App. 188, 690 N.W.2d 634 (2004), holds to the contrary, it is disapproved.

[8] In assessing the pleading consequences of the exhaustion requirement of § 1997e(a), the majority of federal appellate courts have recognized that the PLRA's exhaustion requirement is an affirmative defense. See *Casanova v. Dubois*, 304 F.3d 75, 77 n.3 (1st Cir. 2002) (cases collected). We have previously so held in *Cole v. Isherwood*. In *Ray v. Kertes, supra*, the Court of Appeals for the Third Circuit referred to *Porter v. Nussle*, noted that the exhaustion requirement was not jurisdictional, and explored the burdens of pleading and proof occasioned by treating the exhaustion provision as an affirmative defense.

The *Ray v. Kertes* court recognized that in enacting the exhaustion requirement found in § 1997e(a), Congress had two primary concerns. The first was a desire to lessen the judicial burden of entertaining frivolous prisoner claims. The second was to reinforce the power of prison administrators to control prison problems by minimizing the interference of courts in matters of prison administration. The *Ray v. Kertes* court observed that these policies are not inconsistent with construing the exhaustion requirement of § 1997e(a) as an affirmative defense, whereby the burden of pleading and proving failure to exhaust is placed on the defendants. Referring to the expertise and resources available to prison officials, the *Ray v. Kertes* court noted that prison officials are best situated to articulate and show that a prisoner has failed to exhaust his or her administrative remedies. Thus, the *Ray v. Kertes* court observed that categorizing the exhaustion requirement as an affirmative defense with its customary burdens of pleading and proof is consistent with policy and fairness.

We note that § 1997e(c) provides for dismissal of a prisoner action sua sponte if the court is satisfied that the action (1) is frivolous, (2) is malicious, (3) fails to state a claim upon which relief can be granted, or (4) seeks monetary relief from a defendant who is immune from such relief. However, sua sponte dismissal on the basis of failure to exhaust is not listed in the PLRA.

In the instant case, Kellogg's action was dismissed not sua sponte, but, rather, as a result of a motion to dismiss filed by appellees. Within the federal circuits which recognize exhaustion as an affirmative defense, it has been acknowledged that a motion to dismiss based on failure to exhaust is not absolutely precluded. E.g., *Ray v. Kertes*, 285 F.3d 287, 295 n.8 (3d Cir. 2002). However, a complaint alleging exhaustion is ordinarily not vulnerable to a motion to dismiss based on a failure to plead exhaustion. Exhaustion can be explored by other procedural devices. In this regard, it has been observed by a federal appellate court which recognizes exhaustion as an affirmative defense that "no provision of the PLRA requires pleading exhaustion with particularity." *Ray v. Kertes*, 285 F.3d at 297. Contra *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1211 (10th Cir. 2003) (stating in federal circuit which rejects exhaustion as affirmative defense that "Congress, not this court, has required a prisoner to plead specific exhaustion information"). We agree with the federal appellate courts which have both concluded that exhaustion is an affirmative defense and declined to impose a heightened pleading requirement on a prisoner.

Given our conclusions that exhaustion of available administrative remedies under § 1997e(a) is not jurisdictional and further that exhaustion is an affirmative defense, we turn to the instant complaint which appellees claim on appeal should stand dismissed for failure to exhaust. In reviewing Kellogg's allegations in his complaint, we note that he states generally that he "has exhausted available administrative remedies pursuant to Title 42 U.S.C.A. §§ 1997(e) [sic]." Attached to the complaint, and thus considered a part thereof, see rule 10(c), are numbered exhibits which indicate Kellogg's efforts to administratively resolve his claims.

Regarding prisoners' civil rights claims, we have observed that various procedures are available to prisoners. In *Cole v. Isherwood*, 264 Neb. 985, 993, 653 N.W.2d 821, 828 (2002), we referred to *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999), which we overruled on other grounds, and observed that an inmate has "a number of administrative remedies available to him which [should be] exhausted prior to filing [a] § 1983 action [including] Neb. Rev. Stat. §§ 83-4,111 and 83-4,135 through 83-4,139 (Reissue 1999) and 68 Neb. Admin. Code, ch. 2 (1994)."

In *Pratt v. Clarke, supra*, we noted that other remedies are not precluded. "In particular, 68 Neb. Admin. Code, ch. 2, § 005.01 (1994), stated: 'Claims against the [DCS] involving miscellaneous or tort claims for money damages may be filed pursuant to the State Tort Claims Act.' " 258 Neb. at 407, 604 N.W.2d at 826. In *Cole v. Isherwood*, we approved the statement in *Pratt v. Clarke* to the effect that prisoners in Nebraska must adhere to and exhaust available procedures before bringing a § 1983 claim. Our review of the instant complaint indicates that Kellogg has alleged that he has pursued available administrative remedies and that his allegations are sufficient to withstand a motion to dismiss.

Given the nature of the allegations in Kellogg's § 1983 claim, the district court erred in dismissing his complaint and the Court of Appeals erred in affirming this ruling.

CONCLUSION

The record demonstrates that Kellogg obtained service of process over appellees in both their official and individual capacities. The record further shows that Kellogg has abandoned his purported claim under § 20-148 and that Kellogg's ADA claim is moot. With regard to Kellogg's § 1983 claim, Kellogg has pleaded the exhaustion of his available administrative remedies under § 1997e(a) and a cognizable claim for relief, and we reject appellees' assertions to the contrary.

The district court erred when it dismissed Kellogg's complaint, and the Court of Appeals erred in affirming this order. Accordingly, we reverse the decision of the Court of Appeals 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.

JAMES G. FITL, APPELLEE, V. MARK STREK, DOING BUSINESS AS STAR CARDS OF SAN FRANCISCO, APPELLANT.

690 N.W.2d 605

Filed January 7, 2005. No. S-03-836.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous.
2. **Sales: Uniform Commercial Code: Notice: Time.** The notice requirement set forth in Neb. U.C.C. § 2-607(3)(a) (Reissue 2001) serves three purposes. It provides the seller with an opportunity to correct any defect, to prepare for negotiation and litigation, and to protect itself against stale claims asserted after it is too late for the seller to investigate them.
3. **Fraud.** A party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed.

Joel M. Carney and James J. Bemis, Jr., of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Patrick M. Heng, of Raynor, Rensch & Pfeiffer, for appellee.

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

WRIGHT, J.

NATURE OF CASE

James G. Fitl purchased a baseball card from Mark Strek, doing business as Star Cards of San Francisco. When Fitl discovered that the baseball card had been altered and was of no value, he sued Strek for what he argued was the current fair market value of an unaltered version of the same card. Following a bench trial, judgment was entered against Strek in the amount of $17,750 plus costs. Strek appeals.

SCOPE OF REVIEW

[1] In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

FACTS

In September 1995, Fitl attended a sports card show in San Francisco, California, where Strek was an exhibitor. Fitl subsequently purchased from Strek a 1952 Mickey Mantle Topps baseball card for $17,750. According to Fitl, Strek represented that the card was in near mint condition. After Strek delivered the card to Fitl in Omaha, Nebraska, Fitl placed it in a safe-deposit box.

In May 1997, Fitl sent the baseball card to Professional Sports Authenticators (PSA), a grading service for sports cards that is located in Newport Beach, California. PSA reported to Fitl that the baseball card was ungradable because it had been discolored and doctored.

On May 29, 1997, Fitl wrote to Strek and indicated that he planned to pursue "legal methods" to resolve the matter. Strek replied that Fitl should have initiated a return of the baseball card in a timely fashion so that Strek could have confronted his source and remedied the situation. Strek asserted that a typical grace period for the unconditional return of a card was from 7 days to 1 month.

In August 1997, Fitl sent the baseball card to ASA Accugrade, Inc. (ASA), in Longwood, Florida, for a second opinion. ASA also concluded that the baseball card had been refinished and trimmed.

On September 8, 1997, Fitl sued Strek, alleging that Strek knew the baseball card had been recolored or otherwise altered and had concealed this fact from him. Fitl claimed he had reasonably relied upon Strek's status as a reputable sports card dealer. Strek's answer generally denied Fitl's allegations.

In a trial to the court, Fitl appeared with counsel and offered evidence. Strek was represented by counsel but did not appear or offer any evidence. Fitl testified that he was in San Francisco over the Labor Day weekend of 1995, where he met Strek at a sports card show. Fitl subsequently purchased from Strek a 1952 Mickey Mantle Topps baseball card and placed it in a safe-deposit box. In 1997, Fitl retrieved the baseball card and sent it to PSA, a sports card grading service.

Steve Orand testified that he had been a sports card collector for 27 years and that he bought, sold, and traded cards. He testified that PSA originated in 1996 or 1997 and was a leader in the sports card grading industry. He stated that PSA would not grade

an altered card because alteration would totally devalue the card. He opined that any touchup or trimming of a card would render the card valueless and that an altered card is worth no more than the paper on which it is printed.

Orand examined the baseball card in question the week before trial and said that the edges of the card had been trimmed and reglued. One spot on the front of the baseball card and a larger spot on the back had been repainted, which left the card with no value. He testified that the standard for sports memorabilia was a lifetime guarantee and that a reputable collector would stand behind what he sold and refund the money if an item were fake or had been altered.

The district court entered judgment for Fitl in the amount of $17,750 and costs. The court found that Fitl had notified Strek as soon as he realized the baseball card was altered and worthless and that Fitl had notified Strek of the defect within a reasonable time after its discovery. The court rejected Strek's theory that Fitl should have determined the authenticity of the baseball card immediately after it had been purchased.

ASSIGNMENT OF ERROR

Strek claims that the district court erred in determining that notification of the defective condition of the baseball card 2 years after the date of purchase was timely pursuant to Neb. U.C.C. § 2-607(3)(a) (Reissue 2001).

ANALYSIS

In a bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). The district court found that Fitl had notified Strek within a reasonable time after discovery of the breach. Therefore, our review is whether the district court's finding as to the reasonableness of the notice was clearly erroneous.

Section 2-607(3)(a) states: "Where a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy[.]" "What is a reasonable time for

taking any action depends on the nature, purpose and circumstances of such action." Neb. U.C.C. § 1-204(2) (Reissue 2001).

[2] The notice requirement set forth in § 2-607(3)(a) serves three purposes. It provides the seller with an opportunity to correct any defect, to prepare for negotiation and litigation, and to protect itself against stale claims asserted after it is too late for the seller to investigate them. See *Cheyenne Mountain Bank v. Whetstone Corp.*, 787 P.2d 210 (Colo. App. 1990). "Whether the notice given is satisfactory and whether it is given within a reasonable time are generally questions of fact to be measured by all the circumstances of the case." *Id.* at 213.

In *Maybank v. Kresge Co.*, 302 N.C. 129, 273 S.E.2d 681 (1981), the court reviewed the policies behind the notice requirement. The most important one is to enable the seller "to make efforts to cure the breach by making adjustments or replacements in order to minimize the buyer's damages and the seller's liability." *Id.* at 134, 273 S.E.2d at 684. A second policy is to provide the seller "a reasonable opportunity to learn the facts so that he may adequately prepare for negotiation and defend himself in a suit." *Id.* A third policy, designated the "least compelling" by the court, is the same as the policy behind statutes of limitation: "to provide a seller with a terminal point in time for liability." *Id.* at 135, 273 S.E.2d at 684.

[3] Fitl purchased the baseball card in 1995 and immediately placed it in a safe-deposit box. Two years later, he retrieved the baseball card, had it appraised, and learned that it was of no value. Fitl testified that he had relied on Strek's position as a dealer of sports cards and on his representations that the baseball card was authentic. In *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000), we stated that a party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity. In order for Fitl to have determined that the baseball card had been altered, he would have been required to conduct an investigation. We find that he was not required to do so. Once Fitl learned that the baseball card had been altered, he gave notice to Strek.

As the court noted in *Maybank v. Kresge Co., supra*, one of the most important policies behind the notice requirement of North Carolina's equivalent to § 2-607(3)(a) is to allow the seller to cure

the breach by making adjustments or replacements to minimize the buyer's damages and the seller's liability. However, even if Fitl had learned immediately upon taking possession of the baseball card that it was not authentic and had notified Strek at that time, there is no evidence that Strek could have made any adjustment or taken any action that would have minimized his liability. In its altered condition, the baseball card was worthless.

Strek claimed via his correspondence to Fitl that if Strek had received notice earlier, he could have contacted the person who sold him the baseball card to determine the source of the alteration, but there is no evidence to support this allegation. In fact, Strek offered no evidence at trial. His letter is merely an assertion that is unsupported. Earlier notification would not have helped Strek prepare for negotiation or defend himself in a suit because the damage to Fitl could not be repaired. Thus, the policies behind the notice requirement, to allow the seller to correct a defect, to prepare for negotiation and litigation, and to protect against stale claims at a time beyond which an investigation can be completed, were not unfairly prejudiced by the lack of an earlier notice to Strek. Any problem Strek may have had with the party from whom he obtained the baseball card was a separate matter from his transaction with Fitl, and an investigation into the source of the altered card would not have minimized Fitl's damages.

Strek represented himself as a sports card dealer at a card show in San Francisco. After Fitl expressed interest in a specific baseball card, Strek contacted Fitl to sell him just such a card. Orand stated that a reputable dealer will stand behind what he sells and refund the money if an item is fake or has been altered. In the context of whether a rejection of goods was made in a reasonable amount of time, we have stated that "when there is no precise rule of law which governs, the question of what, under the circumstances of a particular case, is a reasonable amount of time is usually a question for the jury." See *Smith v. Paoli Popcorn Co.*, 255 Neb. 910, 917, 587 N.W.2d 660, 664 (1999).

The district court found that it was reasonable to give Strek notice of a defect 2 years after the purchase. This finding was not clearly erroneous. Pursuant to § 2-607(4), the burden is on the buyer to show a breach with respect to the goods accepted. Fitl presented evidence that the baseball card was not authentic, as he

had been led to believe by Strek's representations. Strek did not refute Fitl's evidence.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAMIAN J. MARSHALL, APPELLANT.

690 N.W.2d 593

Filed January 7, 2005. No. S-03-893.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **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.
4. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred where a defendant was represented by a different attorney on direct appeal than at trial and the alleged deficiencies in trial counsel's performance were known or apparent from the record.
5. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review.
6. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
7. **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. When 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.
8. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, 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.

9. **Pleadings.** A denial of a plea in bar involves a question of law.
10. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.
11. **Double Jeopardy: Juries.** Under Neb. Const. art. I, § 12, in a case tried to a jury, jeopardy attaches when the jury is impaneled and sworn.
12. **Constitutional Law: Double Jeopardy.** The constitutional protection against double jeopardy does not mean that every time a defendant is put to trial before a competent tribunal, the defendant is entitled to go free if the trial fails to end in a final judgment.
13. **Constitutional Law: Double Jeopardy: Final Orders: New Trial.** Where jeopardy has attached in a prior criminal proceeding which does not result in final judgment and the State subsequently seeks to retry the defendant on the same charge, the constitutional protection against double jeopardy bars the retrial only if the prior proceeding terminated jeopardy.
14. **Constitutional Law: Double Jeopardy: Motions for Mistrial.** In cases in which a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial. The issue in such cases is whether the mistrial terminated jeopardy and thus triggered the constitutional protection against double jeopardy as a bar to subsequent prosecution.
15. **Double Jeopardy: Motions for Mistrial.** Double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant.
16. **Motions for Mistrial: Final Orders: Postconviction: Appeal and Error.** A mistrial is required by manifest necessity where a criminal trial is flawed by a defect which could not be waived by the defendant's failure to object, and could be asserted on appeal or in a postconviction proceeding to overturn a final judgment of conviction.
17. **Juries: Discrimination.** Although peremptory challenges play a recognized role in reinforcing a defendant's right to trial by an impartial jury, they are not of federal constitutional dimension.
18. ____: ____. With respect to a state criminal prosecution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise. As such, the right to peremptory challenges is denied or impaired only if the defendant does not receive that which state law provides.
19. **Criminal Law: Juries: Discrimination: Appeal and Error.** Depriving a defendant in a criminal proceeding of the peremptory challenges to which the defendant is statutorily entitled is structural error.
20. **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 Douglas County: J. RUSSELL DERR, Judge. Affirmed.

Brian S. Munnelly for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

STEPHAN, J.

In 1996, Damian J. Marshall was tried before a jury and convicted of second degree murder, attempted second degree murder, and two counts of using a firearm to commit a felony. His convictions were affirmed by this court on direct appeal. *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998). On January 31, 2003, Marshall filed a pro se motion for postconviction relief. The district court for Douglas County denied the motion without conducting an evidentiary hearing. Marshall appeals from that order.

FACTS

The facts underlying Marshall's convictions are set forth in detail in our opinion in *State v. Marshall, supra*, and need not be fully reiterated here. Rather, we summarize those facts which relate directly to this postconviction proceeding.

Prior to Marshall's jury trial and conviction, two mistrials were declared, resulting in the discharge of the two jury panels which had been sworn. The first jury selection occurred on January 30, 1996. The court called 24 prospective jurors for voir dire. Following voir dire, each party exercised six peremptory challenges. The remaining 12 jurors and a subsequently selected alternate were sworn.

During the noon recess, C.B., one of the 12 sworn jurors, advised the bailiff that he was not sure he could hear the case. C.B. was brought into chambers and questioned by the judge and counsel. C.B. stated that he had read about the case in the newspapers and that he had been charged with manslaughter 12 years earlier, but the charges were dismissed because "it was ruled self-defense." Upon questioning, C.B. indicated that he did not think his knowledge and personal experience would reflect on his ability to be a fair and impartial juror. The judge expressed concern about whether C.B. should be removed from the jury based upon his statements and requested counsel to bring case law on the subject after a recess.

When court reconvened, the judge advised counsel that he would have excused C.B. on his own motion during voir dire if the information about C.B.'s previous arrest and manslaughter charge had been disclosed at that time. The prosecutor presented the court with documents pertaining to the charges which had been filed against C.B., which documents disclosed that the case had progressed further than indicated by C.B. before it had been dismissed. The prosecutor thereafter made a motion for mistrial without prejudice. Marshall's trial counsel opposed the motion.

After further discussion with both counsel on the same day, the judge advised counsel that because of potential bias on the part of C.B., "in good conscience I simply can't let the trial progress." He thereafter sustained the State's motion for mistrial without prejudice and discharged the jury. The record reflects no discussion with respect to replacing C.B. with an alternate juror.

On March 1, 1996, Marshall filed a plea in bar alleging that the mistrial was granted in error and that another trial would subject him to double jeopardy. The motion was heard and taken under advisement on April 22, 1996. On the same day, the second jury selection was conducted. Thirty-six prospective jurors were randomly chosen for voir dire. At the conclusion of voir dire, the prosecution and Marshall each exercised 12 peremptory challenges and the remaining 12 jurors were sworn. After a recess, the judge and counsel met with one of the jurors who disclosed that he had formed an opinion about Marshall's guilt. He was excused from the jury. The judge then proposed to counsel that two jurors be selected from a pool of six prospective jurors in order to provide one alternate and another juror to replace the juror who was excused. A discussion ensued about whether a mistrial should be declared instead. The judge declared a mistrial without prejudice to the prosecution, stating that it "would be unfair to the defendant to proceed" and "further participation of this jury in this case would lead to a substantial miscarriage of justice." Defense counsel, who had argued that a mistrial was the correct procedure, did not object.

On June 25, 1996, defense counsel made an oral plea in bar with respect to the second mistrial. On that same date, the district court overruled both pleas in bar. No appeal was taken from that order. Later the same day, a third jury selection was conducted.

Thirty-six prospective jurors were randomly selected by the court for voir dire, each side exercised 12 peremptory challenges, and the jury was sworn. Thereafter, an alternate was selected and sworn and trial commenced. After the jury returned verdicts of guilty and sentences were imposed, Marshall filed his direct appeal.

Marshall's trial counsel did not represent him on appeal. His appellate counsel assigned 10 errors, including the granting of both mistrials and ineffective assistance of trial counsel. Appellate counsel argued that because the mistrials were erroneously granted, jeopardy attached, and that the trial court therefore erred in overruling Marshall's pleas in bar. We held that because Marshall did not file a timely appeal from the order denying his pleas in bar, we lacked jurisdiction to review the double jeopardy claim. We considered and rejected Marshall's contention that his trial counsel was ineffective for four specific reasons. However, Marshall did not assign on direct appeal that his trial counsel was ineffective in not perfecting a timely appeal from the denial of his pleas in bar.

Marshall filed his motion for postconviction relief on January 31, 2003, asserting ineffective assistance of trial counsel, ineffective assistance of appellate counsel in several particulars, prosecutorial misconduct, and denial of due process. Marshall specifically alleged that his trial counsel was ineffective in failing to commence a timely appeal from the denial of his pleas in bar and that his appellate counsel was ineffective in failing to raise this and other issues on direct appeal. In an order entered on July 16, the district court denied postconviction relief without an evidentiary hearing based upon its conclusion that the issues raised in the postconviction motion could have been raised on appeal and were therefore procedurally barred. With respect to the fact that no timely appeal was taken from the denial of the pleas in bar, the court noted:

> At the time of the failure to timely appeal the denial of the plea in bar, the record clearly reveals [Marshall] was represented by his trial counsel and not his appellate counsel. Therefore, as previously noted, since this failure is apparent from the record on appeal and was not raised on appeal by

different appellate counsel, this issue is procedurally barred on post-conviction review.

Marshall, through postconviction counsel who was neither his trial nor appellate counsel, perfected a timely appeal from the order of the district court denying postconviction relief. 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).

ASSIGNMENT OF ERROR

Marshall assigns that the district court erred in denying him an evidentiary hearing on his motion for postconviction relief.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004); *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003).

ANALYSIS

We begin by addressing Marshall's argument that *Massaro v. United States*, 538 U.S. 500, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003), eliminates any procedural bar resulting from the failure of appellate counsel to raise claims of ineffective assistance of trial counsel on direct appeal. *Massaro* was a federal postconviction proceeding brought pursuant to 28 U.S.C. § 2255 (1994) in which the prisoner alleged ineffective assistance of trial counsel. A federal appeals court had affirmed the dismissal of the action on the ground of procedural default, due to the fact that Massaro was represented on direct appeal by new counsel who did not raise the issue of ineffective assistance of trial counsel. The Court acknowledged the general federal rule that "claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice," noting that this "procedural-default

rule is neither a statutory nor a constitutional requirement," but, rather, "a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." 538 U.S. at 504. Resolving a conflict among the federal courts of appeals, the U.S. Supreme Court held that "failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255." 538 U.S. at 509.

[3,4] The *Massaro* Court noted that a "growing majority" of state courts follow the rule adopted by its holding. 538 U.S. at 508. This court, however, has not adopted the rule. We do not interpret *Massaro* as requiring that we do so, inasmuch as the Court specifically acknowledged that procedural default rules are not constitutional requirements. The general procedural default rule we have long applied in postconviction proceedings under Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995) holds that 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. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). Thus, a motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred where a defendant was represented by a different attorney on direct appeal than at trial and the alleged deficiencies in trial counsel's performance were known or apparent from the record. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002); *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000); *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000). In this case, the district court correctly applied this principle in concluding that Marshall's claims of ineffective assistance of trial counsel were procedurally barred.

[5] However, a claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review. *State v. Williams, supra*. As in *Williams*, this postconviction proceeding is Marshall's first opportunity to assert that his appellate counsel was ineffective in failing to raise certain claims of ineffective assistance of trial counsel. Such claims directed at the performance of appellate counsel are not procedurally barred.

[6] The assignment of error in this appeal is very broad and nonspecific, asserting generally that the district court erred in denying Marshall an evidentiary hearing on his postconviction motion. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Perry, supra*; *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). Although Marshall alleged in his motion for postconviction relief that his appellate counsel was ineffective in failing to raise multiple claimed performance deficiencies on the part of his trial counsel, the only specific shortcoming argued in this appeal is the failure of appellate counsel to assign on direct appeal that trial counsel was ineffective in not perfecting a timely appeal from the denial of the pleas in bar. Based upon *State v. Al-Zubaidy, supra*, and *State v. Williams, supra*, we conclude that this specific postconviction claim is not procedurally barred. Therefore, we must consider whether Marshall was entitled to an evidentiary hearing on this issue.

[7,8] 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. When 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. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, 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. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002). Assessment of Marshall's postconviction claim regarding the performance of his appellate counsel necessarily

requires examination of the performance of his trial counsel, specifically, whether trial counsel rendered ineffective assistance in not appealing from the order denying the pleas in bar. See *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000).

In Marshall's direct appeal, we relied on our cases holding that "[a] ruling on a plea in bar is a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1995)." *State v. Marshall*, 253 Neb. 676, 681, 573 N.W.2d 406, 410 (1998), citing *State v. Trevino*, 251 Neb. 344, 556 N.W.2d 638 (1996); *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996); *State v. Lynch*, 248 Neb. 234, 533 N.W.2d 905 (1995). We subsequently held in *State v. Rubio*, 261 Neb. 475, 477, 623 N.W.2d 659, 661 (2001), that this rule applies only to the denial of a "true plea in bar," which we defined as one meeting the requirements of Neb. Rev. Stat. § 29-1817 (Reissue 1995). We need not consider whether the order denying Marshall's pleas in bar would be final under *Rubio*, because our holding on Marshall's direct appeal that the order was final for purposes of appeal constitutes the law of the case to which we adhere in this postconviction proceeding. See *Thomas v. State*, 268 Neb. 594, 685 N.W.2d 66 (2004). We therefore start from the premise that Marshall's trial counsel did not perfect a timely appeal from a final order denying his pleas in bar and that appellate counsel did not assert this as ineffective assistance of trial counsel on direct appeal.

Marshall argues that due to the failure to perfect an appeal, prejudice should be presumed under *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), and *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000). We reject this argument based upon the reasoning of *State v. Meers*, 267 Neb. 27, 671 N.W.2d 234 (2003). That case involved a postconviction claim that trial counsel was ineffective in failing to appeal from a pretrial order denying the defendant's motion for absolute discharge on speedy trial grounds. We distinguished this circumstance from *Trotter*, which applied the presumption of prejudice under *Cronic* to counsel's failure to comply with a defendant's direction to perfect a direct appeal *after* trial, conviction, and sentence. We reasoned in *Meers* that failure to appeal from the denial of a potentially dispositive pretrial motion did not amount to the complete denial of assistance of counsel at either the

pretrial, trial, or appellate stages of the criminal prosecution, but, rather, was analogous to those postconviction cases in which a convicted defendant claimed that trial counsel was ineffective in failing to preserve a specific issue for appellate review. We concluded that the claim should be fully adjudicated within the postconviction action utilizing the two-pronged *Strickland* standard for determining the effectiveness of counsel, focusing on "whether a timely appeal from the pretrial order denying absolute discharge would have resulted in a reversal and prevented a subsequent trial and conviction." *State v. Meers*, 267 Neb. at 32, 671 N.W.2d at 238.

[9] We apply the same analytical approach to this case. The issue is whether a timely appeal from the order denying the pleas in bar would have resulted in a reversal which would have prevented Marshall's trial and conviction. Only if this question is resolved in the affirmative "could the failure to perfect the appeal be deemed prejudicial in the sense that it would have altered the result of the prosecution." *Id*. If there was no double jeopardy violation, Marshall could not have been prejudiced by the fact that his attorney did not file a timely appeal from the denial of the pleas in bar. See *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001). Because denial of a plea in bar involves a question of law, we are required to reach an independent conclusion on this issue. See, *State v. Winkler*, 266 Neb. 155, 663 N.W.2d 102 (2003); *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001).

[10-13] Marshall's pleas in bar asserted that continued prosecution after the mistrials subjected him to double jeopardy. The Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364 (2001); *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000). The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution. *State v. Winkler, supra*; *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001). Under Neb. Const. art. I, § 12, in a case tried to a jury, jeopardy attaches when the jury is impaneled and sworn. *State v. Rhea, supra*; *State v. Bottolfson, supra*. However, the constitutional protection against double

jeopardy " 'does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment.' " *State v. Bostwick*, 222 Neb. 631, 642, 385 N.W.2d 906, 914 (1986), quoting *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949). Where jeopardy has attached in a prior criminal proceeding which does not result in final judgment and the State subsequently seeks to retry the defendant on the same charge, the constitutional protection against double jeopardy bars the retrial only if the prior proceeding terminated jeopardy. See *State v. Bostwick, supra*.

[14,15] Jeopardy attached in this case when the first jury was impaneled and sworn on January 30, 1996, but that proceeding did not result in a final judgment because a mistrial was granted over Marshall's objection. "[I]n cases in which a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." *Illinois v. Somerville*, 410 U.S. 458, 467, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973). The issue in such cases is whether the mistrial terminated jeopardy and thus triggered the constitutional protection against double jeopardy as a bar to subsequent prosecution. See *State v. Bostwick, supra*. Double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant. *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978); *State v. Bostwick, supra*.

This court has held that the test of manifest necessity is met when a mistrial is declared after discovery of potential juror bias during trial. *State v. Clifford*, 204 Neb. 41, 281 N.W.2d 223 (1979). See, also, *Quinton v. State*, 112 Neb. 684, 200 N.W. 881 (1924). Marshall argues, however, that the first mistrial was unnecessary because Neb. Rev. Stat. § 29-2004 (Reissue 1995) provides that "[i]f, before the final submission of the cause a regular juror dies or is discharged, the court shall order the alternate juror, if there is but one, to take his place in the jury box." The statute further provides that if there are two alternate jurors, "the court shall select one by lot" to replace the deceased or discharged regular juror. In support of his argument that such action is mandated, Marshall draws our attention to a footnote in

Arizona v. Washington, 434 U.S. at 512 n.31, which states that "if there is a suggestion of individual juror bias, it may be possible to replace that juror with an alternate." We read this footnote in the context of the Court's observation that a prosecutor's improper opening statement creates "a risk, often not present in the individual juror bias situation, that the entire panel may be tainted." *Arizona v. Washington*, 434 U.S. at 512. This statement followed the Court's discussion of its "consistent course of decision" that, in the case of possible juror bias, mistrial was justified even if not strictly necessary. *Id.*

[16] While acknowledging that the record does not reflect why the trial court did not replace C.B. with an alternate, the State argues that the first mistrial could not have terminated jeopardy in any event because the jury selection process deprived Marshall of his right under Neb. Rev. Stat. § 29-2005 (Reissue 1995) to exercise 12 peremptory challenges and was, therefore, fundamentally flawed. The State's argument is based on the holding of *Illinois v. Somerville*, 410 U.S. at 460, that a mistrial is required by manifest necessity where a criminal trial is flawed by a defect which "could not be waived by the defendant's failure to object, and could be asserted on appeal or in a post-conviction proceeding to overturn a final judgment of conviction." Based upon *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988), and *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), *overruled, Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the State argues that the failure to afford Marshall the 12 peremptory challenges to which he was entitled under § 29-2005 constituted structural error affecting the framework within which the trial would have proceeded. See, *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *State v. Lowe*, 267 Neb. 782, 677 N.W.2d 178 (2004). We agree.

[17,18] Although peremptory challenges play a recognized role "in reinforcing a defendant's right to trial by an impartial jury," they are "not of federal constitutional dimension." *United States v. Martinez-Salazar*, 528 U.S. 304, 311, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000). With respect to a state criminal prosecution, "it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of

their exercise." *Ross v. Oklahoma*, 487 U.S. at 89. "As such, the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides." *Id.*

Nebraska law provides that "[e]very 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 . . . ." § 29-2005. Marshall was charged, inter alia, with murder in the second degree, a Class IB felony carrying a maximum penalty of life imprisonment. Neb. Rev. Stat. §§ 28-105 (Reissue 1989) and 28-304 (Reissue 1995). Thus, under Nebraska law, Marshall was entitled to 12 peremptory challenges. The record reflects that during the jury selection that preceded the first mistrial, he received only six.

[19] We recently held that the State's discriminatory exercise of its peremptory challenges in violation of *Batson v. Kentucky, supra*, constituted structural error. *State v. Lowe, supra*. It logically and necessarily follows that depriving Marshall of half of the peremptory challenges to which he is entitled under state law is likewise structural error. In this case, the trial judge did not articulate this error as a basis for granting the first mistrial. However, under *Arizona v. Washington*, 434 U.S. 497, 516-17, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978), if "the record provides sufficient justification for the state-court ruling, the failure to explain that ruling more completely does not render it constitutionally defective." Because the record at the time of the first mistrial reflected structural error which would have warranted reversal of any guilty verdict which may have resulted from continuation of the proceedings, the granting of the mistrial did not terminate jeopardy so as to bar retrial on the same charges.

Nor was jeopardy terminated by the second mistrial. Marshall's trial counsel did not object to the second mistrial and, in fact, argued that it was necessary. The record does not suggest, nor does Marshall argue on appeal, that he was goaded into agreement by any bad faith conduct on the part of the prosecution. Absent such bad faith, double jeopardy does not attach. *United States v. Dinitz*, 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976); *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998).

CONCLUSION

[20] Accordingly, we conclude as a matter of law that because neither of the mistrials terminated jeopardy, Marshall's pleas in bar were without merit. Thus, trial counsel's failure to perfect a timely appeal did not subject Marshall to prejudice under the second prong of the *Strickland* test. Likewise, appellate counsel's failure to raise the issue of trial counsel's performance in this regard on direct appeal was not prejudicial. As these legal conclusions are apparent from the files and records of the case, the district court did not err in dismissing Marshall's motion for postconviction relief without conducting an evidentiary hearing. We acknowledge that our reasoning differs from that of the district court. However, 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. Gamez-Lira*, 264 Neb. 96, 645 N.W.2d 562 (2002).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
FREDERICK ALLEN, APPELLANT.

690 N.W.2d 582

Filed January 7, 2005. No. S-04-379.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by the exigencies which justify their initiation.

3. **Constitutional Law: Investigative Stops: Warrantless Searches: Probable Cause: Police Officers and Sheriffs.** Acting without a warrant, police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment. An investigative stop of this nature is the least intrusive type of police-citizen encounter subjected to Fourth Amendment protection.
4. **Police Officers and Sheriffs: Investigative Stops.** When further questions are created in an officer's mind, an investigative stop may be prolonged and the scope enlarged as circumstances require.
5. **Constitutional Law: Search and Seizure: Evidence.** The wrong condemned by the Fourth Amendment is fully accomplished by the unlawful search or seizure itself. Inasmuch as the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, the exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect.
6. ____: ____: ____. Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. This prohibition applies as well to the fruits of the illegally seized evidence.
7. **Constitutional Law: Criminal Law.** Where the exclusionary rule does not result in appreciable deterrence, its use is unwarranted.
8. **Constitutional Law: Police Officers and Sheriffs.** Whether the exclusionary rule's remedy is appropriate in a particular context is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.
9. **Warrantless Searches: Search and Seizure: Proof.** If police have acted without a search warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. It follows that the State must bear the burden of showing that the good faith exception applies in the case of an unconstitutional warrantless search.
10. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Negligence.** The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.
11. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Reversed and remanded for a new trial.

Thomas C. Riley, Douglas County Public Defender, and Scott C. Sladek for appellant.

Jon Bruning, Attorney General, and Jeffrey J. Lux for appellee.

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

STEPHAN, J.

The issue presented in this appeal is whether evidence obtained as a result of a warrantless investigative traffic stop, conducted solely on the basis of inaccurate vehicle registration information transmitted to police by their dispatcher, should have been suppressed as the fruit of an unreasonable seizure which violated the Fourth Amendment.

BACKGROUND

During the early morning hours of May 23, 2003, Omaha police officers Jodi Sautter and Aaron Von Behren were patrolling the area of 33d Street and Creighton Boulevard in Omaha, Nebraska, in a marked cruiser. Sautter decided to request a registration check on a maroon minivan she was following. Using her radio, she contacted the dispatcher and "called out the numerics on the plate," stating "Nora, Henry, Nora 861" to designate Nebraska license plate No. NHN 861 displayed on the rear of the minivan. The dispatcher did not repeat the number to Sautter before responding that the plates were registered to a white Honda Accord. Upon hearing the dispatcher's report, the source of which is described in the record as a "computer system at the dispatcher station," Sautter stopped the minivan for the sole reason that "the plates didn't match the vehicle."

Approaching the minivan on foot, Sautter observed two occupants, a male driver later identified as Frederick Allen and a female passenger. Sautter informed Allen that she stopped him because the license plates did not match the vehicle he was operating and requested that he produce his operator's license, registration, and proof of insurance. Allen replied that the vehicle was owned by his girl friend and that he was unable to find the registration certificate in the vehicle. At that point, Sautter observed a beer container on the console of the minivan and detected the odor of alcohol. The officers asked Allen to exit the vehicle, and Von Behren administered field sobriety tests. Based upon the test results, the officers decided to transport Allen to police headquarters for processing on a driving under the influence charge. They conducted a pat-down search before placing Allen in the

police vehicle and found a 4-inch blade in his trouser pocket. A backup officer who had arrived on the scene during the detention remained with the minivan to await the tow vehicle.

When Sautter arrived at police headquarters, she received a call from the backup officer advising her that the minivan's vehicle identification number matched the license plate numbers displayed on the vehicle. Sautter then contacted the dispatcher and advised her of the information received from the backup officer. The dispatcher determined that she had mistakenly run a check on plate No. NHN 864 instead of NHN 861, as Sautter had requested. Sautter reported the dispatcher's error to a police sergeant and noted it on her official report. While at the police station, Sautter ran an additional check on Allen's identification which disclosed that his operator's license was under suspension.

Allen was charged by information with operating a motor vehicle while his operator's license had been suspended or revoked in violation of Neb. Rev. Stat. § 60-6,196(6) (Cum. Supp. 2002), a Class IV felony. He filed a motion to suppress all evidence obtained as a result of the traffic stop on grounds that police "lacked sufficient probable cause to stop [his] vehicle and such detention was improper." The district court conducted a hearing on the motion, at which hearing Sautter testified to the facts summarized above.

In an order overruling the motion to suppress, the district court found that the traffic stop "was premised only upon the information provided by the dispatcher, which if true, constituted a traffic violation." The court determined that the actions of Sautter in stopping Allen's vehicle were "objectively reasonable and in good faith" and specifically declined to impute the dispatcher's error to Sautter because "[t]here was no evidence that the dispatcher had the powers of a law enforcement officer." The court reasoned that the purpose of the exclusionary rule would not be served by exclusion of the evidence obtained because there was no indication that Sautter was not acting reasonably in relying upon the information which she initially received from the dispatcher. In addition, the court found that after the vehicle had been stopped, Allen's failure to produce a registration and the evidence of alcohol use justified the officers' decision in detaining Allen further for field sobriety testing. The court found that

Allen's performance on the field sobriety test and the discovery of the knife during the pat-down search furnished probable cause for his arrest.

At a stipulated bench trial, Allen preserved his objection to evidence obtained as a result of the traffic stop and renewed his motion to suppress, both of which were overruled. The district court found Allen guilty beyond a reasonable doubt and sentenced him to intensive supervised probation for a period of 2 years. Allen 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).

ASSIGNMENT OF ERROR

Allen assigns that the district court erred in overruling his motion to suppress.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigative stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000).

ANALYSIS

We begin by noting that Sautter's radio request for a registration check does not present a constitutional issue. The provisions of both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect against unreasonable seizures. *State v. Burdette, supra.* If there is no detention or seizure, these constitutional safeguards do not arise. See *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997). No reasonable suspicion or probable cause was necessary for Sautter to request the registration check because the check itself did not require or involve a detention or seizure. See *id.*

[2-4] However, a seizure occurred when Sautter stopped the vehicle operated by Allen and requested that he produce the registration. See *State v. Burdette, supra*. Sautter acted without a search warrant. Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by the exigencies which justify their initiation. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001). Acting without a warrant, police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment. *State v. Burdette, supra*; *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). An investigative stop of this nature is the least intrusive type of police-citizen encounter subjected to Fourth Amendment protection. *Id.* When further questions are created in an officer's mind, an investigative stop may be prolonged and the scope enlarged as circumstances require. *State v. Soukharith, supra*.

In this case, Allen argues that the investigative stop violated his Fourth Amendment rights because it was based entirely upon inaccurate information regarding the registration of the vehicle he was operating and that all evidence derived from the stop should therefore have been suppressed under the Fourth Amendment exclusionary rule. The State concedes that Sautter relied upon inaccurate information in stopping Allen, but argues that there was no police misconduct which would trigger application of the exclusionary rule. The State also argues that Sautter's actions were objectively reasonable and therefore within the good faith exception to the exclusionary rule first recognized in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). Neither party disputes that had it been accurate, the information transmitted to Sautter by the dispatcher would have justified an investigative stop. See *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996) (police officer's observation of vehicle without license plates or in-transit tags is legitimate basis for reasonable, articulable suspicion justifying brief investigative stop).

[5-7] The U.S. Supreme Court has held that the "wrong condemned by the [Fourth] Amendment is 'fully accomplished' by

the unlawful search or seizure itself." *United States v. Leon*, 468 U.S. at 906, quoting *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974). Inasmuch as "the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands," the exclusionary rule "operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona v. Evans*, 514 U.S. 1, 10, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995). Under the exclusionary rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *United States v. Calandra*, 414 U.S. at 347. "This prohibition applies as well to the fruits of the illegally seized evidence." *Id.* However, "[w]here 'the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted.' " *Arizona v. Evans*, 514 U.S. at 11, quoting *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976).

In *Arizona v. Evans*, the Court held that the exclusionary rule did not require suppression of evidence seized incident to an arrest conducted pursuant to what the officer believed to be an outstanding arrest warrant. It was subsequently determined that the warrant had been quashed prior to the arrest but that apparently due to a clerical error by court employees, the information had not been transmitted to law enforcement personnel. The Court reasoned that if court employees were responsible for the error,

> there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime . . . they have no stake in the outcome of particular criminal prosecutions. . . . The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed.

(Citations omitted.) *Arizona v. Evans*, 514 U.S. at 15. Thus, the Court concluded that "[a]pplication of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical

errors of court employees." 514 U.S. at 16. However, the Court specifically declined to address the question of whether a similar analysis would be applied "in order to determine whether the evidence should be suppressed if police personnel were responsible for the error." 514 U.S. at 16 n.5.

In the present case, the State argues that the reasoning of *Arizona v. Evans* should be applied because the dispatcher was neither a law enforcement officer nor an agent of law enforcement. Allen, however, contends that "[t]he failure of either the officer or the dispatcher to take the few seconds to check that the license plate number had been if [sic] fact heard correctly was careless police work, the kind that the exclusionary rule should strive to prevent." Brief for appellant at 5. The district court specifically declined "to impute the dispatcher's mistake to Sautter to invalidate a suspicion that was objectively reasonable" because "[t]here was no evidence that the dispatcher had the powers of a law enforcement officer" and thus that application of the exclusionary rule would not serve its intended deterrent purpose.

The record does not reflect the name of the dispatcher or the identity of her employer. All we know about the dispatcher is derived from the following portion of Sautter's testimony at the suppression hearing:

> [Defense counsel]. And when you're talking about calling in to dispatch, this is the Omaha Police Department's dispatch?
>
> [Sautter]. Yes.
>
> Q. Okay. So this is part of the Omaha Police Department?
>
> A. They also do Douglas County and State Patrol, so I —
>
> Q. Law enforcement?
>
> A. Yes.
>
> Q. All right. It's not part of the court system —
>
> A. No.

We agree with the district court that the record does not establish that the dispatcher possessed all the powers of a law enforcement officer. However, the record does reflect that the dispatcher was "not part of the court system." We thus conclude that the facts in this case are distinguishable from *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995), because the source of

the information on which Sautter relied in making the investigative stop was not a court employee. Rather, the dispatcher is a person who can fairly be characterized as an "adjunct[] to the law enforcement team." *Arizona v. Evans*, 514 U.S. at 15. Thus, Sautter stopped the vehicle operated by Allen on the basis of information which she received "via police channels." See 4 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 9.5(i) (4th ed. 2004).

We considered a similar circumstance in *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997), which involved a challenge to an investigative stop based upon the officer's receipt of a dispatch report indicating that there was a missing person associated with the vehicle and his observation that the driver of the vehicle did not match the description of the missing person. We stated that " '[a] reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle *without any proof of the factual foundation* for the relayed message.' " *State v. Soukharith*, 253 Neb. at 321, 570 N.W.2d at 354, quoting *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977). However, relying on *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985), we determined that the stop was justified because the officers who initiated the message relayed by the dispatcher had knowledge of facts creating a reasonable suspicion sufficient to justify stopping the vehicle and the stopping officer perceived that the driver did not match the description of the missing person. We noted that "[a]n investigative stop, like probable cause, is to be 'evaluated by the collective information of the police engaged in a common investigation.' " *State v. Soukharith*, 253 Neb. at 322, 570 N.W.2d at 354, quoting *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

This is not a case in which police possess factual information supporting a reasonable suspicion of criminal activity which, upon further investigation, proves to be unfounded. Here, there was no factual foundation for the information which the dispatcher transmitted to Sautter, as it is undisputed that the information was false due to the dispatcher's mistake in running the wrong license plate number. Sautter had no other reason for initiating the stop. Thus, the record reflects that neither Sautter

nor any other law enforcement personnel possessed any true fact which would support the reasonable suspicion necessary to justify an investigative stop. The stop was therefore an unreasonable seizure in violation of the Fourth Amendment.

[8,9] However, " 'whether the exclusionary rule's remedy is appropriate in a particular context [is] an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.' " *Arizona v. Evans*, 514 U.S. 1, 10, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995), quoting *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). See, also, *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000). The State argues that the exclusionary rule should not be applied in this case because Sautter's actions in response to the information she initially received from the dispatcher were objectively reasonable and thus fall within the good faith exception to the exclusionary rule. We have held that if police have acted without a search warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001); *State v. Davidson, supra.* It follows that the State must bear the burden of showing that the good faith exception applies in the case of an unconstitutional warrantless search. See, *U.S. v. Santa*, 180 F.3d 20 (2d Cir. 1999); *Hoay v. State*, 348 Ark. 80, 71 S.W.3d 573 (2002).

In this case, the State did not establish the applicability of the "categorical exception to the exclusionary rule" recognized in *Arizona v. Evans*, 514 U.S. at 16, because it did not establish that the erroneous information upon which the stop was predicated was supplied by a court employee. As noted above, the source of the incorrect information was the dispatcher whose role, based on the limited record before us, was at least that of an adjunct to law enforcement. Thus, we are presented with the issue which the U.S. Supreme Court did not reach in *Arizona v. Evans*; namely, whether there is a good faith exception to the exclusionary rule when law enforcement personnel are responsible for erroneous information upon which other officers act in effecting a warrantless search or seizure. Perhaps foreshadowing this issue, a concurring opinion in *Arizona v. Evans*, 514 U.S. at 17, notes that "[s]urely it would *not* be reasonable for the police to rely, say, on

a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests . . . ." (O'Connor, J., concurring.)

The State relies upon *U.S. v. De Leon-Reyna*, 930 F.2d 396 (5th Cir. 1991), which involved an investigative stop based in part upon a dispatcher's report that the license plate numbers transmitted by a border patrol officer did not correspond to the vehicle which the officer was following. This information proved to be erroneous because the officer failed to utilize established code words in transmitting the license plate number and the dispatcher misunderstood the officer's recitation of the number. Reversing the trial court's suppression of evidence obtained during a search of the vehicle after it was stopped, a divided court of appeals reasoned that the incorrect license plate information the officer received from the dispatcher could be taken into account with the totality of the circumstances, "albeit discounted somewhat for lessened reliability." *Id.* at 402. Other circumstances included the officer's observation of materials known to be used for drug smuggling, the driver's unusual reaction to the officer, and the erratic movement of the vehicle.

Because there were circumstances in addition to the license plate check which formed the basis for the stop, *U.S. v. De Leon-Reyna* is distinguishable from the present case. Moreover, we question the concept of "discounting somewhat" incorrect information resulting from police negligence. Rather, we agree that "erroneous information created by the negligent conduct of a law enforcement officer cannot be used to support a finding that the officer acted reasonably." *Id.* at 402 (Thornberry, J., dissenting.)

Another case involving facts similar to those before us is *State v. White*, 660 So. 2d 664 (Fla. 1995). During a lawful traffic stop, a deputy sheriff was informed that there was an outstanding arrest warrant for the driver of the vehicle. The driver was arrested, and a search incident to the arrest produced contraband. It was later discovered that a computer in the sheriff's office incorrectly showed the arrest warrant as active when in fact it had previously been served and was no longer valid. The Florida Supreme Court concluded that the error

> boils down to one unmistakable fact—failure of the police to maintain up-to-date and accurate computer records resulted

> in an illegal arrest and search. This type of police negligence fits squarely within the class of governmental action that the exclusionary rule was designed to deter, i.e., police negligence or misconduct that is likely to be thwarted if the evidence seized is suppressed. Suppression of evidence seized pursuant to police computer error will encourage law enforcement agencies to diligently maintain accurate and current computer records.

Id. at 667. The court concluded that the good faith exception was inapplicable because it was within the collective knowledge of the sheriff's office that the warrant was void and the arresting officers were thus "charged with knowledge that they had no authority to arrest the defendant." *Id.* at 668.

[10] In considering whether the State has established a good faith exception to the exclusionary rule in this case, we apply the general analytical framework of *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), which the Court applied in the context of a warrantless search in *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995). We begin with the basic concept that "'"[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . ."'" *United States v. Leon*, 468 U.S. at 919. Thus, the first step is to determine whether such conduct is involved in this case. There is no indication that Sautter or the dispatcher engaged in any willful misconduct, but there is evidence that one or both of them acted negligently. Negligence, by definition, includes the failure to do something that a reasonably careful person would do under the circumstances. See *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998). It would have been reasonable for the dispatcher to repeat the license plate number supplied by Sautter before running the check in order to verify its accuracy. Sautter testified that some dispatchers follow this practice, but the dispatcher involved in this case did not. Likewise, it would have been reasonable for Sautter to repeat the license plate number to the dispatcher in order to confirm the basis for the stop, considering that Sautter had no other basis for suspecting unlawful activity. Had either Sautter or the dispatcher used this simple verification procedure,

the error which resulted in the unconstitutional seizure would in all probability have been avoided. Thus, we conclude that this case presents the type of conduct which the exclusionary rule was historically designed to deter.

Prior to the development of the good faith exception, the Fourth Amendment exclusionary rule was criticized because of its failure to differentiate between "honest mistakes" on the part of law enforcement and "deliberate and flagrant . . . violations of the Fourth Amendment." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 418, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (Burger, C.J., dissenting). See 1 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 1.2(d) (4th ed. 2004). In *Arizona v. Evans*, the Court considered the extent and severity of the error. In that case, it found no evidence that court employees were "inclined to ignore or subvert the Fourth Amendment" so as to require the "extreme sanction of exclusion." *Arizona v. Evans*, 514 U.S. at 14-15. The Court specifically noted testimony of a court employee that the type of error at issue "occurred once every three or four years." 514 U.S. at 15. In contrast, the State did not present any evidence in this case to show that the dispatcher's error was an isolated "honest mistake" which is unlikely to recur, and we therefore cannot find that to be so.

The most important consideration in deciding whether to apply a good faith exception in this case is whether there is a basis for believing that application of the exclusionary rule will have a significant effect on those responsible for seeking and transmitting vehicle registration information which can be used as a basis for an investigative stop. See *Arizona v. Evans, supra.* We conclude that the threat of exclusion is likely to cause police officers and dispatchers to exercise greater care than was exercised in this case when obtaining and transmitting vehicle registration information which may be used to justify an investigative stop. As we have noted, simple verification procedures could have prevented the error which formed the sole basis for the unreasonable seizure in this case.

CONCLUSION

For the reasons discussed, we conclude that the purported investigative stop of the vehicle operated by Allen was an unreasonable seizure in violation of the Fourth Amendment, because

police had no true facts upon which to base a reasonable suspicion of unlawful conduct. We further conclude that the good faith exception to the exclusionary rule is inapplicable and that therefore the district court erred in overruling Allen's motion to suppress and in receiving evidence derived from the unlawful stop at trial.

[11] Having found reversible error, we must determine whether the evidence presented by the State was sufficient to sustain the conviction in order to determine whether to remand for a new trial. In *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988), the Court held that the Double Jeopardy Clause does not forbid retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. See, *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000); *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). Thus, although we have concluded that all evidence derived from the unlawful investigative stop was erroneously admitted, we consider it in our analysis of the sufficiency of the evidence. See, *Lockhart v. Nelson, supra*; *State v. Sheets, supra*. We conclude that the evidence so considered was sufficient to sustain Allen's conviction, and we therefore reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

SPRING VALLEY IV JOINT VENTURE, A NEBRASKA GENERAL PARTNERSHIP, ET AL., APPELLANTS, V. NEBRASKA STATE BANK OF OMAHA, A NEBRASKA CORPORATION, APPELLEE.

690 N.W.2d 778

Filed January 14, 2005. No. S-03-965.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; 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.

3. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
4. **Contracts: Parties: Intent.** Beneficiaries of a contract may recover thereon, though not named as parties, if it appears by express stipulation or by reasonable intendment that the rights and interests of the unnamed parties were contemplated and provision was being made for them.
5. ____: ____: ____. In determining whether a beneficiary of a contract may recover thereon, the test is whether the parties to the contract intended to confer a benefit directly upon the third party or whether the benefit to the third party was merely incidental.
6. **Contracts: Parties: Intent: Words and Phrases.** Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (1) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary or (2) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. An incidental beneficiary is a beneficiary who is not an intended beneficiary.
7. **Contracts: Parties.** An incidental beneficiary acquires no right against the promisor or promisee.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Edward D. Hotz and Patrick M. Flood, of Hotz, Weaver, Flood & Breitkreutz, for appellants.

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

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

GERRARD, J.

Leo Dahlke and R.C.S. & Sons, Inc. (R.C.S.), entered into several loan agreements with Nebraska State Bank of Omaha (Bank), the appellee, in the spring of 2001. The loan proceeds were distributed via cashier's checks to Dahlke and R.C.S. On the loan documents, Dahlke and R.C.S. indicated that the purpose of the loans was to fund interests in the appellants. The appellants (Partnerships) are seven Nebraska partnerships that collectively filed an action against the Bank, claiming they were entitled to the proceeds of the Dahlke and R.C.S. loans and that

the Bank converted the funds by distributing them to other entities. The district court dismissed the action for lack of standing, and the Partnerships appeal. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 8 and April 12, 2001, Dahlke and R.C.S. entered into several loan agreements with the Bank. Dahlke and R.C.S. executed separate promissory notes to the Bank and completed corresponding disbursement request and authorization forms, providing instructions for the disbursement of the loan proceeds. These forms indicated that the purpose of the loan proceeds was to fund interests in the Partnerships, but ordered the proceeds to be paid directly to the respective borrowers, Dahlke or R.C.S. Pursuant to those instructions, the proceeds of the loans were disbursed by cashier's checks, payable to Dahlke and R.C.S., individually. With the proceeds of the March 8 loans, Dahlke and R.C.S. purchased new cashier's checks, payable to Spring Valley IV Joint Venture, Spring Valley V Joint Venture, Spring Valley X Joint Venture, and Spring Valley XI Joint Venture. The proceeds of the April 12 loans were also used to purchase new cashier's checks, payable to the following parties: Prime Realty, Inc., remitted on behalf of Dahlke, R.C.S., and Brook Valley VI Joint Venture; Prime Realty, Inc., remitted on behalf of Dahlke, R.C.S., and Brook Valley XII Joint Venture; and Prime Realty, Inc., and Heartland Title Services, remitted on behalf of Dahlke, R.C.S., and Brook Valley XIII Joint Venture.

The Partnerships collectively filed an action against the Bank, claiming that the proceeds of the Dahlke and R.C.S. loans were meant to fund the Partnerships and alleging that the Bank engaged in conversion and conversion of instruments in distributing the proceeds to other entities. The Bank filed a motion to dismiss, asking the court to consider evidence outside the pleadings and convert the motion to a motion for summary judgment. See Neb. Ct. R. of Pldg. in Civ. Actions 12(b) (rev. 2003). In its motion, the Bank asserted, inter alia, that the Partnerships had no rights or interest in the loan proceeds and, thus, could not maintain an action for conversion.

After a hearing on the motion, the district court entered an order granting the Bank's motion for summary judgment and

dismissing the case, finding that the Partnerships lack standing to bring the suit. The Partnerships appeal.

ASSIGNMENTS OF ERROR

The Partnerships assign, summarized and restated, that the district court erred in dismissing the case for lack of standing and failure to state a claim for conversion.

STANDARD OF REVIEW

[1] 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. *Plowman v. Pratt*, 268 Neb. 466, 684 N.W.2d 28 (2004).

[2] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; 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. *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004).

ANALYSIS

The Partnerships assign that the district court erred in finding that the Partnerships lack standing to maintain a conversion action against the Bank. The Partnerships argue that under the terms of the loan documents, they are third-party beneficiaries of the loan agreements, have a legal or equitable interest in the loan proceeds, and, thus, have standing to sue the Bank.

The Bank counters, arguing that the Partnerships lack standing because they were not parties to the loan transactions and had no other agreement directly with the Bank. Accordingly, the Bank asserts that even if Dahlke and R.C.S. agreed to use the loan proceeds to fund interests in the Partnerships, such an understanding with the borrowers does not give the Partnerships standing to sue the Bank.

[3] In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002); *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002). In the present case, the

Partnerships concede that they were not parties to the loan agreements entered into by the Bank and the borrowers, Dahlke and R.C.S., but claim rights to the proceeds as third-party beneficiaries of those agreements.

While the Partnerships are not suing for breach of contract, their conversion action rests upon alleged property rights that are, in turn, based on the loan agreements. In other words, while this is not a contract action, the Partnerships' argument requires us to consider principles of contract law to determine if the Partnerships did, indeed, acquire any rights under the loan agreements as intended beneficiaries.

[4,5] Beneficiaries of a contract may recover thereon, though not named as parties, if it appears by express stipulation or by reasonable intendment that the rights and interests of the unnamed parties were contemplated and provision was being made for them. *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994). As stated by the Court of Appeals of North Carolina, "[t]he test is whether the parties to the contract intended to confer a benefit directly upon the third party or whether the benefit to the third party was merely incidental." *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 33-34, 351 S.E.2d 786, 790 (1987).

[6,7] The Restatement (Second) of Contracts distinguishes between an intended beneficiary and an incidental beneficiary:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) of Contracts § 302 at 439-40 (1981). In illustrating the distinction, the Restatement offers the following scenario:

> B promises A to pay whatever debts A may incur in a certain undertaking. A incurs in the undertaking debts to C, D and E. If the promise is interpreted as a promise that B will pay C, D and E, they are intended beneficiaries under Subsection (1)(a); *if the money is to be paid to A in order that he may be provided with money to pay C, D and E, they are at most incidental beneficiaries.*

(Emphasis supplied.) Restatement, *supra*, comment *b.*, illus. 3 at 441. An incidental beneficiary acquires no right against the promisor or promisee. *Century Bank v. Makkar*, 132 Md. App. 84, 751 A.2d 1 (2000).

In the present case, Dahlke and R.C.S. indicated that the purpose of the loans was to fund partnership interests. Although the March 8, 2001, distribution request and authorization forms referred specifically to funding partnership interests in Spring Valley Partnerships, the April 12, 2001, forms referred generally to funding interests in partnerships. On the same forms, Dahlke and R.C.S. provided instructions for the disbursement of the loan proceeds, instructing that the funds, minus any fees, be disbursed directly to the borrower, Dahlke or R.C.S. The forms made no instruction for the Bank to disburse funds to the Partnerships.

In *Scott v. Mamari Corp.*, 242 Ga. App. 455, 530 S.E.2d 208 (2000), Robert Scott constructed a dam on a real estate development but was not fully paid for his work by the resort with whom he contracted. Scott filed claims against the resort's creditors, claiming that he was a third-party beneficiary to certain financing agreements related to the development. One such agreement involved an extension of credit of $63,879, an amount based on Scott's estimated cost to complete the dam. The resort requested the full amount of the note, supported by a final invoice from Scott, and stated that the contractors had been paid and payment should be made directly to the resort. The Bank disbursed the funds as directed, but the resort failed to pay Scott on his final invoice. The Court of Appeals of Georgia determined that Scott was not an intended beneficiary of the loan agreement. Specifically, the court stated that the notes represented promises by the resort to repay the Bank and not promises by the Bank to do anything for Scott. The court stated that "[i]t is commonplace to base a loan request on anticipated need. This fact alone does

not create an obligation on the [part of the] lender to disburse the loan to the party to whom the borrower intends to pay with the borrowed funds." *Id.* at 457, 530 S.E.2d at 211.

We agree with the court's reasoning. Likewise, in the instant case, the evidence indicates that the Bank was under no obligation to disburse funds directly to the Partnerships, but, rather, was obligated to disburse the funds to the individual borrower, who would then be able to invest the sums in the Partnerships. Thus, we conclude that the Partnerships were at most incidental beneficiaries of the loan agreements and, therefore, lack any enforceable property rights to the loan proceeds. Accordingly, the Partnerships lack standing to maintain an action against the Bank for the loan proceeds and the district court did not err in dismissing the case on those grounds.

Because we have determined that the district court was correct in dismissing the instant case for lack of standing, we do not reach the Partnerships' remaining arguments. Further, because we have concluded that the Partnerships were not intended beneficiaries under the loan agreements, we do not have occasion to decide whether a party deemed to be an intended beneficiary of a contract would, as the Partnerships argued, have standing to bring an action for conversion of the property from which that beneficiary is intended to benefit under the contract.

CONCLUSION

The district court did not err in dismissing the Partnerships' operative complaint for lack of standing. The Partnerships did not show that they had a legal or equitable right, title, or interest in the loan proceeds. The judgment of the district court is therefore affirmed.

AFFIRMED.

McCORMACK, J., not participating.

STEPHANIE ZOUCHA, APPELLANT, V. TOUCH OF CLASS LOUNGE, APPELLEE.

690 N.W.2d 610

Filed January 14, 2005. No. S-03-971.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. **Workers' Compensation: Proof.** The two phrases "arising out of" and "in the course of" in Neb. Rev. Stat. § 48-101 (Reissue 2004) are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist.
4. **Workers' Compensation: Words and Phrases.** The phrase "arising out of," as used in Neb. Rev. Stat. § 48-101 (Reissue 2004), describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident.
5. ____: ____. The "in the course of" requirement of Neb. Rev. Stat. § 48-101 (Reissue 2004) has been defined as testing the work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment.
6. ____: ____. An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto.
7. **Workers' Compensation.** Injuries sustained by an employee while going to and coming from work do not arise out of and in the course of employment unless it is determined that a distinct causal connection exists between an employer-created condition and the cause of the injury.
8. ____. An employee injured on the premises of the employer where he or she works while coming to work or leaving after work is within the course of his or her employment under Neb. Rev. Stat. § 48-101 (Reissue 2004).
9. ____. Parking lots owned or maintained by an employer are generally considered part of the employer's premises for workers' compensation purposes.
10. ____. For workers' compensation purposes, a shopping center parking lot provided for the convenience of, and used by, employees of the businesses located in the center is considered part of the premises of an employer located in the center.
11. ____. An employee leaving the premises of his or her employer in the usual and customary way after his or her work is ended is within the course of his or her employment within the meaning of workers' compensation law.

Petition for further review from the Nebraska Court of Appeals, CARLSON, MOORE, and CASSEL, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals reversed, and cause remanded with directions.

Michael M. O'Brien, P.C., for appellant.

Matthew J. Buckley and William D. Gilner, of Nolan, Olson, Hansen & Lautenbaugh, L.L.P., for appellee.

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

GERRARD, J.

NATURE OF CASE

During the early morning hours of June 5, 2001, Stephanie Zoucha was assaulted as she left work at the Touch of Class Lounge (the Lounge) in Omaha, Nebraska. Zoucha was severely injured. She filed a claim for workers' compensation benefits, but the single judge of the Workers' Compensation Court dismissed her petition based upon his finding that the assault did not take place on the premises of Zoucha's employer, was not causally related to Zoucha's employment, and thus did not occur in the course of Zoucha's employment. The single judge's order was affirmed by the review panel of the Workers' Compensation Court, and the judgment was affirmed by the Nebraska Court of Appeals; we granted Zoucha's petition for further review. The question presented in this appeal is whether, for workers' compensation purposes, a shopping center parking lot, used by employees of the businesses located in the center, is considered part of the premises of an employer located in the center.

FACTUAL BACKGROUND

Zoucha was employed at the Lounge as a bartender and waitress starting in early 2001. Patricia Bauer, the owner of the Lounge, testified that Zoucha's duties ended when she closed and locked the door of the Lounge after closing. Zoucha was not required, for instance, to make night deposits of the Lounge's revenue.

On June 4, 2001, Zoucha started her shift at approximately 4:30 or 5 p.m. and was the only bartender working that evening. During the evening, a group of people came in, including William

Nunez. At one point during the evening, Zoucha took a drink away from Nunez. Nunez also approached Zoucha and asked if she was interested in smoking marijuana with him after her shift. Zoucha admitted to smoking marijuana on occasion, but testified that she had not smoked marijuana with Nunez before, or socialized with him, and that she told him she would not smoke with him.

Zoucha stopped serving drinks at 1 a.m. and collected drinks from the patrons of the Lounge at 1:15 a.m. See Neb. Rev. Stat. § 53-179 (Reissue 1998). She cleaned up the Lounge, locked up, and left at about 2:15 a.m. Zoucha testified that she went to her car in the parking lot, unlocked the door, put her bags in, and was struck with "[l]ike a tire iron on the back of my head." Zoucha sustained an open skull fracture and other severe injuries. Zoucha has no memory of any events from the time of the assault on June 5, 2001, until June 16. At the time of trial, Zoucha still suffered from significant cognitive impairment, including difficulty with speech and thought formation. Zoucha's purse, containing her tip money from her shift, was stolen and not recovered.

Zoucha testified that she had seen her attacker before being struck and that he resembled Nunez. Nunez was arrested and, at the time of trial, had been charged with the assault. The Omaha police officer who investigated the assault, in an affidavit seeking an arrest warrant for Nunez, averred that Nunez had admitted being at the scene, and a denim jacket had been found in Nunez' apartment with Zoucha's blood on it.

Bauer testified that she did not own the building in which the Lounge was located but simply leased space in the building. There were two businesses in the building, including the Lounge, and approximately seven or eight other businesses in another, adjacent building. Characterized generally, the Lounge is located in a suburban shopping plaza, or "strip mall." Bauer testified that she did not own or have control or authority over the parking lot, which was provided for the common use of all the businesses located in the plaza. Bauer estimated that Zoucha's car had been located about 50 to 60 feet from the door of the Lounge. Bauer stated that she did not require her employees to park in the plaza parking lot, but would expect them to do so as a matter of convenience.

Zoucha filed a petition in the Workers' Compensation Court seeking disability benefits and medical expenses. After trial, the single judge made findings of fact generally accepting Zoucha's description of the events prior to the assault. However, the single judge concluded that at the time of the assault, Zoucha had left the premises of the Lounge. The single judge applied the "going to and from work" rule, which will be explained in greater detail below, and found that Zoucha "was not in the course of her employment at the time that she suffered her severe injuries." Consequently, the single judge dismissed Zoucha's petition. The review panel of the Workers' Compensation Court, and the Court of Appeals, affirmed the judgment of the single judge for substantially the same reasons articulated by the single judge. See *Zoucha v. Touch of Class Lounge*, No. A-03-971, 2004 WL 943218 (Neb. App. May 4, 2004) (not designated for permanent publication). Zoucha filed a petition for further review, which we granted.

ASSIGNMENTS OF ERROR

Zoucha assigns that the Court of Appeals erred in (1) concluding that Zoucha's injuries did not arise out of and in the course of her employment with the Lounge, (2) concluding that Zoucha's injuries did not occur on the premises of the Lounge, and (3) failing to find a direct causal connection between Zoucha's employment and her injuries.

STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004).

ANALYSIS

[3,4] Prior to discussing the particular circumstances of this case, we review some of the basic principles of workers' compensation law that will be relevant to our analysis. When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury. Neb. Rev. Stat. § 48-101 (Reissue 2004). The two phrases "arising out of" and "in the course of" in § 48-101 are conjunctive; in order to recover, a claimant must establish by a preponderance of the evidence that both conditions exist. *Logsdon v. ISCO Co.*, 260 Neb. 624, 618 N.W.2d 667 (2000). The phrase "arising out of," as used in § 48-101, describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope of the employee's job; the phrase "in the course of," as used in § 48-101, refers to the time, place, and circumstances surrounding the accident. *Logsdon, supra*. We note, although it is not contested by the parties, that the assault was an "accident" within the meaning of § 48-101. See *P.A.M. v. Quad L. Assocs.*, 221 Neb. 642, 380 N.W.2d 243 (1986).

[5,6] The "in the course of" requirement of § 48-101 has been defined as testing the work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment. *Misek v. CNG Financial*, 265 Neb. 837, 660 N.W.2d 495 (2003). An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto. *Id*.

[7] In this case, the single judge concluded that Zoucha's injuries did not occur in the course of employment because she failed to satisfy the requirements of the "going to and coming from work" rule. That rule, as currently applied in Nebraska, is that injuries sustained by an employee while going to and coming from work do not arise out of and in the course of employment

unless it is determined that a distinct causal connection exists between an employer-created condition and the cause of the injury. *Torres v. Aulick Leasing*, 261 Neb. 1016, 628 N.W.2d 212 (2001). Prior to our adoption of this rule, we adhered to a "bright-line" rule, pursuant to which an employee could recover for an injury sustained while going to and from work only if that injury occurred on premises owned by the employer. See *id*. But we abandoned that rule in *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998), and adopted the current rule set forth above.

[8] Our current formulation of the "going to and coming from work" rule, however, "allows an employee to recover for injuries sustained *off the employer's premises* when there is a distinct causal connection between an employer-created condition and the occurrence of the injury." (Emphasis supplied.) *Torres*, 261 Neb. at 1022, 628 N.W.2d at 218. The initial inquiry—and the issue presented by Zoucha's argument in this appeal—is whether or not the employee was on the employer's premises when the injury was sustained. See *La Croix, supra*. The requirement of a distinct causal connection between an employer-created condition and the occurrence of the injury for an employee to recover for an injury sustained *off* the employer's premises, see *id*., does not alter our prior rule that an employee injured *on* the premises of the employer where he or she works while coming to work or leaving after work is within the course of his or her employment under § 48-101, see *P.A.M., supra*.

[9] Consequently, we first address Zoucha's argument that she was on the Lounge's premises when she was assaulted. Parking lots owned or maintained by an employer are generally considered part of the employer's premises for workers' compensation purposes. See, *La Croix, supra*; 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 13.04[2][a] (2004). But as Zoucha correctly notes, the general rule is that "if the owner of the building in which the employee works provides a parking lot for the convenience of all tenants, or if a shopping center parking lot is used by employees of businesses located in the center, the [parking lot] rule is applicable." See *id*. at 13-41. Accord, *May Dept. Stores Co. v. Harryman*, 307 Md. 692, 517 A.2d 71 (1986); *Lovato v. Maxim's Beauty Salon, Inc.*, 109 N.M. 138, 782 P.2d

391 (N.M. App. 1989); *P.B. Bell & Associates v. Ind. Com'n of Ariz.*, 142 Ariz. 501, 690 P.2d 802 (Ariz. App. 1984).

It would be "impractical and illogical" to require actual ownership or control of a parking lot by a tenant in a shopping plaza consisting of multiple independent businesses, each of which would have to be an owner in common with all the other tenants in order to share a nebulous control over its geographical confines. *Frishkorn v. Flowers*, 26 Ohio App. 2d 165, 167, 270 N.E.2d 366, 368 (1971), *abrogated in part on other grounds, Brown v. B.P. Am., Inc.*, 85 Ohio App. 3d 194, 619 N.E.2d 479 (1993). Accord, *May Dept. Stores Co., supra*; *Merrill v. J. C. Penney*, 256 N.W.2d 518 (Minn. 1977). As the *Frishkorn* court explained under the circumstances of that case,

> [i]n reality, the employer and the other tenants of the . . . Shopping Center, having reciprocal rental rights and privileges, were also accorded the common use and access of the parking area. Logically, to that extent, this was tantamount to an essential expansion of their respective premises for the purpose of adequately serving and furthering their business interests. It follows that the appellant-employee, as well as the employees of the other tenants, derived their similar rights and privileges from the shopping center by virtue of a vested privity in the objectives of their employers.

26 Ohio App. 2d at 168-69, 270 N.E.2d at 369. Accord, *May Dept. Stores Co., supra*; *Merrill, supra*. Based on that reasoning, the majority of courts to have addressed the question have concluded that parking lots in shopping malls are part of the premises of employers whose main premises are located within the mall. See, e.g., *Turner v. B Sew Inn*, 18 P.3d 1070 (Okla. 2000); *Livingstone v. Abraham & Straus, Inc.*, 111 N.J. 89, 543 A.2d 45 (1988); *Barnes v. Stokes*, 233 Va. 249, 355 S.E.2d 330 (1987); *May Dept. Stores Co., supra*; *Merrill, supra*; *Adams v. Lemuria, Inc.*, 738 So. 2d 295 (Miss. App. 1999); *Lovato, supra*; *P.B. Bell & Associates, supra*; *Montgomery Ward v. Cutter*, 64 Or. App. 759, 669 P.2d 1181 (1983); *Frishkorn, supra*; *Rose v. Cadillac Fairview Shopping Center*, 668 A.2d 782 (Del. Super. 1995), *affirmed* 676 A.2d 906 (Del. 1996). See, generally, 1 Larson & Larson, *supra*.

[10] We find the reasoning of these courts to be persuasive and consistent with established principles of Nebraska workers'

compensation law. Therefore, we hold that for workers' compensation purposes, a shopping center parking lot provided for the convenience of, and used by, employees of the businesses located in the center is considered part of the premises of an employer located in the center. Given that holding, the record in this case establishes beyond dispute that Zoucha was on the premises of her employer when she was assaulted, and the single judge erred in concluding otherwise. Consequently, the review panel and Court of Appeals erred in affirming the order of the single judge.

[11] Likewise, the single judge erred in concluding that Zoucha's injuries did not arise out of and in the course of her employment. The single judge's factual findings conclusively establish that Zoucha was injured while on the premises of her employer and while leaving her employment. " ' "As to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and coming from work . . . are compensable . . . ." ' " *P.A.M. v. Quad L. Assocs.*, 221 Neb. 642, 648, 380 N.W.2d 243, 247 (1986). Accord 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 13.00 (2004). " 'An employee leaving the premises of her employer in the usual and customary way after her work is ended is within the course of her employment within the meaning of the [workers'] compensation law.' " *P.A.M.*, 221 Neb. at 648, 380 N.W.2d at 247-48, quoting *McDonald v. Richardson County*, 135 Neb. 150, 280 N.W. 456 (1938).

In *P.A.M., supra*, two female restaurant employees were leaving the restaurant late at night, after cleaning the restaurant and locking the doors. One of the employees, P.A.M., was required to go to the bank to make the night deposit, but the other employee, S.K., was simply getting a ride home from P.A.M. and had no remaining duties to perform. As they were getting into P.A.M.'s automobile, they were assaulted and robbed. We concluded that P.A.M.'s injuries arose out of and in the course of her employment, because she was on her employer's premises and on her way to the bank to make the night deposit, a duty for which she received compensation. But we also concluded that S.K.'s injuries arose out of and in the course of her employment.

> While the situation with regard to S.K. may at first blush seem somewhat different, the result must, nevertheless, be

> the same. Although it is true that at the time the injury occurred to S.K. she was not then carrying out a specific task for the employer for which she received compensation, as was P.A.M., the evidence conclusively establishes that she was injured while on the premises of her employer and while leaving her employment. This has traditionally and consistently been held by this court to be an injury arising out of and in the course of one's employment.

Id. at 647, 380 N.W.2d at 247.

The circumstances of *P.A.M., supra*, are substantially indistinguishable from the facts of this case as found by the single judge. The evidence in the instant case reveals that Zoucha, while leaving her employment, walked directly from the Lounge to her car, which was parked on the premises of her employer, where she was assaulted. Pursuant to *P.A.M.*, the record establishes that Zoucha's injuries arose out of and in the course of her employment and are compensable under § 48-101. Zoucha's first and second assignments of error have merit, and given our conclusion on those issues, we need not consider her remaining assignment of error.

CONCLUSION

The Workers' Compensation Court erred in concluding that Zoucha was not on the Lounge's premises when she was assaulted and that her injuries did not arise out of and in the course of her employment. The Court of Appeals erred in affirming the judgment of the Workers' Compensation Court review panel. The judgment of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with directions to reverse the judgment of the Workers' Compensation Court review panel and remand the cause to the review panel for further remand to the single judge for a determination of the benefits to which Zoucha is entitled, including any attorney fees allowed pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2004).

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH R. SKLENAR, APPELLANT.

690 N.W.2d 631

Filed January 14, 2005. No. S-03-1082.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. ____: ____. If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
4. **Criminal Law: Statutes.** Where a criminal procedure is not authorized by statute, it is unavailable to a defendant in a criminal proceeding.

Appeal from the District Court for Douglas County, THOMAS A. OTEPKA, Judge, on appeal thereto from the County Court for Douglas County, LYN V. WHITE, Judge. Order of District Court vacated, and cause remanded with directions.

James J. Regan for appellant.

Jon Bruning, Attorney General, and Jeffrey J. Lux for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The appellant, Joseph R. Sklenar, argues in this case that he is entitled to a discharge from the probation violation proceeding initiated against him because he did not receive "prompt consideration" of the charge under Neb. Rev. Stat. § 29-2267 (Reissue 1995). He also contends that the presiding judge in the county court proceeding should have recused herself. We conclude that Sklenar appealed from an interlocutory order.

BACKGROUND

In 2001, Sklenar pled no contest to a charge of theft by unlawful taking. On October 25, he was sentenced to probation for a period of 1 year.

On August 15, 2002, the Omaha City Attorney filed a motion to revoke Sklenar's probation. On March 19, 2003, Sklenar filed a motion to discharge the violation of probation, alleging that he had not been afforded "prompt consideration" of the matter under § 29-2267. At a hearing held the next day, the county court denied Sklenar's motion to discharge, as well as his motion to recuse.

On March 28, 2003, Sklenar filed an appeal to the district court, assigning as error the county court's decisions to deny his motion to discharge and motion to recuse. The district court affirmed. Sklenar appeals.

ASSIGNMENT OF ERROR

Sklenar contends the district court erred in affirming the county court's decisions to deny his motion to discharge and motion to recuse.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Id*. The State argues that the county court order denying Sklenar's motion to discharge was not a final order, rendering the district court without jurisdiction, see Neb. Rev. Stat. § 25-2728 (Cum. Supp. 2002), as well as this court, see *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997) (if court from which appeal was taken lacked jurisdiction, appellate court acquires no jurisdiction).

[4] In relevant part, § 29-2267 provides that "[w]henever a motion or information to revoke probation is filed, the probationer shall be entitled to a prompt consideration of such charge by the sentencing court." Notably, neither § 29-2267 nor any other statute provides for a procedure by which to enforce its provisions prior to final disposition. Where a criminal procedure is not authorized by statute, it is unavailable to a defendant in a criminal proceeding. *State v. Louthan*, 257 Neb. 174, 595 N.W.2d

917 (1999). That omission is even more evident when comparing § 29-2267 to the various speedy trial statutes, which Sklenar cites in support of his position.

We have held that orders denying a defendant's motion to discharge on speedy trial grounds under various statutes are final, appealable orders. See, *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000) (citing Neb. Rev. Stat. § 29-3805 (Reissue 1995)); *State v. Williams*, 253 Neb. 619, 573 N.W.2d 106 (1997) (citing Neb. Rev. Stat. § 29-759 (Reissue 1995)); *State v. Jacques, supra* (citing Neb. Rev. Stat. § 29-1208 (Reissue 1995)). Unlike § 29-2267, each of the three statutes at issue in those cases expressly allows for an absolute discharge upon violation of the right contained therein. Thus, a motion to discharge under those statutes, but not § 29-2267, is a "legally conferred right that authorizes a special application to a court for enforcement." *State v. Jacques*, 253 Neb. at 254, 570 N.W.2d at 336.

The facts of *State v. Windels*, 244 Neb. 30, 503 N.W.2d 834 (1993), illustrate the proper procedure to follow. In that case, a motion to revoke the defendant's probation was filed in October 1990 and a warrant was issued at the same time. However, the State was not diligent in serving the warrant, so a hearing was not held on the revocation until 9 months later. Only *after* the county court found that the defendant violated his probation did the defendant appeal, arguing that he did not get "prompt consideration" under § 29-2267. Sklenar's attempt to raise the same argument in an appeal in this case, before the court rendered a decision on his alleged violation of probation, was premature.

CONCLUSION

The county court order denying Sklenar's motion to discharge and motion to recuse was not a final, appealable order. Therefore, both this court and the district court are without jurisdiction. We therefore vacate the district court's order affirming the county court's denial of Sklenar's motion to discharge, and remand the cause to the district court with directions to remand to the county court for further proceedings.

ORDER VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

GERRARD, J., concurs in the result.

RAY D. NUSS AND SANDRA FOX, SPECIAL ADMINISTRATORS FOR AND ON BEHALF OF THE ESTATE OF CURTIS M. NUSS, DECEASED, APPELLANTS AND CROSS-APPELLEES, V. ANNABELLE D. ALEXANDER, PERSONAL REPRESENTATIVE OF THE ESTATE OF EUGENE M. ALEXANDER, DECEASED, APPELLEE AND CROSS-APPELLANT.

691 N.W.2d 94

Filed January 14, 2005. No. S-03-1084.

1. **Limitations of Actions: Appeal and Error.** Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.
2. **Pleadings: Limitations of Actions: Demurrer.** A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute.
3. **Demurrer: Pleadings: Appeal and Error.** Before error can be predicated upon the refusal of a trial court to permit an amendment to a petition after a demurrer is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion.
4. **Malpractice: Limitations of Actions.** Professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice and comes within the professional or malpractice statute of limitations.
5. **Negligence: Limitations of Actions: Pleadings.** A plaintiff cannot separate a cause of action which arises primarily out of the professional's alleged negligence and label it something else in hopes of creating a different theory of recovery in order to receive the benefit of a longer statute of limitations.
6. **Limitations of Actions.** A limitations period begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
7. ____. For a limitations period to begin to run, it is not necessary that a plaintiff have knowledge of the exact nature or source of a problem, but only that a problem exists.
8. **Limitations of Actions: Pleadings.** A plaintiff seeking to invoke the "discovery" clause to toll the statute of limitations must allege facts showing why the cause of action reasonably could not have been discovered during the limitations period.

Appeal from the District Court for Adams County: STEVEN D. BURNS, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

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

Jeffrey L. Stoehr, of Law Offices of Jeffrey L. Stoehr, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

Ray D. Nuss and Sandra Fox, the special administrators and personal representatives for the estate of Curtis M. Nuss (appellants), appeal the district court's order dismissing part of their lawsuit against Eugene M. Alexander's estate as time barred. The remainder of the suit was tried, and the court found for the appellants. Annabelle D. Alexander, the personal representative of Eugene Alexander's estate (appellee), cross-appeals, arguing that the entire action was time barred. We conclude that the entire action was time barred and affirm in part, and in part reverse and remand with directions to dismiss.

BACKGROUND

The appellants filed a fifth amended petition alleging that Nuss had employed Alexander for various legal services based on an oral contract. Nuss died on March 14, 1993, and the current action was initially filed on March 13, 1996.

The appellants alleged that from 1972 until the time of his death, Nuss paid Alexander $236,697.69 in attorney fees. The petition does not describe what legal services were provided, nor does it allege that Nuss was incompetent to make decisions or control his finances.

The appellants also allege that on June 19, 1992, Nuss entered into a contract with a real estate broker, which contract provided that Alexander was to receive 3½ percent of the gross selling price of $319,200—an $11,172 fee. The real estate agreement did not require Alexander to perform any work on the sale. It did, however, provide that he would receive a portion of the sale proceeds. The appellants allege that the fee was excessive.

The appellants alleged four theories of recovery. First, they alleged assumpsit, stating that Alexander retained money paid to him that exceeded reasonable compensation for services rendered and had not accounted for the services through time records, hourly rates, or a description of services performed. Second, the appellants alleged a breach of fiduciary duty, stating that Alexander had a duty to disclose the actual costs, time, and preparation required to provide services to Nuss. They further

alleged that Alexander was negligent in failing to disclose excessive charges to Nuss. Third, the appellants alleged that Alexander converted Nuss' property. Finally, they alleged a breach of implied covenant of good faith and fair dealing by charging an excessive fee. Each theory of recovery sought damages in the amount of $236,697.69.

The appellants also alleged that they filed their action "as soon as the acts and omissions alleged . . . were discovered," that the causes of action could not have been discovered within any applicable statute of limitations, that they could not discover Alexander's acts and omissions until they were appointed as personal representatives, that Alexander concealed facts from Nuss that prevented him from discovering the facts, and that Nuss could not reasonably discover the facts within any applicable statute of limitations.

Opportunity to Discover Facts

After Nuss' death, Alexander met with the appellants to discuss the probate proceeding. The record shows the appellants were suspicious of Alexander and questioned the fees he proposed to charge for the probate proceedings. Alexander did not provide documents or disclose information to the appellants, stating that he would do so when he was named personal representative of the estate.

On March 22, 1993, Alexander filed formal probate proceedings and requested that he be appointed personal representative, which was denied. On April 12, the appellants filed objections based in part on the allegation that Nuss had paid excessive fees. In December, depositions were taken and the appellants were provided with information about the real estate contract and Alexander's customary fees. The appellants, however, testified that they had difficulty getting information about the relationship between Nuss and Alexander because they were not yet appointed special administrators or personal representatives of the estate. But the record also shows that by December 21, they had information about the real estate sale and financial transactions between Alexander and Nuss. At trial, appellant Ray Nuss admitted that he did not pursue being named special administrator earlier because the appellants did not believe there was a

need for it. At the December depositions, information about the contract and the fees was disclosed.

Ruling on Demurrer

The appellee filed a demurrer alleging that the petition failed to state a cause of action and was time barred on its face. On ruling on the demurrer, the court considered the $11,172 fee under the real estate contract separately from the remaining fees. Regarding the fees not pertaining to the real estate contract, the court found that the petition failed to state a cause of action. The court also found that there was no factual allegation that Nuss could not have discovered the issues during his lifetime and determined that all theories of recovery were time barred except the $11,172 fee for the real estate contract. Thus, the court sustained the demurrer with the exception that it allowed the case to proceed on the real estate agreement fee. The court refused to allow the appellants to amend their petition because it had been amended on multiple occasions restating the same issues.

The action on the real estate fee was tried to the district court, which determined that the 2-year professional malpractice statute of limitations was tolled when Alexander sought appointment as personal representative. The court then found the real estate fee to be excessive and entered judgment for $10,672. Nuss appeals, and Alexander cross-appeals.

ASSIGNMENTS OF ERROR

The appellants assign, rephrased, that the district court erred by sustaining the demurrer without leave to amend and finding that (1) the statute of limitations had run, (2) the statute of limitations had not been tolled, (3) the petition failed to state a cause of action, and (4) they could not amend to state a cause of action.

On cross-appeal, the appellee assigns, rephrased, that the court erred when it (1) failed to find that the entire action was time barred, (2) determined that the statute of limitations had been tolled, and (3) determined that the real estate fee was excessive without hearing expert testimony or considering Alexander as a third-party beneficiary to the real estate contract.

STANDARD OF REVIEW

[1] Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion

reached by the trial court. *Parks v. Merill, Lynch*, 268 Neb. 499, 684 N.W.2d 543 (2004).

[2] A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002).

[3] Before error can be predicated upon the refusal of a trial court to permit an amendment to a petition after a demurrer is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion. *Butler Cty. Sch. Dist. No. 502 v. Meysenburg*, 268 Neb. 347, 683 N.W.2d 367 (2004).

ANALYSIS

The appellants argue that the district court erred when it determined that the petition failed to state a cause of action. They argue that the statute of limitations had not run or had been tolled. The appellee argues that the limitation period ran on all claims, and she cross-appeals concerning the claim of excessive fees under the real estate agreement. We determine that all claims were barred by the statute of limitations.

Appropriate Statute of Limitations

We first address which statute of limitations applies. Although the petition attempted to assert causes of action under several theories, the underlying claim in all cases was for excess attorney fees. Neb. Rev. Stat. § 25-222 (Reissue 1995) provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action

> be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

[4,5] Professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice and comes within the professional or malpractice statute of limitations. *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994); *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982). Thus, we have stated in a professional negligence action that a plaintiff cannot separate a cause of action which arises primarily out of the professional's alleged negligence and label it something else in hopes of creating a different theory of recovery in order to receive the benefit of a longer statute of limitations. Merely because a cause of action is couched in terms of a cause of action other than negligence does not make it so. *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995).

Here, the causes of action or theories of recovery are premised on excessive fees. The petition concerns professional misconduct, and thus, the 2-year limitations period under § 25-222 applies.

When § 25-222 Began to Run and Whether It Was Tolled

The appellants contend that the statute of limitations did not begin to run until the county court denied Alexander's appointment as personal representative of the estate, and the appeal was dismissed. They argue that they could not discover Alexander's wrongful acts until that time.

[6-8] A limitations period begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Sodoro, Daly v. Kramer*, 267 Neb. 970, 679 N.W.2d 213 (2004). For a limitations period to begin to run, it is not necessary that a plaintiff have knowledge of the exact nature or source of a problem, but only that a problem exists. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). A plaintiff seeking to invoke the "discovery" clause to toll the statute of limitations must allege facts showing why the cause of action reasonably could not have been discovered

during the limitations period. *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997).

Here, the record shows that the limitations period had run on all allegations in the petition. The latest allegation focused on excessive fees or wrongdoing concerning the real estate agreement of June 19, 1992. But the action was not filed until March 13, 1996, well outside the 2-year statute of limitations. We disagree that the appellants could not have discovered the alleged cause of action within the 2-year period. Although the appellants contend that they lacked some specifics about the relationship between Nuss and Alexander, the record is clear that they had concerns about excessive fees by April 1993, when they objected to Alexander's appointment as personal representative. Further, by December 21, 1993, the appellants had deposed Alexander and had all necessary information about Alexander's alleged wrongdoing. Thus, the limitation period was in effect and not tolled. Accordingly, the petition was filed out of time.

The district court held, however, that the limitations period was tolled by Neb. Rev. Stat. § 25-214 (Reissue 1995), because Alexander's actions in attempting to be named personal representative concealed the facts and prevented the appellants from acting. We disagree.

Section 25-214, entitled "Actions against absconding or absent debtor," states:

> If, when a cause of action accrues against a person, he is out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is absconded or concealed; and if, after the cause of action accrues, he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

Assuming without deciding that § 25-214 applies to a professional malpractice action, we determine that it does not apply to the facts alleged in the petition. It was not alleged that Alexander was absent from the state or concealed himself. The appellants argue, however, that Alexander concealed facts by attempting to be named personal representative, thus preventing them from

taking any action. But any concealment of the facts was discovered before the 2-year limitations period ran and did not prevent the appellants from filing suit. Although from December 1993, the appellants were aware of any excessive fees, they did not seek to be appointed special administrators. A special administrator has the power of a personal representative except as limited in the appointment and duties as prescribed in the order—including the ability to file a lawsuit. Neb. Rev. Stat. § 30-2460 (Reissue 1995). Although the appellants could have moved to be appointed as special administrators, they admit that they did not believe there was a need to do so before May 1995, which was after the statute of limitations had run. Thus, § 25-214 does not act to toll the statute of limitations.

Amendment of Pleadings

The appellants contend that they should be allowed to amend their pleadings to plead the inability to discover the facts underlying their allegations. The district court noted that the petition had been amended five times without pleading such facts. The record makes clear that the facts were known and that suit could have been filed before the statute of limitations ran. Accordingly, the court did not abuse its discretion when it denied leave to amend.

CONCLUSION

We conclude that the court did not err when it sustained the demurrer and dismissed part of the petition with prejudice because the petition was barred by the statute of limitations. On cross-appeal, we conclude that the district court erred when it failed to dismiss the remainder of the petition, because the petition was also barred by the statute of limitations. Accordingly, we affirm on appeal, and reverse, and remand with directions to dismiss on cross-appeal.

Affirmed in part, and in part reversed and remanded with directions to dismiss.

KELVIN LEIN, APPELLANT, V. TOM NESBITT, SUPERINTENDENT, NEBRASKA STATE PATROL, APPELLEE.
JAMES D. OLSON, APPELLANT, V. TOM NESBITT, SUPERINTENDENT, NEBRASKA STATE PATROL, APPELLEE.

690 N.W.2d 799

Filed January 14, 2005. Nos. S-03-1169, S-03-1170.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.

Appeals from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Dean S. Forney, of Forney Law Office, for appellants.

Jon Bruning, Attorney General, and Mark D. Starr for appellee.

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

STEPHAN, J.

In these consolidated appeals, Kelvin Lein and James D. Olson challenge their classification as Level 3 sex offenders under the Sex Offender Registration Act (SORA), Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 2004). The district court for Lancaster County affirmed orders of Tom Nesbitt, the superintendent of the Nebraska State Patrol, upholding each classification.

BACKGROUND

LEIN

In 1994, Lein pled guilty to two counts of sexual assault on a child. The victims were his two minor daughters. Lein had no

previous criminal history. In a letter dated March 27, 2000, the Nebraska State Patrol informed Lein that he had been assigned a Level 3 classification under SORA. The classification was based on answers to the 14 questions composing the Nebraska State Patrol's sex offender risk assessment instrument. Lein requested a hearing to contest his classification level, taking specific exception to items 9, 12, and 13 of the risk assessment instrument. On July 2 and December 27, 2002, a hearing regarding Lein's classification was held before a hearing officer. Lein offered the expert testimony of Dr. Laura Gaudet, and the State offered the expert testimony of Drs. Shannon Black and Mario Scalora. The substance of the testimony is detailed in relevant part below.

On January 28, 2003, the hearing officer recommended that Lein's classification as a Level 3 sex offender be upheld, based upon a determination that his overall score of 165 points on the risk assessment instrument was correct and exceeded the 130-point cutoff for Level 3 classification. The Nebraska State Patrol adopted this recommendation in full. Lein timely petitioned to the district court for Lancaster County for judicial review under the Administrative Procedure Act (APA). On September 9, the district court issued an order upholding the Level 3 classification. Lein filed this timely appeal.

Olson

In 1998, Olson pled guilty to one count of sexual assault on a child. The victim was Olson's minor sister-in-law. Olson's prior criminal history included one charge of larceny and one charge of disturbing the peace. He had no prior history of sex-related convictions.

In a letter dated July 14, 2000, the Nebraska State Patrol informed Olson that based upon answers to the 14 questions composing the risk assessment instrument, he had been assigned a Level 3 sex offender classification under SORA. Olson requested a hearing to contest his classification level, taking specific exception to items 9 through 14 of the risk assessment instrument.

On July 2 and December 27, 2002, a hearing regarding Olson's classification was held before a hearing officer. Olson presented the expert testimony of Gaudet, and the State presented the expert testimony of Black and Scalora. The substance of the testimony

is identical to that offered by Lein and is detailed in relevant part below.

On February 2, 2003, the hearing officer recommended that Olson's classification remain at Level 3. The hearing officer determined that while Olson's score of 190 points on the risk assessment instrument should be reduced to 160, it remained in excess of the score of 130 which is the cutoff point for a Level 3 classification. The Nebraska State Patrol adopted this recommendation in full. Olson timely filed a petition for judicial review with the district court for Lancaster County under the APA. The district court affirmed the Level 3 classification on September 9, and Olson filed this timely appeal.

The parties' stipulation to consolidate the appeals for briefing and oral argument was allowed. We then moved the consolidated appeals to our docket on our own motion pursuant to our statutory authority under Neb. Rev. Stat. § 24-1106(3) (Reissue 1995) to regulate the dockets of the appellate courts in this state.

ASSIGNMENT OF ERROR

Lein and Olson each assign that the district court erred in upholding his classification as a Level 3 sex offender under SORA.

STANDARD OF REVIEW

[1-4] A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004). When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Slansky, supra*. 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*. 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*.

ANALYSIS

These appeals represent the fourth recent challenge to SORA. See, *Welvaert v. Nebraska State Patrol*, 268 Neb. 400, 683 N.W.2d 357 (2004); *Slansky, supra*; *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). In *Slansky* and *Worm*, we discussed at length the pertinent features of SORA and the rules and regulations that implement SORA. In *Slansky*, we also discussed the risk assessment instrument that was developed to classify sex offenders under SORA and is again challenged in these appeals. We therefore direct the reader to *Slansky* and *Worm* for background information regarding SORA.

In the instant appeals, Lein and Olson allege that the risk assessment instrument is invalid because "a stakeholder group . . . consisting of representatives from law enforcement, victim advocacy and defense attorneys, was brought in to determine the scoring cut-offs used to determine risk level." Brief for appellants at 8. They contend that the use of this group was unscientific and not supported by " 'fair or substantial reason.' " *Id.* at 10.

In *Slansky*, we addressed whether the risk assessment instrument was invalid because of a statistical error rate of 12 percent. In finding that it was not, we recognized that "no instrument will perfectly predict future conduct." *Slansky*, 268 Neb. at 374, 685 N.W.2d at 348. We further stated:

> "[T]he non-existence of a perfect predictor of recidivism should not preclude legislative resort to a rationally based instrument of risk assessment, developed and validated by mental health professionals." *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir. 1997). In this regard, [expert] testimony concerning the instrument establishes that it was carefully and rationally crafted. While acknowledging some of the instrument's shortcomings, [an expert] testified that the instrument (1) is based on a significant amount of empirical data, (2) utilizes factors that correlate with a registrant's risk of recidivism, (3) is valid and appropriate for its purpose, and (4) is consistent with other instruments that have been developed. Consequently, we conclude that the instrument is a rationally based risk assessment tool and that the grounds [the defendant] asserted to challenge the instrument are without merit.

Slansky v. Nebraska State Patrol, 268 Neb. 360, 374-75, 685 N.W.2d 335, 348-49 (2004).

The expert testimony adduced by the Nebraska State Patrol in the instant cases is substantially similar to that adduced in *Slansky*. Black holds a doctorate in clinical psychology and has served as the clinical director of the Nebraska State Patrol Sex Offender Registry since 1999. She testified that the risk assessment instrument is consistent with other instruments that have been developed and is an appropriate and valid instrument for determining a sex offender's risk of recidivism. Scalora, who is associated with the Department of Psychology at the University of Nebraska-Lincoln, testified regarding the development of the risk assessment instrument. This process included a review of relevant scientific literature and risk assessment protocols from other states and a study of recidivism statistics for 1,300 sex offenders who had been discharged from Nebraska correctional institutions. The study identified and weighted statistically significant factors which had a predictive value as to the likelihood that a sex offender would reoffend. Scalora testified that Nebraska's risk assessment instrument had a predictive rate which compared favorably with other instruments designed for the same purpose.

Scalora further testified that the stakeholder group had no involvement in developing the risk assessment instrument or in determining which factors indicated a risk of recidivism. The stakeholder group was involved only in the policy decision to determine the cutoff points for the three risk categories that determine the level of notification required under SORA. This determination was based on considerations of the number of offenders that would be impacted by SORA and the potential risk for the public. The risk assessment instrument classifies offenders scoring 70 points or fewer as Level 1, considered at a low risk to reoffend. Offenders who score 75 to 125 points are considered at moderate risk to reoffend and are classified as Level 2. Those who score 130 points or above are considered at high risk to reoffend and are classified as Level 3 offenders. According to Scalora, the stakeholder group decided that 90 percent of recidivists would fall within the Level 3 risk classification. He testified that if there was bias in doing so, it was a bias in favor of public safety.

Lein and Olson contend that the use of the stakeholder group renders the risk assessment invalid. Gaudet testified that "whenever you have a stakeholder group [research] becomes more subjective as opposed to objective." However, the evidence is clear that the stakeholder group in this case was not involved in the research that formed the basis of the creation of the risk assessment instrument. Instead, the group was involved only in determining the risk level cutoff scores, a decision which by its nature requires some level of subjectivity. Moreover, there is no constitutional requirement that sex offenders be divided into risk-level categories; if the State of Nebraska chose to, it could conclude that every conviction for a sex offense provide evidence of a substantial risk of recidivism. See *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). Lein and Olson's argument with respect to the stakeholder group is therefore without merit.

The testimony of Black and Scalora constitutes competent evidence which supports the decisions of the district court upholding the Level 3 classifications of Lein and Olson. Both decisions conform to the law and are not arbitrary, capricious, or unreasonable.

CONCLUSION

For the reasons discussed, we affirm the judgments of the district court.

AFFIRMED.

WRIGHT, J., not participating.

BODIE J. WEEDER, APPELLANT, V. CENTRAL COMMUNITY COLLEGE, A POLITICAL SUBDIVISION, AND MIKE SWANSON, INDIVIDUALLY AND AS AN EMPLOYEE OF CENTRAL COMMUNITY COLLEGE, APPELLEES.

691 N.W.2d 508

Filed January 14, 2005. No. S-03-1174.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.

2. **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. **New Trial: Words and Phrases.** A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court.
4. **Pleadings: Judgments.** A postjudgment motion must be reviewed based on the relief sought and not based on its title.
5. **Pleadings: Judgments: Time.** In order to qualify for treatment as a motion to alter or amend the judgment, the motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), and must seek substantive alteration of the judgment.
6. **Political Subdivisions: Torts: Jurisdiction.** The filing of a tort claim, rather than being jurisdictional in nature, is a condition precedent to instituting a suit against a political subdivision.
7. **Political Subdivisions Tort Claims Act: Rules of the Supreme Court: Pleadings.** The case law of the Nebraska Supreme Court requiring a defendant to raise a plaintiff's noncompliance with a condition precedent under the Political Subdivisions Tort Claims Act as an affirmative defense in either a demurrer or answer has been partially abrogated by the adoption of the Nebraska Rules of Pleading in Civil Actions, because the demurrer has been abolished.
8. **Pleadings.** Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in interpreting similar Nebraska civil pleading rules.
9. **Rules of the Supreme Court: Pleadings.** A motion filed pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b) (rev. 2003) can properly be entitled a motion to dismiss.
10. ____: ____. Prior Nebraska case law holding that a pretrial motion to dismiss was not a permissible pleading is abrogated pursuant to the adoption of the Nebraska Rules of Pleading in Civil Actions.
11. ____: ____. An affirmative defense may be asserted in a motion filed pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) when the defense appears on the face of the complaint.
12. ____: ____. A defendant's failure to specifically reference Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is not fatal because a trial court must rule on the basis of the motion's substance, rather than on its form.
13. **Rules of the Supreme Court: Pleadings: Notice.** The Nebraska Rules of Pleading in Civil Actions, like the federal rules, have a liberal pleading requirement for both causes of action and affirmative defenses, but the touchstone is whether fair notice was provided.
14. **Rules of the Supreme Court: Motions to Dismiss.** A defendant's right to assert an affirmative defense in a motion to dismiss instead of a responsive pleading is governed by Neb. Ct. R. of Pldg. in Civ. Actions 12(b) (rev. 2003), and not Neb. Ct. R. of Pldg. in Civ. Actions 8(c) (rev. 2003).

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded for further proceedings.

Dean J. Sitzmann and Nichole S. Bogen, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellant.

Lucy Higgins Sinkular and David C. Huston, of Huston & Higgins, for appellees.

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

HENDRY, C.J.

I. INTRODUCTION

Bodie J. Weeder brought an action against Central Community College and its employee Mike Swanson (collectively CCC) pursuant to the Political Subdivisions Tort Claims Act (the Act). CCC filed a motion to dismiss Weeder's petition. The district court for Buffalo County granted CCC's motion. Weeder appeals. 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).

II. FACTUAL BACKGROUND

The pleadings indicate that on April 11, 2002, Weeder sent by certified mail a letter to the board of governors of the college. In that letter, which Weeder stated was to serve as notice of the filing of a tort claim against CCC pursuant to the Act, Weeder alleged that on April 18, 2001, he was injured while demonstrating welding techniques at an off-campus recruitment project. Weeder's letter contended that at the time he suffered his injury, he was being supervised by Swanson, who was a welding instructor at the college. Thereafter, on July 18, 2002, Weeder sent a second letter to CCC withdrawing the claim and notifying CCC that his attorney was authorized to commence a lawsuit against CCC on Weeder's behalf. On April 18, 2003, Weeder filed suit against CCC.

In response to Weeder's "petition," CCC filed a motion entitled "Motion to Dismiss for Failure to Comply With the Political Subdivisions Tort Claims Act Filing Requirements," which motion we will refer to as a "motion to dismiss." In that motion to dismiss, CCC, "pursuant to the Nebraska Rules of Pleading in

Civil Action, Rule Nos. 8(c) and 12(b)," moved the district court as follows:

> 1. To dismiss the action against the Defendant Mike Swanson on the grounds that no claim was filed against him with the governing body of the political subdivision. Neb. Rev. Stat. §13-920 [(Reissue 1997)].
>
> 2. To dismiss the action on the grounds that . . . Weeder failed to comply with the Political Subdivisions Tort Claims Act requirement that he withdraw his claim before commencing suit. Neb. Rev. Stat. §13-906 [(Reissue 1997)].
>
> 3. To dismiss the action on the grounds that . . . Weeder failed to comply with the Political Subdivisions Tort Claims Act requirement that he file his petition against these defendants within two years after his claim accrued. Neb. Rev. Stat. §13-919 [(Reissue 1997)].

The district court granted CCC's motion to dismiss in a detailed journal entry. In that journal entry, the court initially addressed paragraph 1 of CCC's motion regarding defendant Swanson and Swanson's specific argument that "it [the claim] fails to specifically request a recovery against the employee [Swanson]." Finding that the claim sufficiently requested a recovery against Swanson, the district court denied the motion to dismiss, based on paragraph 1. Neither the college nor Swanson cross-appealed from this ruling.

The court next addressed paragraph 2 of CCC's motion, which asserted that Weeder failed to comply with the Act by withdrawing his claim before commencing suit. Finding in favor of CCC, the court reasoned:

> The record as presented by the parties and noted before indicates that [Weeder] filed his claim with the political subdivision on April 11, 2002 and withdrew the claim on July 18, 2002 prior to the expiration of the 6 month period that the subdivision is allowed pursuant to the statutes to consider a claim. The petition was then filed with the Court on April 18, 2003. . . .
>
> Political subdivisions as well as the State itself are immune from tort claims except to the extent the State allows itself to be sued. Sections 13-901 et seq of the Nebraska

> Statute creates the substantive and procedural rules by which the State allows itself to be sued. Both sections 13-906 and 13-920 are specific in directing that "no suit shall be permitted on a claim" unless the political subdivision has denied the claim or has had a 6 month opportunity to consider the claim. The clear and precise meaning of the statutes of this State prohibit the filing of a claim that has not been denied prior to the running of the 6 month period. This Court therefore finds that the premature filing of this litigation is in fact a nullity and this Court is without jurisdiction to consider the claim as presented. [CCC's] motion to dismiss is therefore sustained.

In its ruling, the district court made no findings with respect to paragraph 3 of CCC's motion to dismiss, and neither party asserts any error in that regard.

Weeder filed a motion for new trial, asking the district court to "reexamine its decision to dismiss . . . and reinstate the action as previously filed." The district court denied Weeder's motion, and Weeder appeals.

III. ASSIGNMENTS OF ERROR

On appeal, Weeder argues that the district court erred in (1) finding that it was without jurisdiction to consider Weeder's claim and (2) sustaining CCC's motion to dismiss.

IV. STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Kellogg v. Nebraska Dept. of Corr. Servs., ante* p. 40, 690 N.W.2d 574 (2005) (adopting federal standard of review for motions to dismiss and stating that this court will look to federal court decisions for guidance regarding pleading rules, as Nebraska's rules are now modeled after federal rules). See, also, *Chepstow Ltd. v. Hunt*, 381 F.3d 1077 (11th Cir. 2004) (specifically applying de novo standard of review to trial court's grant of rule 12(b)(6) motion); *Brown v. Nationsbank Corp.*, 188 F.3d 579 (5th Cir. 1999) (same).

V. ANALYSIS

1. Weeder's Motion for New Trial

[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. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). At issue is whether Weeder's notice of appeal was timely filed.

The district court sustained CCC's motion to dismiss and entered judgment on August 14, 2003. Thereafter, Weeder filed a pleading entitled "Motion for New Trial" on August 22. That motion was overruled on September 11, and Weeder filed his notice of appeal on October 8.

[3] A new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a trial and decision by the court. Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2002); *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004). In this case, we are presented with a court granting a motion to dismiss. Such action is not a verdict by a jury or a trial and decision by the trial court. As a result, Weeder's motion for new trial was not a proper motion and would not toll the time for filing a notice of appeal.

[4] However, we have stated that a postjudgment motion must be reviewed based on the relief sought and not based on its title. See, *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra*; *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). As a result, the issue is whether Weeder's August 22, 2003, motion could be viewed as a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002), which would toll the time for filing a notice of appeal.

[5] In order to qualify for treatment as a motion to alter or amend the judgment, the motion must be filed no later than 10 days after the entry of judgment, as required under § 25-1329, and must seek substantive alteration of the judgment. See, *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra*; *State v. Bellamy, supra.* In this case, Weeder's August 22, 2003, motion for new trial was filed within 10 days of the district court's grant of the motion to dismiss on August 14. Furthermore, in his August 22 motion, Weeder asked the district court, inter alia, to

"reexamine its decision to dismiss . . . and reinstate the action as previously filed." We conclude that this language seeks substantive alteration of the judgment of the district court dismissing Weeder's action. As a result, Weeder's August 22 motion qualifies as one to alter or amend the judgment under § 25-1329, and tolled the time for filing a notice of appeal. Weeder's appeal was timely, and we have jurisdiction over this matter.

We pause briefly to note that since Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2002) was amended in 2000, see 2000 Neb. Laws, L.B. 921, this court or the Court of Appeals, on repeated occasions, has found it necessary to determine whether an improperly filed motion for new trial could be viewed as one to alter or amend a judgment. See, *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004); *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra*; *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003); *State v. Bellamy, supra*; *Vesely v. National Travelers Life Co.*, 12 Neb. App. 622, 682 N.W.2d 713 (2004). In the future, we request the practicing bar to carefully consider the nature of the proceeding prior to filing any motion calling into question a court's judgment.

We now turn to Weeder's assignments of error.

2. District Court's Finding That It Lacked Jurisdiction

In Weeder's first assignment of error, he contends the district court erred in concluding that it was without subject matter jurisdiction to consider his action. The district court's determination that it lacked subject matter jurisdiction was premised upon its conclusion that Weeder's tort claim was not properly presented. In its brief, CCC appears to concede that the district court possessed subject matter jurisdiction.

[6] This court has held that the filing of a tort claim, rather than being jurisdictional in nature, is a condition precedent to instituting a suit against a political subdivision. 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). See, also, *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002) (applying rationale of *Keller* and *Millman* to State Tort Claims Act). Thus, we concur with Weeder that the district court erred in

determining that it lacked subject matter jurisdiction. However, this conclusion is not dispositive of this appeal, as we must now determine, given the grounds stated in paragraph 2 of CCC's motion, whether the court properly dismissed the action.

3. Effect of Nebraska Rules of Pleading in Civil Actions

[7] Having concluded that Weeder's alleged failure to comply with the Act is not jurisdictional but a condition precedent, our case law would require that such noncompliance be raised as an affirmative defense in either a demurrer or answer, or it is waived. See, *Big Crow v. City of Rushville*, 266 Neb. 750, 669 N.W.2d 63 (2003); *Cole v. Isherwood, supra* (decided under State Tort Claims Act); *Millman v. County of Butler, supra.* However, effective January 1, 2003, this court, pursuant to authorization granted by Neb. Rev. Stat. § 25-801.01 (Cum. Supp. 2002), promulgated the new Nebraska Rules of Pleading in Civil Actions. These rules were in effect at the time Weeder filed this action. Under the new rules, the demurrer has been abolished. See Neb. Ct. R. of Pldg. in Civ. Actions 7(c) (rev. 2004). See, also, § 25-801.01(2)(c). Thus, we must decide whether CCC's motion to dismiss was an appropriate method in which to raise this affirmative defense under our civil pleading rules.

As an initial matter, we note that CCC entitled its motion a "Motion to Dismiss for Failure to Comply With the Political Subdivisions Tort Claims Act Filing Requirements." Prior Nebraska case law has held that a pretrial motion to dismiss was generally not a permissible pleading. See, e.g., *Anderson v. Matthis*, 246 Neb. 215, 518 N.W.2d 94 (1994); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993); *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992); *Cool v. Sahling Trucks, Inc.*, 237 Neb. 312, 466 N.W.2d 71 (1991); *United States Fire Ins. Co. v. Affiliated FM Ins. Co.*, 225 Neb. 218, 403 N.W.2d 383 (1987); *Voyles v. DeBrown Leasing, Inc.*, 222 Neb. 250, 383 N.W.2d 36 (1986). However, these opinions predate Nebraska's new civil pleading rules.

[8-10] Federal courts routinely refer to federal rule 12(b) motions as motions to dismiss, see, e.g., *Maki v. Allete, Inc.*, 383 F.3d 740 (8th Cir. 2004); *Strand v. Diversified Collection*

Service, 380 F.3d 316 (8th Cir. 2004); and *Iowa Network Services, Inc. v. Qwest Corp.*, 363 F.3d 683 (8th Cir. 2004), while treatises on federal civil procedure also use that term in reference to federal rule 12(b) motions. See, e.g., 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §§ 1349 to 1359 (2d ed. 1990 & Supp. 2002). See, also, *Kellogg v. Nebraska Dept. of Corr. Servs., ante* p. 40, 690 N.W.2d 574 (2005); *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003) (recognizing that Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in interpreting similar Nebraska pleading rules); *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000) (same). As such, we conclude that a rule 12(b) motion can properly be entitled as a motion to dismiss. To the extent our prior case law holds there is no pretrial motion to dismiss, that case law has been abrogated by the Nebraska Rules of Pleading in Civil Actions.

(a) Asserting Affirmative Defenses in
Rule 12(b)(6) Motion to Dismiss

We now turn to whether a rule 12(b)(6) motion to dismiss is a proper method by which to raise the affirmative defense in question. As rule 12(b) is substantially identical to Fed. R. Civ. P. 12(b), we again look to federal cases interpreting similar federal rules for guidance. See, *Bailey v. Lund-Ross Constructors Co., supra*; *Gernstein v. Lake, supra.*

Nebraska's rule 12(b) states:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> (1) lack of jurisdiction over the subject matter;
>
> (2) lack of jurisdiction over the person;
>
> (3) [reserved]
>
> (4) insufficiency of process;
>
> (5) insufficiency of service of process;
>
> (6) that the pleading fails to state a claim upon which relief can be granted;
>
> (7) failure to join a necessary party.

It is common practice under the Federal Rules of Civil Procedure to allow an affirmative defense to be asserted in a rule 12(b)(6) motion when, on the face of the complaint, allegations are included which could be the subject of an affirmative defense. See, *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004); *Hafley v. Lohman*, 90 F.3d 264 (8th Cir. 1996); *Weaver v. Clarke*, 45 F.3d 1253 (8th Cir. 1995); 2 James Wm. Moore, Moore's Federal Practice § 12.34[4][b] (3d ed. 2004); 5A Wright & Miller, *supra*, § 1357. Such practice is similar to our prior demurrer jurisprudence. See, *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 440 N.W.2d 664 (1989); *Card v. Card*, 174 Neb. 124, 116 N.W.2d 21 (1962); *In re Estate of McCleneghan*, 145 Neb. 707, 17 N.W.2d 923 (1945). Cf., *Houska v. City of Wahoo*, 227 Neb. 322, 417 N.W.2d 337 (1988); *Marsh-Burke Co. v. Yost*, 102 Neb. 814, 170 N.W. 172 (1918).

[11] A rule 12(b)(6) motion is generally considered to be the modern day equivalent of the demurrer. *Tregenza v. Great American Communications Co.*, 12 F.3d 717 (7th Cir. 1993). See, also, 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1355 (2d ed. 1990 & Supp. 2002) (citing various cases stating relationship between demurrer and rule 12(b)(6) motion). Weeder's "petition" alleged that he submitted his claim to CCC on April 11, 2002, and that he gave notice he was withdrawing his claim on July 18. In our de novo review, we determine that the "petition," on its face, included allegations which could be the subject of an affirmative defense under Neb. Rev. Stat. § 13-906 (Reissue 1997). Thus, we conclude that CCC could properly assert an affirmative defense of failure to comply with the Act in its motion to dismiss.

(b) CCC's Failure to Specifically Refer to
Rule 12(b)(6) in Its Motion to Dismiss

[12] In its motion to dismiss, CCC raised three affirmative defenses without specifically referring to subsection (6) of rule 12(b). Instead, CCC's motion to dismiss referred only to Neb. Ct. R. of Pldg. in Civ. Actions 8(c) (rev. 2003) and rule 12(b). We conclude, however, that CCC's failure to specifically reference subsection (6) of rule 12(b) is not fatal. See, generally, *State of Louisiana v. United States*, 656 F. Supp. 1310 (W.D. La.

1986) (court treated motion under rule 12(b)(2) as one under rule 12(b)(6), reasoning that substance of 12(b) motion controls over its form); *Hankins v. Fansteel Metals, Inc.*, 452 F. Supp. 509, 511 (E.D. Okla. 1978) (court treated motion for summary judgment as motion to dismiss under rule 12(b)(1), since " 'label attached to a motion is unimportant' "); 5A Wright & Miller, *supra*, § 1347 at 186 ("technical accuracy in the designation of the specific rule under which the defense, motion, or objection is asserted, is [not] critical to its presentation and determination"). We now turn to the issue of whether CCC's motion to dismiss properly presented the affirmative defense upon which the district court dismissed Weeder's action.

Weeder argues that paragraph 2 of CCC's motion to dismiss did not assert the affirmative defense upon which the district court based its ruling. Paragraph 2 of CCC's motion asserts that Weeder's complaint should be dismissed "on the grounds that . . . Weeder failed to comply with the Political Subdivisions Tort Claims Act requirement *that he withdraw his claim before commencing suit.* Neb. Rev. Stat. §13-906 [(Reissue 1997)]." (Emphasis supplied.)

A review of the district court's journal entry supports Weeder's argument. It is clear from this review that the district court's basis for dismissing the action was not that Weeder failed to withdraw his claim before commencing suit, but that Weeder failed to allow CCC 6 months to consider the claim before withdrawing it and commencing this action. CCC does not specifically contend otherwise, but argues its affirmative defense was sufficiently raised by its citation generally to § 13-906 in paragraph 2 of its motion to dismiss. In response, Weeder states:

> Surely [CCC is] not allowed to argue one way in their Motion to Dismiss that [Weeder] failed to withdraw his claim, and then for the first time on appeal argue that [Weeder] was aware of their affirmative defense that he withdrew his claim too early. It would be manifestly unfair to [Weeder] for this Court to affirm the decision of the District Court because [Weeder] was never given adequate notice of the affirmative defense nor an opportunity to present evidence to rebut it.

Reply brief for appellant at 4-5.

With the adoption of our new civil pleading rules, we must determine the appropriate standard to utilize when deciding whether an affirmative defense has been adequately asserted. We again look to federal cases interpreting those federal rules for guidance. See *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003).

The federal rules were designed to liberalize pleading requirements. See, *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002); *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). This liberalization extends to the pleading of affirmative defenses. See, *Hassan v. U.S. Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988) ("liberal pleading rules established by the Federal Rules of Civil Procedure apply to the pleading of affirmative defenses"); *Barnwell & Hays, Inc. v. Sloan*, 564 F.2d 254, 256 (8th Cir. 1977) (noting that federal rules were intended to liberalize pleading requirements and that failure to use term "waiver" in answer "impose[d] a requirement of undue formalism . . . inconsistent with that liberal purpose"); *American Motorists Ins. Co. v. Napoli*, 166 F.2d 24 (5th Cir. 1948) (liberal rules of pleading not premised on extensive factual allegations and thus simply pleading contributory negligence was sufficient to preserve defense).

In considering liberalization of our pleading rules ushered in by this court's adoption of its new rules of civil pleading, the inquiry is whether Weeder was afforded fair notice of the nature of the defense. See, *Perez v. U.S.*, 830 F.2d 54 (5th Cir. 1987) (purpose of federal rules requiring pleading of affirmative defense is to prevent unfair surprise; instead, pleading of affirmative defenses should provide fair notice of defense to plaintiff); 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1274 at 455-56 (2d ed. 1990) ("[a]n affirmative defense may be pleaded in general terms and will be held to be sufficient . . . as long as it gives plaintiff fair notice of the nature of the defense"). Cf. *Conley v. Gibson*, 355 U.S. at 47 ("all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests").

[13] Thus, while the Nebraska Rules of Pleading in Civil Actions, like the federal rules, have a liberal pleading requirement

for both causes of action and affirmative defenses, the touchstone is whether fair notice was provided. Based on our de novo review, we conclude that Weeder was not given fair notice of the nature of CCC's defense.

Although it is true that CCC cited generally to § 13-906, paragraph 2 of its motion to dismiss specifically asserted that Weeder had failed to "comply with the . . . requirement that he *withdraw his claim*." (Emphasis supplied.) The language chosen by CCC did more than, in CCC's words, "[refer] to the provisions for withdrawing a claim [in § 13-906]." Brief for appellees at 3. Indeed, the language it chose specifically referred to only that portion of § 13-906 requiring any claim to be withdrawn before suit is instituted. The chosen language did not make any reference to the 6-month period to which CCC was entitled to consider Weeder's claim before Weeder could have withdrawn it from CCC's consideration and filed suit.

Had the district court ruled on the affirmative defense asserted by CCC in paragraph 2 of its motion to dismiss, the district court would have had no option but to deny CCC's motion. The face of Weeder's "petition" alleged in part that "[o]n July 18, 2002 . . . notice of withdrawal of the Claim was mailed . . . withdrawing the Claim from further consideration . . . ."

Under these circumstances, the language chosen by CCC provided Weeder with notice only of CCC's claim that Weeder had failed to withdraw his claim. Such did not provide Weeder with notice of CCC's claimed affirmative defense that Weeder had, in fact, withdrawn that claim prematurely. In reaching this determination, we note that no record was made of the proceedings held on June 26, 2003, the date the district court heard CCC's motion to dismiss. We therefore have no means of knowing whether CCC's argument at the hearing was more expansive than that which we have determined was set forth in paragraph 2.

[15] Finally, although CCC relied on both rules 8(c) and 12(b), rule 8(c) does not govern a defendant's right to assert an affirmative defense in a motion to dismiss. Rather, rule 8(c) provides that a defendant has the burden of pleading an affirmative defense in a responsive pleading. See 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §§ 1270 and 1277 (2d ed. 1990 & Supp. 2002). As discussed, whether an

affirmative defense may be raised in a motion to dismiss is governed by rule 12(b). Therefore, we need not further discuss the relevance of rule 8(c) to this appeal.

Upon our de novo review, we conclude that the district court erred in granting CCC's motion to dismiss.

VII. CONCLUSION

The district court's order granting CCC's motion to dismiss is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE,
v. LINH BAO, APPELLANT.

690 N.W.2d 618

Filed January 14, 2005. No. S-03-1333.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **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. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
5. **Pleadings: Judgments: Time.** 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. 2002), and must seek substantive alteration of the judgment.
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 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. The defendant must also 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.** 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.
8. **Effectiveness of Counsel: Presumptions.** In determining whether trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
9. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
10. **Postconviction: Constitutional Law: Effectiveness of Counsel.** There is no constitutional guarantee of effective assistance of counsel in a postconviction action and therefore no claim for ineffective assistance of postconviction counsel.
11. **Pleadings.** The decision to grant or deny an amendment to a pleading rests in the discretion of the court.
12. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1995), it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.
13. **Appeal and Error.** Absent plain error, an issue not raised to the trial court will not be considered by the Nebraska Supreme Court on appeal.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Linh Bao, pro se.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Linh Bao was convicted in the district court for Lancaster County of first degree murder and use of a weapon to commit a felony. Bao's convictions and sentences were affirmed on appeal to this court. *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002). On July 16, 2003, the district court denied Bao's motion for postconviction relief in which he claimed ineffective assistance of trial counsel. Bao appeals the denial of postconviction relief. We affirm.

STATEMENT OF FACTS

The facts of the underlying case were described in our decision in Bao's direct appeal. See *id*. A jury found Bao guilty of first degree murder and use of a weapon to commit a felony. On February 6, 2001, Bao was sentenced to life imprisonment on the murder conviction and a consecutive sentence of 2 to 6 years' imprisonment on the weapon conviction. Bao's convictions were affirmed on appeal. Bao was represented by public defenders at trial and on direct appeal.

Bao filed a pro se motion for postconviction relief on June 5, 2002. Counsel other than those representing Bao at trial and on appeal was subsequently appointed and filed an amended motion in which it was alleged that trial counsel was ineffective for (1) failing to have Bao evaluated by a qualified mental health professional and failing to pursue a defense based on mental health, (2) relying solely on a defense that Bao was justified in using deadly force, and (3) failing to defend on the theory that Bao was guilty of sudden quarrel manslaughter rather than first degree murder. In subsequent briefing, Bao also asserted that the performance of one of his trial attorneys was affected by the attorney's problem with alcohol. Bao requested an evidentiary hearing for the purpose of obtaining an order vacating and setting aside his convictions and sentences.

Following an evidentiary hearing, the court on July 16, 2003, overruled Bao's motion and denied the requested relief. The court concluded that as to each claim, Bao failed to show either deficient performance or prejudice which could support a finding of ineffective assistance of counsel. In so concluding, the court determined that (1) the testimony of a mental health expert presented by Bao in the postconviction hearing showed "only that Bao was more prone to violent behavior, not that he did not know what he was doing at the time of the act itself" and that therefore, Bao did not establish prejudice from trial counsel's purported failure to pursue such testimony and a defense based on mental health; (2) although it was "not at all clear that the only defense raised by Bao [at trial] was that the shooting was justified," even if the only defense was justifiable shooting, Bao did not establish that trial counsel's performance was deficient for making the reasonable strategic decision to rely on a theory of self-defense; (3)

the trial record contradicted Bao's postconviction assertion that trial counsel failed to suggest or argue that the jury could find Bao guilty of sudden quarrel manslaughter rather than first degree murder; and (4) Bao failed to establish that the alcohol problem of one of his attorneys manifested itself at trial or prejudiced his defense in any way.

On July 25, 2003, Bao filed a pro se motion for reconsideration of the order denying postconviction relief. Bao asserted that the court erred in various determinations, and he asserted that postconviction counsel was ineffective for failing to pursue certain claims that he had raised in his original pro se motion. Such claims related to trial counsel's purported failure to secure jury instructions relative to Bao's intoxication on the night the crimes were committed. Prior to a ruling on the motion for reconsideration, Bao filed a notice of appeal. This court, without opinion, dismissed the appeal for lack of jurisdiction on September 10.

On October 16, 2003, the motion for reconsideration was withdrawn by postconviction counsel, and the court entered an order dismissing the motion. On the same day, the court denied Bao's request for substitute counsel. On October 21, Bao filed a pro se request to reinstate the motion for reconsideration, asserting that court-appointed counsel had withdrawn the motion without Bao's permission. The next day, the court denied the request to reinstate. On November 14, Bao filed a notice of appeal in which he stated that he was appealing the July 16 order overruling his motion for postconviction relief and the October 16 order dismissing his motion for reconsideration. The State moved to dismiss the appeal as untimely. We denied the motion without prejudice.

ASSIGNMENTS OF ERROR

Bao makes several assignments of error which he argues in three general categories. In summary, Bao first asserts that the district court erred in failing to grant postconviction relief and failing to find that Bao had received ineffective assistance of counsel. Second, Bao asserts that the court erred in failing to consider claims relating to jury instructions that he had made in his original pro se motion but were abandoned by postconviction counsel. Bao claims that the court should have reinstated and granted his motion for reconsideration in which he urged the

court to consider the jury instruction claims and that counsel provided ineffective assistance by failing to pursue such claims. Finally, Bao claims that the court abused its discretion by failing to appoint substitute postconviction counsel, by failing to appoint an interpreter, and by failing to allow an "inmate legal aide" to assist him at a hearing on the motion for reconsideration.

STANDARDS OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004).

[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. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

[3] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003).

ANALYSIS

Jurisdiction.

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004). The State previously moved for summary dismissal of this appeal on the basis that Bao failed to timely file a notice of appeal. We overruled the State's motion without prejudice. We now determine that given the record and the statutes, Bao timely filed his notice of appeal, and that we have jurisdiction to determine this appeal.

The following statutes are at issue in our jurisdictional analysis: Neb. Rev. Stat. §§ 25-1329 (Cum. Supp. 2002) and 25-1912(3) (Cum. Supp. 2004). Section 25-1912(3) provides in relevant part:

> The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a timely motion for a new trial under section 25-1144.01, (b) by a timely motion to alter or amend a judgment under section 25-1329, or (c) by a timely motion to set aside the verdict or judgment under section 25-1315.02, and the full time for appeal fixed in subsection (1) of this section commences to run from the entry of the order ruling upon the motion filed pursuant to subdivision (a), (b), or (c) of this subsection.

Section 25-1329 provides that "[a] motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment."

The State argues that Bao's motion for reconsideration filed on July 25, 2003, was functionally a motion to alter or amend a judgment which was timely filed within 10 days of the July 16 order denying postconviction relief. See § 25-1329. The State notes that § 25-1912(3) provides in part that "[t]he running of the time for filing a notice of appeal shall be terminated . . . by a timely motion to alter or amend a judgment . . . ." The State acknowledges that the full 30 days for appeal commences to run from the entry of an order "ruling" upon the motion to alter or amend a judgment. See, § 25-1912(3); *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003).

In support of its argument that Bao's notice of appeal was untimely, the State asserts that the withdrawal of a motion to alter or amend is not a "ruling upon the motion" under § 25-1912(3). The State asserts that although the motion to alter or amend stopped the running of the time to appeal, in the absence of a "ruling" on the substance of the motion, the withdrawal of the motion causes the 30-day time period to resume but does not start a new and separate 30-day time period. The State claims that because 9 days had elapsed between the July 16 order and the date Bao filed the motion for reconsideration, Bao had 21 days left of his 30-day appeal time to file his notice of appeal after he withdrew his motion on October 16. Bao filed his notice of appeal on November 14, and the State argues that the notice was not timely filed because, although it was filed within 30 days of the withdrawal of the motion, it was not filed within the 21 days that the State argued were all that remained.

Relying on statutory language, Bao argues in response that § 25-1912(3) provides that the 30-day time period for filing the notice of appeal is "terminated" by the timely filing of a motion to alter or amend a judgment and that therefore the act of filing his motion to alter or amend ended the initial 30-day time period to file for appeal. Bao argues that the 9 days between the July 16, 2003, order and his filing the motion should not be counted against the 30-day time for filing a notice of appeal because he obtained a new 30-day time period upon the withdrawal and dismissal of his motion to alter or amend.

[5] Regarding the characterization of Bao's pleadings, we agree with the State that Bao's "motion for reconsideration" should be treated as a motion to alter or amend the judgment. 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. *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). Bao's "motion for reconsideration" was filed within 10 days after the July 16, 2003, order denying postconviction relief, and the motion sought substantive alteration of the judgment, because Bao asserted that the court erred in various conclusions and in failing to address certain claims and requested that the July 16 order be vacated and leave be granted to amend the motion for postconviction relief.

Regarding the timeliness of Bao's notice of appeal, we agree with Bao that his notice of appeal was timely. Our review of the law and the record shows that the time for filing Bao's notice of appeal was "terminated" when he filed the motion for reconsideration on July 25, 2003, and that a new full period of 30 days commenced to run on October 16 when the motion was withdrawn and the court ruled that the matter was dismissed. See § 25-1912(3). In reaching our determination, we note that § 25-1912(3) provides in relevant part that "[t]he running of the time for filing a notice of appeal shall be *terminated* . . . by a timely motion to alter or amend a judgment" and "the *full time* for appeal fixed in subsection (1) of this section [30 days] *commences* to run *from* the entry of the order *ruling* upon the motion filed pursuant to subdivision (a) [new trial], (b) [alter or amend

judgment], or (c) [set aside verdict or judgment]." (Emphasis supplied.) Upon being advised by postconviction counsel on October 16 that Bao's motion for reconsideration was withdrawn, the court entered an order dismissing the motion. For purposes of § 25-1912(3), the filing of the motion "terminated" rather than merely suspended or tolled the initial 30-day period, and the court's dismissal of the motion was a "ruling." Therefore, a new and separate period of 30 days to file a notice of appeal commenced to run on October 16, the date of the entry of the order dismissing the motion to alter or amend. See *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003). Bao had 30 days from October 16 to file his notice of appeal, and therefore the notice of appeal filed November 14 was timely.

In reaching our conclusion regarding the timeliness of Bao's notice of appeal, we note that § 25-1912(3) is substantially similar to federal appellate rules of procedure governing time for appeal. We have stated that it is appropriate to look to cases interpreting substantially similar federal procedural rules for guidance in interpreting Nebraska's statutes. *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003). Our conclusion that Bao's notice of appeal was timely appears to be consistent with decisions of federal courts applying federal rules of appellate procedure that are similar to § 25-1912(3). See, *Rutledge v. U.S.*, 230 F.3d 1041 (7th Cir. 2000) (stating that under Fed. R. App. P. 4(a)(1)(B), time for filing notice of appeal began to run on day defendant withdrew motion to alter or amend); *U.S. v. Rodriguez*, 892 F.2d 233 (2d Cir. 1989) (stating that full time for filing appeal under Fed. R. App. P. 4(b) began to run after motion for reconsideration was withdrawn). We note that the U.S. Court of Appeals for the Second Circuit stated in *Rodriguez* that its conclusion which endorsed a new period of 30 days after withdrawal of the motion for reconsideration was considered sound, at least in the absence of evidence that the motion was filed and then withdrawn "in bad faith, as part of some sort of hardball litigation strategy," or as a result of neglect. 892 F.2d at 236.

We see no indication that Bao's motion to alter or amend was filed and withdrawn in bad faith, and we therefore conclude that the filing of such motion terminated the time for filing a notice

of appeal under § 25-1912(3) and that a new period of 30 days for filing a notice of appeal commenced on October 16, 2003, when the motion was withdrawn and ordered dismissed. Bao's notice of appeal filed November 14 was therefore timely, and this court has jurisdiction over the appeal.

Denial of Postconviction Relief and Purported Failure to Find Ineffective Assistance of Trial Counsel.

Bao asserts that the district court erred in rejecting his various claims of ineffective assistance of trial counsel and in therefore denying postconviction relief. We conclude that the court did not err in rejecting Bao's claims of ineffective assistance of counsel.

In its July 16, 2003, order dismissing Bao's motion for postconviction relief, the district court rejected Bao's four claims of ineffective assistance of counsel outlined above. For his first claim, Bao asserted that trial counsel failed to have Bao evaluated and to pursue a defense based on mental health. With respect to the first claim, the court noted that the testimony of a mental health expert presented by Bao in the postconviction hearing showed "only that Bao was more prone to violent behavior, not that he did not know what he was doing at the time of the act itself." The court concluded that such testimony would not have caused the jury to find that Bao did not have the required intent and that therefore Bao did not establish prejudice from trial counsel's purported failure to pursue such testimony.

For his second claim, Bao asserted that trial counsel improperly based the defense solely on the theory that Bao was justified in using deadly force. With respect to the second claim, the court noted that the record of the trial was "not at all clear that the only defense raised by Bao [at trial] was that the shooting was justified" and concluded that even if it were the only defense presented, Bao did not establish that trial counsel's performance was deficient for making the reasonable strategic decision to rely on a theory of self-defense.

For his third claim, Bao asserted that trial counsel failed to urge that Bao was guilty of sudden quarrel manslaughter rather than murder. With respect to the third claim, the court found that Bao failed to establish his claim of deficient performance because the trial record contradicted Bao's assertion that trial counsel failed to

suggest or argue that the jury could find Bao guilty of sudden quarrel manslaughter rather than first degree murder. The court specifically noted that Bao could not establish prejudice resulting from any purported failure with respect to the sudden quarrel manslaughter theory because under the step instruction given to the jury, the jury would not have considered manslaughter after it found Bao guilty of first degree murder.

For his fourth claim, Bao asserted that the performance of one of his attorneys was affected by alcohol use. With respect to the fourth claim, the court concluded that Bao failed to show prejudice because he failed to establish that the attorney's alcohol problem manifested itself at trial or affected the outcome of the trial in any way.

[6-9] In reviewing the district court's order rejecting Bao's claims of ineffective assistance of counsel, we are guided by the following standards. In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden 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. The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *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. *Id*. In determining whether trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. *Id*. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *Id*.

After reviewing the law and the record, we find no error in the district court's conclusions that Bao failed to establish either deficient performance or prejudice with respect to each of his claims of ineffective assistance of counsel. We therefore conclude that the court did not err in denying Bao's motion for postconviction relief on the bases asserted above.

Purported Failure to Consider Jury Instruction Claims.

Bao generally asserts that the district court erred in failing to consider claims relating to jury instructions which he raised in his original pro se motion for postconviction relief and which postconviction counsel had failed to pursue. Bao argues that the court should have reinstated and granted his motion for reconsideration in which he urged the court to consider the claims despite the fact that postconviction counsel had left the claims out of the operative second amended motion for postconviction relief. In the alternative, Bao argues that in light of counsel's purported deficient performance, this cause should be remanded to the postconviction court to consider the claims relating to jury instructions. We do not find Bao's arguments persuasive.

In his original pro se postconviction motion, Bao made claims that trial counsel provided ineffective assistance by failing to secure jury instructions to the effect that Bao's intoxication could be considered in determining whether premeditation and the appropriate intent were present. After Bao filed his pro se motion, postconviction counsel was appointed and a second amended postconviction motion, which became the operative motion in this case, was filed on February 4, 2003. The second amended motion did not contain the claims relating to jury instructions, and the court therefore did not address the claims in its July 16 order denying postconviction relief. On July 25, Bao filed a pro se motion for reconsideration in which he argued, inter alia, that he was entitled to leave to amend his motion to again include the jury instruction claims. Bao asserted ineffective postconviction counsel as cause to excuse any procedural default in failing to preserve the claims. On October 16, the court dismissed the motion for reconsideration after counsel informed the court that the motion was withdrawn. On October 21, Bao filed a pro se "Request to Reinstate Motion for Reconsideration Proceedings" in which he asserted that counsel withdrew the motion without his consent. The court overruled the request on October 22.

[10] We read Bao's arguments to be founded on an assertion that he was denied constitutionally mandated effective counsel. However, we have held that there is no constitutional guarantee of effective assistance of counsel in a postconviction action and

therefore no claim for ineffective assistance of postconviction counsel. *State v. Dandridge*, 264 Neb. 707, 651 N.W.2d 567 (2002); *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002); *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001). Therefore, Bao's arguments with respect to consideration of the jury instructions claims depending on constitutional allegations of ineffective assistance of postconviction counsel are without merit.

[11] Bao's motion for reconsideration and his request to reinstate the motion for reconsideration after it had been withdrawn were in part requests to amend his motion for postconviction relief to include the jury instruction claims. 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. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002); *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*. We note that § 25-852 was repealed effective January 1, 2003, and its counterpart is now found in the rules of pleading, Neb. Ct. R. of Pldg. in Civ. Actions 15 (rev. 2003). However, Nebraska's new rules of pleading apply to "civil actions filed on or after January 1, 2003." Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2003). See *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004). Because the petition in this case was filed prior to January 1, 2003, we continue to refer to § 25-852.

The operative second amended motion for postconviction relief, which did not contain the jury instruction claims, was a verified motion signed by Bao. This fact compromises Bao's argument that postconviction counsel's purported failure to include the jury instruction claims was without Bao's permission or awareness. We further note that the jury in Bao's trial was given an intoxication instruction which stated, inter alia, "You may consider evidence of alcohol use along with all the other evidence in deciding whether Linh Bao had the required intent." Considering these facts, we conclude that the district court did not abuse its discretion in denying Bao's requests to analyze the jury instruction claims after the court had ruled on the second amended motion. We therefore reject

Bao's assignments of error relating to the purported failure to consider such claims.

Purported Failure to Appoint Substitute Postconviction Counsel, Interpreter, and "Inmate Legal Aide."

Bao finally contends that the district court erred in refusing his requests for substitute postconviction counsel, for an interpreter, and for an "inmate legal aide" to accompany him at the hearing on his motion for reconsideration.

After the district court denied Bao's motion for postconviction relief, Bao filed a motion on July 25, 2003, for appointment of substitute counsel. At an October 16 hearing, the court denied Bao's motion for substitute counsel. The court noted that Bao was filing pro se pleadings and attempting to act as his own attorney. The court then gave Bao the option of continuing pro se or being represented by his then-existing court-appointed attorney. Bao chose to continue being represented by the court-appointed attorney. The attorney then withdrew the motion for reconsideration. On October 21, Bao filed a pro se request to reinstate the motion for reconsideration, and the request was denied on October 22. On October 29, the court granted the court-appointed attorney's motion to withdraw as counsel, and Bao elected to proceed with the present appeal pro se.

[12] Under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1995), it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). We have stated that when the assigned errors in a postconviction petition before the district court contain no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant. *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). In the present case, Bao requested substitute counsel after the court had overruled his postconviction petition and he therefore was seeking counsel to represent him with respect to his motion for reconsideration.

We regard Bao's situation at the time he requested substitute counsel to be similar to a situation where a postconviction petition contains no justiciable issue of law or fact. Because we have

concluded above that the court did not err in its rejection of Bao's postconviction claims, we determine that there was no justiciable issue of law or fact with respect to Bao's motion for reconsideration and that, therefore, appointment of counsel was not indicated. Furthermore, we note that at the October 16 hearing, Bao agreed to continue being represented by his existing court-appointed counsel. We therefore conclude that the court did not abuse its discretion when it did not appoint substitute counsel.

[13] Bao also argues on appeal that the court erred in failing to appoint an interpreter and an "inmate legal aide" to assist him in the hearing on his motion for reconsideration. The record reflects that Bao made no request to the court for either an interpreter or an "inmate legal aide," and therefore the court made no rulings denying such requests. Absent plain error, an issue not raised to the trial court will not be considered by this court on appeal. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004). We see no plain error.

With respect to an interpreter, the record reflects that at the October 16, 2003, hearing, and in earlier proceedings, Bao spoke with the court in English and appeared to understand the proceedings. See *State v. Topete*, 221 Neb. 771, 380 N.W.2d 635 (1986) (where record satisfactorily demonstrates that defendant had sufficient command of English language to understand questions posed and answers given, there has been no abuse of discretion in refusing to appoint interpreter). With respect to the "inmate legal aide," Bao cites no authority to the effect that he was entitled to the presence of an "inmate legal aide" at the hearing on the motion for reconsideration, and we see no basis to declare the existence of plain error. We conclude that the district court did not err in relation to the appointment of counsel issues.

CONCLUSION

We conclude that Bao timely filed a notice of appeal and that therefore this court has jurisdiction. However, we determine that Bao's assignments of error on appeal are without merit. We therefore affirm the district court's denial of Bao's motion for postconviction relief.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HENRY DELGADO, APPELLANT.

690 N.W.2d 787

Filed January 14, 2005. No. S-03-1401.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Right to Counsel: Waiver: Appeal and Error.** In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.
3. **Constitutional Law: Right to Counsel: Waiver.** Under U.S. Const. amend. VI and Neb. Const. art. I, § 11, a criminal defendant has the right to waive the assistance of counsel and conduct his or her own defense.
4. ____: ____: ____. In order to waive the constitutional right to counsel, the waiver must be made knowingly, voluntarily, and intelligently.
5. ____: ____: ____. Under *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), it is not a requirement that formal warnings be given by the trial court to establish a knowing, voluntary, and intelligent waiver of the right to counsel.
6. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted.
7. **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 value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
8. **Evidence: New Trial: Appeal and Error.** When considering the sufficiency of the evidence in determining whether to remand for a new trial or to dismiss, an appellate court must consider all the evidence presented by the State and admitted by the trial court irrespective of the correctness of that admission.
9. **Kidnapping: Words and Phrases.** A person commits kidnapping if he or she abducts another or, having abducted another, continues to restrain him or her with intent to terrorize him or her or a third person.
10. ____: ____. Neb. Rev. Stat. § 28-312(2)(a) and (b) (Reissue 1995) defines "abduction" as restraining a person with intent to prevent his or her liberation by (1) secreting or holding him or her in a place where he or she is not likely to be found or (2) endangering or threatening to endanger the safety of any human being.
11. **False Imprisonment: Words and Phrases.** Neb. Rev. Stat. § 28-312(1)(a) and (b) (Reissue 1995) defines "restrain" in relevant part as restricting a person's movement in such a manner as to interfere substantially with his or her liberty (1) by means of force, threat, or deception or (2) where the person is under the age of 18, without the consent of the relative or person having lawful custody of him or her.

12. **Sexual Assault: Words and Phrases.** Neb. Rev. Stat. § 28-318(6) (Reissue 1995) defines "sexual penetration" in relevant part as any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes.
13. **Criminal Law: Kidnapping.** Neb. Rev. Stat. § 28-313 (Reissue 1995) provides that a defendant will be guilty of a Class II felony, rather than a Class IA felony, if the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury.

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

Bernard J. Straetker, Scotts Bluff County Public Defender, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Following a jury trial, Henry Delgado, appearing pro se, was found guilty of kidnapping, first degree sexual assault on a child, and felon in possession of a firearm. Delgado was sentenced to life imprisonment without parole for kidnapping, 40 to 50 years' imprisonment for first degree sexual assault on a child, and 10 to 20 years' imprisonment for felon in possession of a firearm. All sentences were ordered to run consecutively, and Delgado was given credit of 235 days for time served with respect to his felon in possession of a firearm conviction. Delgado, through counsel, appealed his convictions. We affirm.

II. BACKGROUND

In the early hours of April 19, 2003, an AMBER Alert, which is a child abduction alert system, was issued for 8-year-old K.B., who had last been seen getting into a white car with Delgado on the afternoon of April 18. On April 18, K.B. and her mother attended a gathering at K.B.'s grandmother's apartment. Also present at the gathering was Delgado. K.B.'s mother testified that at

approximately 4 p.m., she left the apartment to obtain additional items for dinner. Upon returning, she discovered that both Delgado and K.B. were missing. K.B.'s mother was informed that K.B. had left the premises with Delgado, although K.B. did not have permission to do so.

There was evidence that K.B. left voluntarily with Delgado after he offered to take her out to dinner. However, instead of taking K.B. out to eat, Delgado went to a liquor store where he purchased liquor for himself and candy for K.B. Delgado then drove to Wildcat Hills, a wooded recreational area. By the time they arrived at Wildcat Hills, it was beginning to get dark. K.B. testified that after parking near a picnic area surrounded by trees, Delgado told K.B. it was time "to party," and he and K.B. moved to the back seat of his vehicle where Delgado consumed some of the alcohol. K.B., upon Delgado's request, tasted some of the liquor. K.B. also testified that later on, Delgado lit a lighter under a piece of tinfoil and sucked up a white substance through a rolled-up $20 bill.

K.B. testified that at some point in the evening, Delgado suggested that he and K.B. remove their clothing. At that time, K.B. removed all her clothing except her underwear, and Delgado removed all his clothing including his underwear. K.B. claimed Delgado then told her to lie down and asked if she wanted to be his girl friend. K.B. answered affirmatively, and Delgado kissed her. Despite K.B.'s attempts to keep her underwear on, she claimed Delgado "pushed them off" and attempted to penetrate her vaginally. K.B. testified that she resisted Delgado's attempts by tightening her stomach muscles and crossing her legs. K.B. further testified that Delgado attempted to penetrate her anally, which she also resisted.

According to K.B., when Delgado had difficulty fully penetrating her with his penis, he yelled at her and hit her on the face. K.B. testified that Delgado also put his fingers in K.B.'s vagina in a further attempt to penetrate her vaginally. K.B. further testified that during the assault, Delgado advised her that if she would let him penetrate her with his penis, they could return home. According to K.B., Delgado also retrieved a gun from the trunk of the vehicle and threatened to take her out in the woods and shoot her if she did not quit crying and let him penetrate her.

K.B. stated that when it began to get light outside, K.B. was allowed to put her clothes back on. Delgado and she then cleaned out the vehicle, and she went to sleep in the back seat of the car. K.B. testified that some time later, she was awakened by Delgado, who directed her to put her shoes and jacket on, and that they then ran from the car. Eventually, Delgado picked up K.B. and carried her halfway down a hill where he placed her under a tree and told her to stay where she was while he tried to start the car. K.B. remained in the trees as instructed. While she waited for Delgado to return, K.B. heard a helicopter, saw people moving around on the hill to her right, and heard someone calling her name. After K.B. began to cry, she was found by a police officer and placed in a helicopter that transported her to a hospital for an examination.

The record reflects that when law enforcement officers arrived at Wildcat Hills, Delgado was not wearing any underwear, shorts, or pants. Instead, he was using a T-shirt as a makeshift covering —he had his legs through each of the T-shirt armholes and had secured the shirt with a belt. The record also shows that following a search of Delgado's vehicle and the surrounding area, law enforcement officers located a pair of men's underwear, a .30/30 Winchester rifle, rifle shells, aluminum foil with burn marks, a pair of white children's underwear, a bottle of blue-colored "Pucker," and a bottle of red-colored "Watermelon Pucker." The liquor and men's underwear were located in a trash can in the shelter area near Delgado's vehicle. Delgado was arrested and later charged with kidnapping, first degree sexual assault on a child, felon in possession of a firearm, and habitual criminal.

On October 1, 2003, Delgado filed a motion to discharge counsel and gave notice of his intent to proceed pro se. The motion was set for hearing, at which time the trial court spoke with Delgado regarding self-representation. The judge's questioning revealed that Delgado felt that he had a fairly good understanding of the State's evidence, that he knew what defenses he might have and would be able to present at trial, that he felt he could adequately cross-examine experts called by the State, that he had represented himself in federal court in habeas corpus proceedings, that he had sat through an entire jury trial where he was the defendant, and

that he had reviewed the Nebraska rules of evidence and felt that he had enough experience to make objections on the proper grounds as needed. At that hearing, the trial court determined that Delgado had waived his right to counsel voluntarily, intelligently, and knowingly and appointed Delgado's trial counsel to serve as standby counsel to assist Delgado if he so wished. Delgado was advised by the court that his trial would commence on November 3, 2003.

On October 24, 2003, Delgado wrote a letter to the court requesting medical records of K.B. under the rape shield statute to establish that she had suffered injuries from being sexually abused by individuals other than Delgado. The trial court ruled that other than questioning the examining physician and other medical personnel regarding their opinions or conclusions as to the age of K.B.'s injuries, no other evidence would be allowed regarding K.B.'s prior sexual history.

At Delgado's trial, he appeared pro se and continued to represent himself throughout the proceeding. During his cross-examination of K.B.'s mother, Delgado attempted to question her regarding her deposition testimony which indicated that K.B. had previously made a false accusation of sexual assault. However, following the State's objection, the trial court excluded such evidence as inadmissible hearsay. Delgado does not appeal the court's hearsay ruling.

Testimony was elicited from Dr. Richard Rojas, the physician who examined K.B. following her abduction. Rojas testified that injuries to K.B.'s vaginal area and anal area were consistent with trauma but were not consistent with vaginal penetration. However, he did feel that there had been penetration of her labia. As to whether K.B. had been anally penetrated, Rojas testified that there could possibly have been some penetration due to the gaping nature of the opening. He indicated the gaping opening could also have been attributable to a need to have a bowel movement. Rojas also testified that a notch on K.B.'s hymen appeared to be an old injury.

At the conclusion of the trial, the jury returned a verdict finding Delgado guilty of all charges. Following his conviction, counsel was appointed to represent Delgado during all further proceedings.

III. ASSIGNMENTS OF ERROR

Delgado assigns, restated, that (1) the trial court erred by allowing Delgado to waive his right to counsel; (2) the trial court erred by denying Delgado the right to present evidence of K.B.'s prior sexual abuse; (3) the evidence was insufficient to convict Delgado of kidnapping, first degree sexual assault, and felon in possession of a firearm; and (4) the trial court erred by sentencing Delgado to life imprisonment.

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. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004); *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

[2] In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review. *State v. Green*, 238 Neb. 492, 471 N.W.2d 413 (1991).

V. ANALYSIS

1. Delgado's Request to Proceed Pro Se During Trial

Delgado argues in his first assignment of error that the trial court erred in allowing him to proceed with his trial pro se. Delgado claims that the trial court did not offer enough warnings regarding the consequences of his decision to proceed pro se and did not sufficiently ensure that he understood the consequences of his decision. Delgado acknowledges that specific, verbatim warnings of the dangers and disadvantages of self-representation are not required, but claims that the advice and warnings offered by the trial court were woefully insufficient to render Delgado's waiver of counsel voluntary, knowing, and intelligent.

[3-5] Under U.S. Const. amend. VI and Neb. Const. art. I, § 11, a criminal defendant has the right to waive the assistance of counsel and conduct his or her own defense. *State v. Sack*, 239

Neb. 690, 477 N.W.2d 921 (1991). In order to waive the constitutional right to counsel, the waiver must be made knowingly, voluntarily, and intelligently. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001). However, this court has held, as have other courts, that *Faretta* does not require that formal warnings be given by the trial court to establish a knowing, voluntary, and intelligent waiver of the right to counsel. See, *Ferguson v. Bruton*, 217 F.3d 983 (8th Cir. 2000) (stating that specific warning of dangers and disadvantages of self-representation is not required in every case if record shows that defendant had such knowledge from other sources); *State v. Dunster, supra*.

Delgado asserts that in determining whether his waiver was given knowingly and intelligently, we should apply the four-part "[f]ederal test" used by the Seventh Circuit Court of Appeals in *U.S. v. Egwaoje*, 335 F.3d 579 (7th Cir. 2003). Brief for appellant at 18. However, the court stated that the four-part inquiry is not a formalistic, mechanical approach. *U.S. v. Egwaoje, supra.* Rather, the court's ultimate inquiry is whether the record supports a knowing and intelligent waiver, regardless of the consideration of the four factors. *Id.* If it does, the trial court's decision will be upheld. *Id.* We also have rejected the claim that a formalistic litany is required to show such a waiver was knowingly and intelligently made. *State v. Green, supra*. Thus, we reject Delgado's argument that we adhere to a strict four-part analysis and instead review the record to determine whether, under the totality of the circumstances, Delgado was sufficiently aware of his right to counsel and the possible consequences of his decision to forgo the aid of counsel. See *State v. Dunster, supra*.

In determining whether Delgado's waiver of counsel was knowingly and intelligently made, the cases of *State v. Green*, 238 Neb. 492, 471 N.W.2d 413 (1991), and *State v. Dunster, supra*, are instructive. In *Green*, we found that the defendant had made a knowing and intelligent waiver of his right to counsel. In reaching that conclusion, we noted that a knowing and intelligent waiver can be inferred from a defendant's conduct and that such a waiver could be made despite the trial court's failure to advise the defendant of the dangers and disadvantages of self-representation. We also emphasized that a defendant's decision

to represent himself need not be prudent, just knowing and intelligent. In *Green*, we also took note of the defendant's prior experience with the judicial system, in particular his prior self-representation during a criminal trial.

Similarly, in *State v. Dunster, supra*, we found that the defendant had made a knowing and intelligent waiver of his right to counsel. In that case, the defendant was aware of his right to legal representation, had discussed self-representation with two attorneys, was advised of the complexities of evidentiary objections and the preservation of those objections, and was informed he would be held to the same standard as a defendant represented by counsel. In addition, the defendant was advised by the trial court that it believed the defendant was making a mistake by electing to proceed pro se.

We conclude, upon a review of the record, that Delgado likewise knowingly, intelligently, and voluntarily waived his right to counsel. The record reflects, as recited above, that Delgado was well aware of his right to legal counsel and of the possible sentences he faced for the various charges against him. The record also reflects that Delgado was advised of his rights surrounding his trial and of the complexities of representing himself, including knowledge of the technical Nebraska rules of evidence. Moreover, Delgado was hardly a novice at dealing with the criminal justice system. The trial court appointed Delgado's trial counsel as standby counsel to assist Delgado if he needed help and to resume representation of Delgado if he later chose to relinquish his right to self-representation.

2. Evidence of K.B.'s Prior Sexual History

In his second assignment of error, Delgado argues that the trial court committed reversible error when it prohibited him from presenting evidence of K.B.'s alleged prior sexual abuse. By letter, which the court treated as a pretrial motion, Delgado requested permission to present such evidence under the rape shield statute, Neb. Rev. Stat. § 28-321(2) (Reissue 1995). The trial court overruled the motion and limited questions regarding K.B.'s prior sexual abuse to the opinions and conclusions of physicians based upon their examination of K.B. following her April 18 and 19, 2003, assault.

[6] Delgado also attempted to question K.B.'s mother regarding an alleged prior accusation of sexual abuse made by K.B., which Delgado claims was later determined to be unfounded. Delgado did not request permission to admit this evidence by pretrial motion, but, rather, attempted to elicit testimony regarding this prior accusation through Delgado's cross-examination of K.B.'s mother. Delgado, however, was not permitted to conduct this cross-examination because of a hearsay objection. In a closed proceeding after the mother's testimony, the trial court addressed in more detail the admissibility of evidence regarding K.B.'s previous accusation of sexual abuse. At that proceeding, Delgado stated his belief that such evidence was admissible under the Nebraska rules of evidence for impeachment purposes. This was the first time this theory was advanced. The trial court noted that it was treating Delgado's questioning as an offer of proof, which it overruled on the ground that the testimony of K.B.'s mother regarding what she had been told by the police officers who investigated K.B.'s previous allegation of sexual abuse was inadmissible hearsay. Hearsay is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801 (Reissue 1995). The questions Delgado sought to ask meet the definition of hearsay and were properly excluded.

Delgado's assignment of error on this subject is without merit.

3. Sufficiency of Evidence

[7,8] Delgado claims the trial court erred in finding there was sufficient evidence to convict him of kidnapping, first degree sexual assault on a child, and felon in possession of a firearm. 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. 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 value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *Id.* When considering the sufficiency of the evidence in determining

whether to remand for a new trial or to dismiss, an appellate court must consider all the evidence presented by the State and admitted by the trial court irrespective of the correctness of that admission. *State v. Rathjen*, 266 Neb. 62, 662 N.W.2d 591 (2003).

(a) Kidnapping

[9-11] A person commits kidnapping if he or she abducts another or, having abducted another, continues to restrain him or her with intent to terrorize him or her or a third person. Neb. Rev. Stat. § 28-313 (Reissue 1995); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994). "Abduction" is defined as restraining a person with intent to prevent his or her liberation by (1) secreting or holding him or her in a place where he or she is not likely to be found or (2) endangering or threatening to endanger the safety of any human being. Neb. Rev. Stat. § 28-312(2)(a) and (b) (Reissue 1995). "Restrain," in turn, is defined in relevant part as restricting a person's movement in such a manner as to interfere substantially with his or her liberty (1) by means of force, threat, or deception or (2) where the person is under the age of 18, without the consent of the relative or person having lawful custody of him. § 28-312(1)(a) and (b).

The evidence presented at trial, viewed in the light most favorable to the State, reveals that Delgado persuaded 8-year-old K.B. to accompany him by promising to take her out to dinner. Instead, Delgado took her to a liquor store and then drove her to a secluded area where he kept her for the remainder of the night. At no time did Delgado receive permission to have K.B. accompany him. While K.B. was confined in Delgado's vehicle, Delgado sexually and physically assaulted her and threatened to kill her with a gun he brandished in front of her. In the morning, when it became obvious that the police were in the vicinity of Wildcat Hills, Delgado hid K.B. among trees and brush and denied knowledge of her whereabouts when questioned by police.

Viewing the evidence regarding K.B.'s abduction and continued restraint in the light most favorable to the State, we determine it is clear that the evidence was sufficient to support Delgado's conviction of kidnapping.

(b) Sexual Assault

Delgado argues that the evidence was insufficient to support his conviction of first degree sexual assault. He contends that the possibility that K.B.'s physical injuries were attributable to causes other than sexual penetration or assault by him renders the evidence insufficient to support his conviction. Delgado also suggests that inconsistencies in what K.B. told the doctors and nurses at the hospital following her abduction, K.B.'s taped interview taken a few days after her abduction, and her testimony at trial imply that her accusations were false. Delgado contends, therefore, that there was insufficient evidence on which to convict him of first degree sexual assault.

[12] In order for Delgado to be convicted of first degree sexual assault, it was necessary for the State to prove that Delgado subjected K.B. to sexual penetration when K.B. was less than 16 years old and Delgado was 19 years old or older. Neb. Rev. Stat. § 28-319 (Reissue 1995). "Sexual penetration" is defined in relevant part as "any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes." Neb. Rev. Stat. § 28-318(6) (Reissue 1995).

The record reflects that on April 18 and 19, 2003, Delgado was 39 years old and K.B. was 8 years old. The record further reflects that K.B.'s treating physician, Rojas, opined that K.B. had been penetrated in the labia area into the labia minora and had possibly been penetrated anally. Consistent with Rojas' findings, K.B. testified that while in Delgado's car, he attempted to penetrate her with his penis vaginally and anally and that he successfully penetrated her vaginally by sticking his fingers in her vaginal opening. This evidence is sufficient for the trier of fact to determine that K.B. was penetrated by Delgado, however slightly, and that this penetration was within the meaning of § 28-318(6). Therefore, there was sufficient evidence to support Delgado's conviction of first degree sexual assault.

(c) Felon in Possession of Firearm

Finally, Delgado argues that there was insufficient evidence to support his felon in possession of a firearm conviction because

there was no documentary evidence adduced at trial that Delgado was a felon. Delgado claims that the only evidence adduced at trial regarding his prior criminal record was the testimony of a police officer who discussed Delgado's prior record as it related to the officer's decision to issue the AMBER Alert.

Contrary to Delgado's assertion on appeal, the record does contain documentary evidence of Delgado's prior felony convictions. The record reflects that on January 7, 1985, Delgado was sentenced in Michigan to 10 to 20 years' imprisonment for breaking and entering and 2 to 5 years' imprisonment for larceny in a building. The record also reflects that a weapon was found in his possession at the time of his arrest for the abduction of K.B. Therefore, Delgado's claim that the evidence was insufficient with respect to his weapons charge is without merit.

4. Excessiveness of Sentence

In his final assignment of error, Delgado claims that the trial court committed reversible error by sentencing him to life imprisonment for kidnapping, as opposed to sentencing him to a term of years. In support of this claim, Delgado relies on § 28-313(3), which permits a trial court to impose a Class II sentence when the court finds that the person kidnapped was voluntarily released or liberated alive by the abductor in a safe place without having suffered serious bodily harm. Delgado also argues in his reply brief that the U.S. Supreme Court's recent decision in *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), restricts the ability of "judicial power to infringe upon the province of the jury." Reply brief for appellant at 3. Delgado claims, therefore, that the jury, and not the trial judge, should have determined whether the mitigating factors of § 28-313(3) had been met. We determine that Delgado's reading of *Blakely* is misguided and that the trial court did not err in sentencing Delgado to life imprisonment for kidnapping.

Section 28-313 provides in pertinent part:

> (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 *Blakely v. Washington, supra*, the U.S. Supreme Court was applying the rules of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The rule is that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.

We have, in our prior cases, examined the statute prescribing the penalty for kidnapping in light of *Apprendi*. In *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), the defendant claimed that the jury should have been instructed to determine whether the victim was voluntarily released or liberated and alive by the abductor and in a safe place without having suffered serious bodily injury. We stated that we had rejected such an argument in *State v. Becerra*, 263 Neb. 753, 758-59, 642 N.W.2d 143, 148 (2002), where we stated:

> In *Apprendi v. New Jersey, supra*, the U.S. Supreme Court held that other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The Court stressed that the fact must increase the penalty. The Court made a distinction between facts in aggravation of punishment and facts in mitigation of punishment. The Court stated that when the issue involves mitigating facts under which the defendant can escape the statutory maximum, core concerns involving the jury and burden of proof requirements are absent. See *id*.
>
> *Apprendi* is inapplicable to [the defendant's] case. We have held that § 28-313 creates a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim. The factors which determine which of the two penalties is to be imposed are not elements of the offense of kidnapping. The factors are simply mitigating factors which may reduce the sentence of those charged under § 28-313, and their existence or nonexistence should properly be determined by the trial judge. *State v. Hand*, 244

> Neb. 437, 507 N.W.2d 285 (1993); *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981). Under § 28-313, any factual finding about whether the person kidnapped was voluntarily released affects whether the defendant will receive a lesser penalty instead of an increased penalty. *Apprendi* made clear that it was concerned only with cases involving an increase in penalty beyond the statutory maximum and does not apply to the mitigating factors in § 28-313.

Section 28-313 creates a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim. *State v. Mata, supra*; *State v. Becerra, supra.* The factors which determine which of the two penalties is to be imposed are not elements of the offense of kidnapping, but are simply mitigating factors which may reduce the sentence of those charged under this section, and their existence or nonexistence should properly be determined by the trial judge. *Id.*

We conclude, therefore, that Delgado's final assignment of error is without merit.

[13] Having established that the trial court had jurisdiction to impose Delgado's kidnapping sentence, we turn to his claim that the mitigating factors of § 28-313(3) had been satisfied. Section 28-313 provides that a defendant will be guilty of a Class II felony, rather than a Class IA felony, if the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury.

In refusing to find that the mitigating factors of § 28-313(3) had been met, the trial court stated the evidence reflected that K.B. had not been voluntarily released or liberated. The evidence supports the trial court's finding. It is apparent from the record that when Delgado became aware of the presence of law enforcement, he attempted to hide K.B. by placing her under a tree in a ravine where he told her to stay while he tried to start his car. Moreover, when questioned by law enforcement officials regarding K.B.'s whereabouts, Delgado denied having any such knowledge. Delgado's conduct was a far cry from voluntarily releasing and liberating the victim within the meaning of § 28-313. Rescue is not a voluntary release. Moreover, the evidence clearly reflects

that K.B. was both physically and sexually abused during her abduction. Therefore, we find the trial court did not err in determining the kidnapping charge should be classified as a IA felony for the purpose of sentencing.

VI. CONCLUSION

For the foregoing reasons, we affirm the decision of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
JAMES Y. PATHOD, APPELLEE.

690 N.W.2d 784

Filed January 14, 2005. No. S-03-1410.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
3. **Words and Phrases.** As a general rule, the word "shall" is considered mandatory and is inconsistent with the idea of discretion.
4. **Criminal Law: Convicted Sex Offender.** The requirements of Neb. Rev. Stat. § 29-4007 (Cum. Supp. 2002) are mandatory.
5. **Criminal Law: Appeal and Error.** Errors, other than structural errors, which occur within the trial and sentencing process, are subject to harmless error review.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Exception sustained.

Gail E. Collins, Deputy Madison County Attorney, for appellant.

Tom D. Hockabout, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellee.

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

CONNOLLY, J.

The State of Nebraska filed an application for leave to docket an appeal under Neb. Rev. Stat. § 29-2315.01 (Reissue 1995). The issue is whether a district court, when sentencing a defendant, must advise and provide written notification of the requirements of Nebraska's Sex Offender Registration Act (the Act), Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 2002). We determine that the court must provide written notification at sentencing. It also must provide copies of the notification and journal entry to various parties. But we also conclude that the failure to do so was harmless because the defendant signed a notice the day after sentencing and had completed serving his sentence when this appeal was heard. The State's exception is sustained.

BACKGROUND

The State charged the appellee, James Y. Pathod, with one count of sexual assault in violation of Neb. Rev. Stat. § 28-320(1)(a) (Reissue 1995). At arraignment, the district court advised Pathod of the Act's requirements. Pathod pled no contest, and sentencing was set for a later date.

The record does not show that the district court informed Pathod of the Act's requirements at sentencing. The day after sentencing, however, Pathod signed a notification of registration responsibilities under the Act. That notification was also signed by the district court judge. The record shows—and the State's attorney confirmed at oral argument—that Pathod has completed serving his sentence.

The State timely filed an application for leave to docket an appeal under § 29-2315.01. The district court signed the application, and the application was filed in this court.

ASSIGNMENT OF ERROR

The State assigns that the district court erred when at sentencing it failed to advise and provide written notification to Pathod of his duty to register under the Act.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the

court below. *Campbell v. Omaha Police & Fire Ret. Sys.*, 268 Neb. 281, 682 N.W.2d 259 (2004).

ANALYSIS

The State argues that the court had a duty to inform Pathod, in writing, at sentencing about his duty to register under the Act. The State further contends that because the court failed to inform Pathod about the Act that the cause should be remanded for resentencing.

Section 29-4007 provides:

> (1) When sentencing a person convicted of a registrable offense under section 29-4003, the court shall:
>
> (a) Provide written notification of the duty to register under the Sex Offender Registration Act at the time of sentencing to any defendant who has pleaded guilty or has been found guilty of a registrable offense under section 29-4003. . . .
>
> . . . .
>
> (b) Require the defendant to read and sign a form stating that the duty of the defendant to register under the Sex Offender Registration Act has been explained;
>
> (c) Retain a copy of the written notification signed by the defendant; and
>
> . . . .
>
> A copy of the signed, written notification and the journal entry of the court shall be provided to the county attorney, the defendant, the sex offender registration and community notification division of the Nebraska State Patrol, and the county sheriff of the county in which the defendant resides or is temporarily domiciled.
>
> . . . .
>
> (3)(a) The Department of Correctional Services or a city or county correctional or jail facility shall provide written notification of the duty to register pursuant to the Sex Offender Registration Act to any person committed to its custody for a registrable offense under section 29-4003 prior to the person's release from incarceration.

[2,3] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation

to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). As a general rule, the word "shall" is considered mandatory and is inconsistent with the idea of discretion. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002). See, also, *State v. Rodriguez*, 11 Neb. App. 819, 660 N.W.2d 901 (2003) (construing term "shall" in § 29-4005 of Act).

[4] Here, the Act's plain language states that when sentencing a person, the court "shall" provide written notification and copies of the notification and corresponding journal entry to various parties. Thus, we determine that the Act's requirements are mandatory.

Pathod argues, however, that because he was in county jail, the duty to inform him of the Act shifted to jail personnel under § 29-4007(3)(a). We disagree. The Act does not shift the burden to notify. Instead, it requires multiple entities to provide notification. Thus, the Act required the court to provide notification at sentencing and jail personnel to provide additional notification before Pathod was released from incarceration.

The record, however, does not contain a journal entry showing that written notification was given at sentencing. Because the court was required to provide written notification under the Act and provide a journal entry, we determine that the court erred. Compliance with the Act's technical procedures are important because if they are not properly followed, defendants may seek to use that failure to attack the validity of their conviction or sentence. See, e.g., *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002); *State v. Rodriguez, supra*.

Having determined that the court erred by failing to provide written notification and a journal entry, we address whether Pathod should be resentenced. The State argues that resentencing is appropriate and that double jeopardy does not apply. We do not reach the issue of double jeopardy because we determine that the court's failure to follow procedure was harmless.

[5] Errors, other than structural errors, which occur within the trial and sentencing process, are subject to harmless error review. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999). Here, although the record does not contain a journal entry or evidence that notification was given at sentencing, it does contain a notice

signed by Pathod and the district court judge that was filed the day after sentencing. In addition, the record shows that Pathod has completed serving his sentence. Concerns about using the failure to provide notification in court to attack the conviction and sentence are lessened, if not eliminated, when the sentence has already been served. Accordingly, we determine that the error was harmless.

CONCLUSION

We conclude that the district court erred when it failed at sentencing to provide written notification in court and failed to provide a journal entry showing that the notification was given. However, the error was harmless because Pathod signed a written advisory form and has already served his sentence.

EXCEPTION SUSTAINED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. LEONARD W. SHEFREN, RESPONDENT.

690 N.W.2d 776

Filed January 14, 2005. No. S-04-457.

Original action. Judgment of public reprimand and suspension.

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

PER CURIAM.

INTRODUCTION

Respondent, Leonard W. Shefren, was admitted to the practice of law in the State of Nebraska on June 25, 1974, and at all times relevant hereto was engaged in the private practice of law in Omaha, Nebraska. On April 14, 2004, formal charges were filed against respondent. The formal charges set forth two counts that included charges that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice);

and Canon 5, DR 5-103(B) (improperly advancing or guaranteeing financial assistance to client), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997).

A referee was appointed and heard evidence. On November 24, 2004, the referee filed his report. With respect to the two counts in the formal charges, the referee found that respondent's conduct had violated DR 1-102(A)(1) and (5) and DR 5-103(B), as well as his oath of office as an attorney. The referee recommended that respondent be publicly reprimanded and suspended from the practice of law for 30 days.

On December 3, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he knowingly did not challenge or contest the findings of fact and recommended sanction set forth in the referee's report and waived all proceedings against him in connection therewith in exchange for a stated form of consent judgment of discipline outlined below. Respondent asked that any suspension be imposed 30 days after the ruling by this court on the conditional admission. Upon due consideration, the court approves the conditional admission and imposes discipline as outlined *infra*.

FACTS

In summary, in his report, the referee found that respondent had guaranteed bank loans for 20 different clients who had sustained personal injuries, primarily in work-related accidents. The loans totaled approximately $550,000. Respondent was pursuing claims on behalf of these clients in an effort to recover damages or benefits as a result of their injuries. The referee found that respondent guaranteed these loans because banks would not otherwise loan money to the injured clients who needed the money for living expenses. The referee further found that respondent did not guarantee the loans to induce the clients to retain respondent's services and that no client had suffered any money damages as a result of respondent's loan guarantee practices. The referee found that respondent's conduct had violated DR 1-102(A)(1) and (5) and DR 5-103(B), as well as his oath of office as an attorney.

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to rule 13, we find that respondent knowingly does not challenge or contest the truth of the matters conditionally admitted and knowingly does not challenge or contest that he violated DR 1-102(A)(1) and (5) and DR 5-103(B), as well as his oath of office as an attorney. We further find that respondent waives all proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1) and (5) and DR 5-103(B), as well as his oath of office as an attorney, and that respondent should be and hereby is publicly reprimanded. We further order that respondent should be and hereby is suspended from the practice of law for a period of 30 days, effective 30 days after filing this opinion. Respondent shall 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. At the end of respondent's 30-day suspension period,

respondent shall be automatically reinstated to the practice of law, provided that respondent has demonstrated his compliance with rule 16, and further provided that the Counsel for Discipline has not notified this court that respondent has violated any disciplinary rule during his suspension. Respondent is also 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 10(P) (rev. 2003) and 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND AND SUSPENSION.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. WILLIAM C. PETERS, JR., RESPONDENT.

690 N.W.2d 629

Filed January 14, 2005. No. S-04-529.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

Respondent, William C. Peters, Jr., was admitted to the practice of law in the State of Nebraska on January 22, 1973, and at all times relevant hereto was engaged in the private practice of law in Gering, Nebraska. On May 3, 2004, formal charges were filed against respondent. The formal charges set forth one count that included charges that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); and Canon 6, DR 6-101(A)(2) (handling legal matter without adequate preparation).

On December 7, 2004, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he

knowingly admitted the truth of the allegations that he violated DR 1-102(A)(1) and (5) and DR 6-101(A)(2), and in effect waived all proceedings against him in connection therewith in exchange for a stated form of a consent judgment of a public reprimand and probation. Upon due consideration, the court approves the conditional admission and imposes discipline as outlined *infra*.

FACTS

In his conditional admission, respondent admits that he undertook the representation of two clients in a chapter 13 bankruptcy proceeding. Respondent further admits that during the course of his representation of those clients, respondent filed bankruptcy plans that did not comply with the bankruptcy rules and failed to object to a creditor's motion for relief from the provisions of the bankruptcy automatic stay. The bankruptcy case was dismissed by the bankruptcy court due to respondent's failure to timely file an amended bankruptcy plan and failure to send appropriate notices as required under the bankruptcy rules.

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to rule 13, we find that respondent knowingly admits the truth of the matters conditionally admitted and knowingly admits that he violated DR 1-102(A)(1) and (5) and DR 6-101(A)(2). We further find that respondent waives all proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1) and (5) and DR 6-101(A)(2) and that respondent should be and hereby is publicly reprimanded. We further order that respondent be on probation for a period of 1 year, effective immediately, during which time respondent will not accept any bankruptcy engagements and will complete 15 hours of continuing legal education in the area of bankruptcy law, to be approved by the Counsel for Discipline. Respondent is also 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 10(P) (rev. 2003) and 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

JERE D. DETTER, APPELLANT, V. MIRACLE HILLS ANIMAL HOSPITAL, P.C., A NEBRASKA CORPORATION, APPELLEE.

691 N.W.2d 107

Filed January 21, 2005. No. S-02-688.

1. **Actions: Equity: Corporations.** An action seeking corporate dissolution is an equitable action.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
3. **Corporations: Valuation.** A trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle.

4. **Goodwill: Words and Phrases.** Goodwill is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.
5. **Actions: Goodwill.** The existence of professional goodwill as a distributable asset in an action for the dissolution of a professional entity presents a question of fact.

Petition for further review from the Nebraska Court of Appeals, HANNON and INBODY, Judges, and BUCKLEY, District Judge, Retired, on appeal thereto from the District Court for Douglas County, RICHARD J. SPETHMAN, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Duane M. Katz for appellant.

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

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

HENDRY, C.J.

INTRODUCTION

Appellant Jere M. Detter seeks further review of the Nebraska Court of Appeals' affirmance of the district court's judgment in which the district court determined the value of Detter's shares in a closely held professional corporation. Detter had filed actions, which were consolidated at trial, to (1) enforce certain promissory notes executed by Jeffrey Schreiber in favor of Detter and (2) judicially dissolve the professional corporation that Detter formed with Schreiber, Miracle Hills Animal Hospital, P.C. (MHAH). After Detter filed his petition to dissolve MHAH, MHAH elected to purchase Detter's shares, but the parties could not agree on the value of the shares. MHAH then filed a motion to have the district court determine the value. See Neb. Rev. Stat. § 21-20,166(2) to (4) (Cum. Supp. 2004).

The district court entered judgment in favor of Detter on the promissory notes, and that judgment is not part of this appeal. Regarding the value of the shares, the district court ruled that

pursuant to this court's decision in *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986), professional corporations do not have a goodwill value when one of the members leaves. The district court therefore allowed "nothing by way of value for the good will of this corporation" and awarded Detter one-half of MHAH's working capital and tangible assets. The district court further found that Detter was not entitled to attorney fees pursuant to § 21-20,166(5)(b). The Court of Appeals affirmed. *Detter v. Miracle Hills Animal Hosp.*, 12 Neb. App. 480, 677 N.W.2d 512 (2004). This court granted Detter's petition for further review.

BACKGROUND

Detter and Schreiber are veterinarians. In 1991, they combined their practices to form MHAH. Detter and Schreiber each contributed $5,000 to the new corporation, and each owned 50 percent of the shares. They were the only members on the board of directors. At the same time the parties agreed to incorporate, Schreiber executed promissory notes in favor of Detter, which notes were in consideration of Detter's contribution of "greater assets" to the corporation.

In October 1997, Schreiber informed Detter that he would no longer make payments on the notes unless Detter agreed to compensate Schreiber for management services. Schreiber and Detter also disputed how much in support services and inventory MHAH should be providing to the pet grooming service Schreiber's wife operated out of MHAH on a commission basis. Settlement negotiations took place in the spring of 1998 but were unsuccessful. In May 1998, Detter commenced an action against Schreiber on the notes.

During 1998, the office environment generally deteriorated. Schreiber began to keep MHAH's business check book at home, making it difficult for Detter to know the status of the business or participate in its management. In September 1998, Detter offered to buy Schreiber's interest in MHAH for $60,000. The offer contained no restrictions on Schreiber's ability to contact his clients.

The $60,000 offer was based on Detter's belief that the business was worth $228,000, of which he attributed $120,000 to the corporation's equipment, furniture, fixtures, trade name, sign, and

location. Detter attributed an additional $108,000 to the annual net income for both veterinarians—salary and dividends—produced from their current client base. Because Detter did not intend to restrict Schreiber's ability to retain his own clients, Detter's $60,000 offer was based only on a 50-percent share of the $120,000 value Detter attributed to the corporation's tangible assets, trade name, sign, and location. When Schreiber did not respond to the offer, Detter filed an action for judicial dissolution on November 18, 1998.

In this action for dissolution, Detter alleged that Schreiber had personally interfered, and had permitted Schreiber's wife and staff to interfere, with Detter's ability to practice at the clinic and participate in management. Detter claimed that the shareholders were deadlocked, that Schreiber had misapplied corporate funds to benefit himself, and that Schreiber had acted in an illegal and oppressive manner.

In March 1999, MHAH filed an election to purchase Detter's outstanding shares pursuant to § 21-20,166 (allowing, under specified conditions, election to purchase shares of shareholder petitioning for dissolution under Neb. Rev. Stat. § 21-20,162(2) (Cum. Supp. 2002)). Because the parties were unable to agree upon the fair market value of the shares, MHAH filed a motion to have the court determine the value of the shares. See § 21-20,166(4) (providing that after 60 days and upon party's motion, court shall stay dissolution proceedings and determine fair market value of shares). Detter continued to practice at MHAH until he resigned on September 4, 1999.

District Court Proceedings

A bench trial was conducted in January 2002. Detter's valuation expert, Cynthia Wutchiett, is a certified public accountant who has specialized in veterinary business consulting, valuations, and acquisitions since 1985. Wutchiett testified that she had performed over 300 valuations of veterinary practices for buyers or sellers, including 3 or 4 in Nebraska since 1995. Wutchiett further testified, without objection, that on November 17, 1998, the day before the action for judicial dissolution was filed, MHAH had a fair market value of $182,082, which included goodwill value of $141,127. See § 21-20,166(4) (providing that parties may move

court to "determine the fair value of the petitioner's shares as of the day before the date on which the petition under subdivision (2) of section 21-20,162 was filed or as of such other date as the court deems appropriate under the circumstances").

Wutchiett also testified that her valuation of the practice was based on the excess earnings method and had two components: (1) working capital and tangible assets of the practice and (2) capitalization of excess earnings, defined as the practice's goodwill value. Wutchiett's valuation of the practice's goodwill was based on adjusted income and expenses for the 3 preceding fiscal years, 1995 to 1997. Wutchiett determined that revenues of the practice had increased 12 percent from 1995 to 1996, and 7 percent from 1996 to 1997, and that the practice serviced 1,300 clients and generated approximately 5,800 transactions annually. Wutchiett did not consider the corporate tax returns for 1998 to 2000, or whether any clients had left after the November 17, 1998, date of her valuation. Wutchiett derived excess earnings by deducting from the practice's annual income (1) normal operating expenses, adjusted to industry standards; (2) doctor compensation for veterinary services, calculated at 22 percent of doctor-generated revenue; and (3) doctor compensation for management services, calculated at 3 percent of doctor-generated revenue. Wutchiett did not assign a separate value to clients, but stated that their value was included in the goodwill valuation.

Wutchiett then weighted and averaged the net income for each of the 3 preceding years to produce the expected excess earnings of the practice, which she calculated at $33,419 per year. Wutchiett then testified that based on the history of the practice, there was a reasonable expectation the practice would continue to have the same amount in expected excess earnings. Wutchiett deducted the calculated expected return rate for the net assets of the practice, and characterized the balance, $28,801, as the practice's return on goodwill, or its income stream, that could be passed on to a willing buyer. The $28,801 was then multiplied by a capitalization factor of 4.9 to derive a total goodwill value of $141,127. The 4.9 factor represented a rate of return of 20.4 percent, which was Wutchiett's professional opinion of the rate of return a buyer would want to earn, as well as the risks associated with an investment in the practice. The goodwill value and net

assets value of the practice were combined for a total fair market value, as of November 17, 1998, of $182,082.

Wutchiett also testified that in her opinion, historical purchase transactions had shown goodwill value of a practice remains with the practice regardless of whether the associates or owners stay or go, and that neither she nor anyone else in the industry recognized goodwill attached to an individual veterinarian as opposed to the practice. Wutchiett further testified that it was very difficult for a veterinarian to retain clients when they leave or relocate a practice. Referring to a veterinary business valuation she was previously engaged in, Wutchiett testified that the particular veterinarian was able to retain only 30 to 40 percent of his clients despite aggressive advertisement, the closure of the old practice, and relocating only 5 to 6 miles from the prior practice. Schreiber did not object to Wutchiett's opinion as to the value of the practice.

Schreiber's valuation expert, Ronald Nebbia, took exception to Wutchiett's valuation because it included goodwill as an asset. Nebbia valued the practice at $35,912, based upon the practice's adjusted net tangible assets, accounts receivables, and par value of its 10,000 shares of stock, or $1 per share. Nebbia testified that "in a professional practice of this nature, goodwill primarily rests with the provider and not the practice."

The final issue presented at trial was whether Detter was entitled to expenses and attorney fees for Schreiber's alleged misapplication of corporate funds or Schreiber's alleged illegal and oppressive conduct. See § 21-20,166(5)(b) (providing for attorney fees and expenses when petitioning shareholder had probable grounds for relief because (1) directors acted in illegal, oppressive, or fraudulent manner or (2) corporate assets were being misapplied or wasted).

In finding generally in favor of Schreiber, the district court accepted Nebbia's $35,912 valuation of the practice, determining that pursuant to this court's decision in *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986), there is no goodwill value for a professional corporation when one of its members leaves. The court also rejected Wutchiett's valuation of the working capital and tangible assets of the practice because "she based that on an equipment evaluation made by a man who never saw the equipment."

The district court then awarded Detter half of Nebbia's $35,912 valuation, or $17,956, plus $3,050 for half the value of a corporate vehicle, for a total of $21,006. The district court further concluded that Detter was not entitled to attorney fees, finding that Schreiber's conduct of which Detter complained did not rise to the level of misconduct that would warrant attorney fees pursuant to § 21-20,166(5)(b).

Court of Appeals' Decision

Detter appealed to the Court of Appeals. Concluding that *Taylor, supra*, was a marital dissolution action and not directly on point, the Court of Appeals found support for the district court's judgment in two cases from other jurisdictions. See, *Detter v. Miracle Hills Animal Hosp.*, 12 Neb. App. 480, 677 N.W.2d 512 (2004), citing *Salinas v. Rafati*, 948 S.W.2d 286 (Tex. 1997), and *Smith, Keller & Assoc. v. Dorr & Assoc.*, 875 P.2d 1258 (Wyo. 1994). In determining that the district court did not err in its conclusion that "goodwill should not be included as an asset of a closely held corporation," the Court of Appeals stated:

> While the credentials of Wutchiett are certainly impressive, she determined the value of MHAH using a method giving the corporation credit for goodwill. As we mentioned previously, goodwill is not an asset with an assignable value in a professional corporation; it is not a marketable asset that stays with a corporation, but, rather, a nonmarketable one that leaves with a professional. Because Wutchiett's valuation of MHAH incorporated an asset that is not a marketable asset, we affirm the trial court's decision to reject her testimony. Based on our review of the record, we find that the trial court properly rejected Detter's method of valuation for MHAH.

Detter, 12 Neb. App. at 489, 677 N.W.2d at 519. Further agreeing with the district court's finding that Schreiber's conduct did not rise to the level of illegal, oppressive, or fraudulent conduct and that Detter did not show that Schreiber was misapplying or wasting corporate assets, the Court of Appeals also affirmed the district court's denial of attorney fees to Detter. *Id.*

ASSIGNMENTS OF ERROR

In his petition for further review, Detter assigns, restated and condensed, that the Court of Appeals erred in determining that

(1) goodwill is not part of the valuation in a dissolution proceeding of a professional corporation and (2) Schreiber's conduct was not illegal, oppressive, or fraudulent and did not waste or misapply corporate assets.

STANDARD OF REVIEW

[1,2] An action seeking corporate dissolution is an equitable action. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

ANALYSIS

[3,4] A trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). The issue presented by this case is whether a professional corporation can have goodwill as a distributable asset in a corporate dissolution proceeding.

> " 'Good-will is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.' "

Taylor v. Taylor, 222 Neb. 721, 727-28, 386 N.W.2d 851, 856-57 (1986), quoting *Haverly v. Elliott*, 39 Neb. 201, 57 N.W. 1010 (1894).

Contrary to the Court of Appeals' decision, we conclude that our opinion in *Taylor, supra*, should not be applied solely to marital dissolutions. In *Taylor*, the husband was a physician and the sole practitioner and shareholder of a professional corporation, his medical practice. The issue was whether professional goodwill should be included as an asset in the marital estate. This court stated:

> Virtually any income-producing entity, regardless of the nature of the business organization, may have . . . an intangible asset [of] goodwill. To the extent that such intangible asset's value results from recurrent customer patronage, there is no question that goodwill is property which may be considered as a part of the marital estate . . . .

Taylor, 222 Neb. at 728-29, 386 N.W.2d at 857. See, also, *Tarry v. Johnston*, 114 Neb. 496, 503, 208 N.W. 615, 619 (1926) ("good will of a professional business may be legally sold in connection with other property rights to which it is attached").

Recognizing in *Taylor, supra*, a split of authority on the question of whether professional goodwill can be a divisible asset in a marital dissolution proceeding, we stated that courts affirmatively answering the question had adopted a capitalization of excess earnings method of valuation. We further stated that although this method represents the earning capacity of a professional practice, it "does not necessarily represent an asset which may be sold, transferred, or assigned." *Taylor*, 222 Neb. at 729, 386 N.W.2d at 858. We stated that professional practices raise special concerns "because goodwill is likely to depend on the professional reputation and continuing presence of a particular individual in that practice," *id.*, but concluded that whether a professional business has goodwill with a value distinct from the practitioner's presence is a question of fact:

> Consequently, where goodwill is a marketable business asset distinct from the personal reputation of a particular individual, as is usually the case with many commercial enterprises, that goodwill has an immediately discernible value as an asset of the business and may be identified as an amount reflected in a sale or transfer of such business. On the other hand, if goodwill depends on the continued presence of a particular individual, such goodwill, by definition, is not a marketable asset distinct from the individual. Any value which attaches to the entity solely as a result of personal goodwill represents nothing more than probable future earning capacity . . . .
>
> Accordingly, to be [considered] as property divisible and distributable in a dissolution proceeding, we conclude that goodwill must be a business asset with value independent

> of the presence or reputation of a particular individual, an asset which may be sold, transferred, conveyed, or pledged. In so characterizing goodwill as marital property . . . *we neither state nor imply that goodwill, as a salable or marketable business asset, may never exist in a professional practice*. . . . If a party produces appropriate evidence establishing salability or marketability of goodwill as a business asset of a professional practice, professional goodwill may be considered in determining value of property in a marital estate to be divided in a dissolution proceeding. *Also, we do not reject in all cases capitalization of excess earnings as a method to determine earning capacity.*
>
> . . . [P]rofessional qualities of a practitioner are often critical to the existence and continuation of professional goodwill. Professional goodwill may be personal in nature and, therefore, not a readily salable or marketable item. Under such circumstances goodwill has no existence independent of the professional generating that goodwill. . . . *Whether goodwill exists and whether goodwill has any value are questions of fact.*

(Emphasis supplied.) *Taylor v. Taylor*, 222 Neb. 721, 731-32, 386 N.W.2d 851, 858-59 (1986).

It would be incongruent for this court to hold that, with appropriate evidence, goodwill of a professional corporation can be a divisible property asset in a marital dissolution proceeding but not a distributable asset if the same professional actually dissolves his or her practice subsequent to the divorce. The cases from other jurisdictions relied upon by the Court of Appeals do not persuade us that our reasoning in *Taylor* should not be applied equally to business dissolutions.

In *Salinas v. Rafati*, 948 S.W.2d 286, 290 (Tex. 1997), the Texas Supreme Court held that the trial court improperly considered intangibles in the valuation of a dissolved partnership of radiologists "[t]o the extent that the valuation of the dissolved partnership was based on the goodwill attributable to the personal skills and talents of the former partners . . . ." However, the court pointedly stated:

> There is no contention nor is there any evidence that the name of the former partnership had goodwill separate and

> apart from the personal talents and abilities of each of the partners or that any partner had the right or the desire to form a new partnership using the name of the dissolved partnership.

Id.

In a later case, the Texas Court of Appeals specifically rejected a party's contention that a professional partnership does not have goodwill value as a matter of law. *Welder v. Green*, 985 S.W.2d 170 (Tex. App. 1998). In *Welder*, the court clarified that under Texas law, a professional partnership can have goodwill value, the same as a mercantile partnership, if the business has a "generally recognized name, that would lead patrons to do business with any person or firm using that name," 985 S.W.2d at 179, or goodwill that is attached to a "location, such as the corner store" that will be patronized despite the dissolution, *id.* at 178.

In *Smith, Keller & Assoc. v. Dorr & Assoc.*, 875 P.2d 1258, 1265 n.5 (Wyo. 1994), the Wyoming Supreme Court stated in a footnote that "[t]he accepted rule has recognized that professional partnerships do not have a goodwill asset [unless] the facts and circumstances show an exception to the general rule is intended by the parties." (Emphasis omitted.) This statement, however, is merely dicta, as the court was not required to decide that issue in order to resolve the case. See *id.* (determining that plaintiffs were entitled to accounting and that because earlier arbitration decision had not been appealed, arbitrators' determination that firm's assets included client goodwill was controlling). See, also, *Pribil v. Koinzan*, 266 Neb. 222, 232, 665 N.W.2d 567, 576 (2003) ("case is not authority for any point not necessary to be passed on to decide the case").

While the dicta in *Smith, Keller & Assoc., supra*, is indicative of how Wyoming's Supreme Court might rule on the issue of professional goodwill as a distributable asset in a dissolution proceeding, it is not consistent with this court's reasoning in *Taylor, supra*, or our prior decisions involving the dissolution or sale of professional entities. See, *Thomas v. Marvin E. Jewell & Co.*, 232 Neb. 261, 440 N.W.2d 437 (1989) (concluding that there was no goodwill to split upon dissolution of accounting firm *when evidence showed* that departing partners in accounting firm had taken files of clients they wished to retain and that despite being

contacted by both new partnerships, clients remained with firm that had their files); *Bailey v. McCoy*, 187 Neb. 618, 193 N.W.2d 270 (1971) (determining goodwill value of accounting and tax services firm in dissolution proceeding where provision in partnership agreement valued partnership based on annual income); *Tarry v. Johnston*, 114 Neb. 496, 208 N.W. 615 (1926).

Further, while there is a split of authority on this issue, see *Snowberger v. Young*, 536 P.2d 1069 (Ariz. App. 1975) (not reaching issue in appeal from arbitration award but citing cases showing split of authority), cases from other jurisdictions, including those from Texas, support our determination that whether goodwill is a distributable asset in a professional entity presents a question of fact. See, *Stefanski v. Gonnella*, 15 Mass. App. 500, 446 N.E.2d 734 (1983) (relating history of Massachusetts case law deciding issue as question of fact); *Durio v. Johnson*, 68 N.M. 82, 85, 358 P.2d 703, 705 (1961) (concluding in action by veterinarian partner to recover agreed-upon price for his interest from former partner that better rule was "good will also exists in professional practice, or in business founded upon personal skill and reputation and is salable"); *Spaulding v. Benenati*, 57 N.Y.2d 418, 442 N.E.2d 1244, 456 N.Y.S.2d 733 (1982) (holding that goodwill of dental practice could be sold by deceased dentist's wife who was sole beneficiary of his estate when sale of goodwill included something other than personal attributes of professional, such as right to practice at same location); *Berg v. Settle*, 70 Wash. 2d 864, 425 P.2d 635 (1967) (evidence supported trial court's finding of professional goodwill in accounting firm based on offer made to prospective partner which included purchase of goodwill).

[5] Under our de novo review, we conclude that both the district court and Court of Appeals determined, as a matter of law, that a professional practice could not have goodwill value as a distributable asset upon dissolution. That determination is contrary to this court's conclusion in *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986), that the existence of professional goodwill as a distributable asset presents a question of fact. Accordingly, the Court of Appeals' opinion affirming the district court's determination that goodwill cannot be a distributable asset in the dissolution of a professional entity is reversed, and the cause remanded. See *Schuman v. Schuman*, 265 Neb. 459,

658 N.W.2d 30 (2003). Upon remand, the district court is to determine in the first instance whether, given the record made at trial, Detter has produced appropriate evidence establishing salability or marketability of goodwill as a business asset and, if so, to determine that value.

ATTORNEY FEES

In his second assignment of error, Detter argues that the Court of Appeals erred in concluding Schreiber's conduct was not illegal, oppressive, or fraudulent and that the corporation's assets were not being misapplied or wasted.

When a corporation makes an election to purchase a petitioning shareholder's shares, § 21-20,166(5)(b) allows the court to award the petitioning shareholder reasonable attorney fees and expenses if the shareholder had probable grounds for obtaining relief under either § 21-20,162(2)(a)(ii) or (iv). Those subsections delineate two of the four situations in which a shareholder may seek corporate dissolution. Under subsection (2)(a)(ii), a shareholder may seek dissolution because the directors or those in control have acted in a manner that is illegal, oppressive, or fraudulent. Under subsection (2)(a)(iv), a shareholder may seek dissolution when corporate assets are being misapplied or wasted.

Upon our de novo review of the record, we agree with the Court of Appeals that the district court did not err in determining that Detter failed to show Schreiber's actions rose to the level of being illegal, oppressive, or fraudulent or that Schreiber misapplied corporate funds.

CONCLUSION

We affirm the Court of Appeals' determination that Detter has failed to show probable grounds entitling him to reasonable expenses and attorney fees. We conclude, however, that the district court and Court of Appeals erred in determining, as a matter of law, that the value of a closely held, professional corporation could not include goodwill.

The judgment of the Court of Appeals is reversed in part, and the cause remanded with directions to the Court of Appeals to reverse the district court's judgment determining the value of

MHAH without consideration of Detter's evidence regarding MHAH's goodwill, and to remand the matter for further proceedings consistent with this opinion.

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

SPEAR T RANCH, INC., APPELLANT, V.
MELVIN G. KNAUB ET AL., APPELLEES.

691 N.W.2d 116

Filed January 21, 2005. No. S-03-789.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief.
3. **Pleadings.** A complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery.
4. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.
5. **Waters: Words and Phrases.** Ground water is defined as that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land.
6. **Waters: Statutes.** Statutory surface water appropriation rules do not apply to conflicts between surface and ground water users.
7. **Torts: Conversion: Property: Words and Phrases.** Tortious conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights.
8. **Waters: Property.** A right to appropriate surface water is not an ownership of property.
9. **Waters: Property: Conversion: Trespass.** Because a surface water user does not have a property interest in its surface water appropriation and only has a right to use, it cannot state a claim for conversion or trespass.
10. **Waters.** Under the English rule of water law—also referred to as the absolute ownership rule—a landowner had absolute ownership of the waters under his or her land and could withdraw any quantity of water for any purpose without liability, even though the result was to drain water from beneath surrounding lands.
11. ____. Under what is termed the "American rule" of water law, the owner of the land is entitled to appropriate subterranean or other waters accumulating on the land, but cannot extract and appropriate them in excess of a reasonable and beneficial use of land, especially if the exercise of such use is injurious to others.

12. **Waters: Words and Phrases.** Under the American rule of water law, the term "reasonable use" relates to the manner in which water is used upon the appropriator's land. The adjacent landowners' interests are in issue only when the appropriator uses water in excess of the reasonable and beneficial use of it upon his or her land and that excess use is injurious to the adjacent landowner.
13. **Waters.** The correlative rights rule of water law provides that the rights of all landowners over a common aquifer are coequal or correlative and that one cannot extract more than his or her share of the water even for use on his or her own land if other's rights are injured by the withdrawal.
14. ____. The Restatement (Second) of Torts §§ 858 and 850A (1979) are adopted to govern conflicts between users of hydrologically connected surface water and ground water.
15. **Waters: Liability.** A proprietor of land or his or her grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water of another, unless the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.
16. **Waters: Courts.** Whether a ground water user has unreasonably caused harm to a surface water user is decided on a case-by-case basis. In making a reasonableness determination, Restatement (Second) of Torts § 850A (1979) provides a valuable guide, but the test is flexible, and a trial court should consider any factors it deems relevant.
17. **Pleadings.** Leave to amend should be granted liberally when justice so requires.
18. **Legislature.** The Legislature is free to create and abolish rights as long as no vested right is disturbed.
19. **Statutes.** Statutes which change or take away a common-law right must be strictly construed.
20. ____. Any statutory construction restricting or abolishing common-law rights should not be adopted, unless the plain words of the statute compel such result.
21. **Waters: Statutes.** The Nebraska Ground Water Management and Protection Act does not show either an express or implied abrogation of the common law.
22. **Administrative Law: Jurisdiction: Claims.** The primary jurisdiction doctrine applies whenever enforcement of a claim, originally cognizable in the courts, requires the resolution of issues that have been placed within the special competence of an administrative body in accordance with the purposes of a regulatory scheme.
23. **Administrative Law: Jurisdiction.** Under the primary jurisdiction doctrine, whether the purposes of an administrative act require that the administrative agency should first pass on a question depends on whether the question raises policy issues that should be considered by the administrative agency in the interests of uniformity and administrative expertise.
24. ____: ____. Application of the primary jurisdiction doctrine does not excuse the court from deciding the issue. Instead, it delays the process pending referral of the issues to the administrative body for its views.
25. ____: ____. Under the primary jurisdiction doctrine, the controverted question and the inquiry necessary for its solution are the determining factors.
26. ____: ____. The primary jurisdiction doctrine does not apply when a pure question of law is at issue.

27. **Administrative Law: Jurisdiction: Damages: Nuisances: Torts.** Exercise of the primary jurisdiction doctrine is inappropriate in actions seeking damages for nuisance or other common-law tort actions.
28. **Parties: Jurisdiction: Waiver.** The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which could be affected by the judgment.
29. **Parties: Words and Phrases.** An indispensable or necessary party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest.
30. **Parties: Pleadings: Tort-feasors: Damages.** A plaintiff need not join all tort-feasors as defendants in an action for damages.
31. **Parties: Tort-feasors: Damages: Liability.** Every joint tort-feasor is liable for all damages to which his or her conduct has contributed, and it is no defense that these damages would not have occurred without the concurring misconduct of another person.

Appeal from the District Court for Morrill County: PAUL D. EMPSON, Judge. Reversed and remanded for further proceedings.

Thomas D. Oliver for appellant.

Harriet M. Hageman and Kara Brighton, of Hageman & Brighton, for appellees George A. Davis and Loretta L. Davis.

John F. Simmons, of Simmons & Olsen Law Firm, P.C., for appellees John Gifford and Roger Gifford.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellees Max Olsen, Olsen Ranches, Inc., Melvin G. Knaub, Melvin G. Knaub Farms, Inc., Knaub, Inc., Melvin G. Knaub Grand Kids L.P., and Special K, Inc.

Daniel M. Placzek, of Leininger, Smith, Johnson, Baack, Placzek, Steele & Allen, for appellee Olsen Ranches, Inc.

John H. Skavdahl, of Skavdahl & Edmund Law Office, for appellee Gifford Circle Diamond Ranch, Inc.

Daniel L. Lindstrom, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee XL Farms, L.L.C.

Philip M. Kelly, of Douglas, Kelly, Ostdiek, Bartels & Neilan, P.C., for appellees Richard Van Pelt and Margaret Van Pelt.

Paul E. Hofmeister, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, P.C., L.L.O., for appellees Hoehn Farms, Mark Hoehn, Krista Hoehn, and Allison Hoehn.

James M. Mathis and Leland K. Kovarik, of Kovarik, Ellison, Mathis & Weimer, P.C., for appellees Leeray Edens and Beverly Edens.

Albert M. Engles and Jason R. Yungtum, of Engles, Ketcham, Olson & Keith, P.C., for appellee Donahue & Rutledge, Inc.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellee Darnall Ranch, Inc.

Jon Bruning, Attorney General, David D. Cookson, and Justin D. Lavene for amicus curiae State of Nebraska.

Dana W. Roper, Lincoln City Attorney, and Steven Huggenberger for amicus curiae City of Lincoln.

Steven C. Smith, of Pahlke, Smith, Snyder, Petitt & Eubanks, G.P., for amici curiae Pathfinder Irrigation District et al.

Donald G. Blankenau, of Fennemore & Craig, P.C., for amicus curiae Nebraska Groundwater Management Coalition.

Donald G. Blankenau, of Fennemore & Craig, P.C., for amicus curiae Nebraska Farm Bureau Federation.

Michael C. Klein, of Anderson, Klein, Swan & Brewster, for amicus curiae Central Nebraska Public Power and Irrigation District.

Robert J. McCormick for amicus curiae Reban Corporation.

LeRoy W. Sievers, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for amicus curiae Nebraska State Irrigation Association.

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

CONNOLLY, J.

This appeal presents the question whether a surface water appropriator has a claim against a ground water user for interference with a surface water users' appropriation.

Spear T Ranch, Inc. (Spear T), a surface water appropriator, appeals a district court order dismissing with prejudice its complaint seeking an injunction and damages for the loss of surface water from Pumpkin Creek. The appellees are ground water irrigators in the Pumpkin Creek basin.

On appeal, Spear T argues that it has stated a claim for conversion, injunction, or trespass. The appellees, however, argue that any common-law claims are abrogated by the Nebraska Ground Water Management and Protection Act (GWMPA), Neb. Rev. Stat. §§ 46-656.01 through 46-656.67 (Reissue 1998 & Cum. Supp. 2002) (now found at Neb. Rev. Stat. §§ 46-701 through 46-753 (Reissue 2004)). In the alternative, they argue that the issues should be determined by the North Platte Natural Resources District under the doctrine of primary jurisdiction.

I. BACKGROUND

Spear T filed a complaint alleging that it has surface water appropriations on Pumpkin Creek, which runs through Banner and Morrill Counties. The appellees own real property in the Pumpkin Creek basin and have irrigation wells within the boundaries of the basin. The complaint alleged that the ground water irrigation wells are hydrologically connected to Pumpkin Creek. According to Spear T, the appellees' pumping of ground water over the 4 years preceding the complaint drained water from Pumpkin Creek and deprived Spear T of its surface water appropriations; the complaint alleged that the appellees have continued to pump ground water and that Spear T has been unable to irrigate crops and provide water for livestock. Spear T alleged that the appellees converted its surface water rights to their own use without compensating Spear T and that it would be irreparably harmed if the appellees continued to use their ground water irrigation wells. The complaint sought compensation for the value of the surface water appropriations taken by the appellees or, in the alternative, special damages for the value of the water rights and other damages; it also sought an injunction.

The appellees moved under Neb. Ct. R. of Pldg. in Civ. Actions 12(b) (rev. 2003) to dismiss, alleging that (1) the court lacked subject-matter jurisdiction, (2) the complaint failed to state a claim upon which relief could be granted, and (3) the complaint failed to join necessary parties. Without giving its reasoning, the court dismissed the complaint with prejudice on all three grounds. Spear T appealed.

We initially heard oral arguments in March 2004. After arguments, the appellees moved for additional briefing and reargument to address the primary jurisdiction issue. Also after arguments, 2004 Neb. Laws, L.B. 962, was passed, which changed provisions of the GWMPA. We granted the motion and ordered additional briefing and argument on the following issues: (1) primary jurisdiction; (2) primary jurisdiction because of L.B. 962; (3) the effect of L.B. 962, if any, on the appeal; and (4) whether the GWMPA or L.B. 962 has abrogated any common-law remedies that Spear T might have.

II. ASSIGNMENTS OF ERROR

Spear T assigns that the district court erred when it dismissed its complaint for lack of subject-matter jurisdiction, failure to state a claim, and failure to join necessary parties.

III. STANDARD OF REVIEW

This action involves a rule 12 motion to dismiss for failure to state a claim and a rule 12 motion to dismiss for failure to join indispensable parties. In 2003, the Nebraska rules of pleading were changed to reflect the federal rules. Thus, we apply the new rules for notice pleading. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004).

[1,2] A district court's grant of a motion to dismiss is reviewed de novo. *Weeder v. Central Comm. College, ante* p. 114, 691 N.W.2d 508 (2005). Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief. *Kellogg v. Nebraska Dept. of Corr. Servs., ante* p. 40, 690 N.W.2d 574 (2005).

[3,4] The federal courts have made it clear that a complaint should not be dismissed merely because it does not state with

precision all elements that give rise to a legal basis for recovery. *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir. 1999). As a practical matter, dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. See *id.*

IV. ANALYSIS

[5] The term "surface water" encompasses all waters found on the earth's surface. Richard S. Harnsberger & Norman W. Thorson, Nebraska Water Law & Administration § 1.04 at 9-10 (Butterworth Legal Publishers 1984). Here, the surface water is the stream on which Spear T has water appropriations. In contrast, ground water is defined as " 'that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land.' " *Id.* at 12. Accord Neb. Rev. Stat. § 46-635 (Reissue 2004).

Hydrologically, ground water and surface water are inextricably related. Ground water pumping can cause diminished streamflows. Streamflow can support the potential for subirrigation. Seepage from surface water supplies canals, and deep percolation of applied irrigation water from surface projects can recharge ground water aquifers. Harnsberger & Thorson, *supra*, § 5.30. Water law commentators have colorfully described this phenomenon: "[A]ll water is interrelated and interdependent. If groundwater were red, most streams would be various shades of pink; if groundwater were poisoned, the streams would also be poisoned." Richard S. Harnsberger et al., *Groundwater: From Windmills to Comprehensive Public Management*, 52 Neb. L. Rev. 179, 183 (1973).

But Nebraska water law ignores the hydrological fact that ground water and surface water are inextricably linked. Instead of an integrated system, we have two separate systems, one allocating streamflows and the other allocating ground water. Under constitutional and statutory provisions, streamflows are allocated by priority in time. See Neb. Const. art. XV, § 6. Ground water, in contrast, is governed by a common-law rule of reasonableness and the GWMPA. Moreover, the lack of an integrated system is reinforced by the fact that different agencies regulate

ground water and surface water. The Department of Natural Resources regulates surface water appropriations. See Neb. Rev. Stat. § 61-201 et seq. (Reissue 2003 & Cum. Supp. 2004). In contrast, under the GWMPA, ground water is statutorily regulated by each Natural Resources District (NRD).

The tension between the two systems has long been recognized by commentators. See Harnsberger et al., *supra* at 182 ("[g]round and stream diverters in Nebraska are on a collision course which may occur sooner than most people think"). That day has arrived.

1. Does Spear T Have Common-Law Claim Against Appellees?

We begin by determining whether Spear T has stated a claim. Spear T argues that it has stated a claim based either on the statutory rule of prior appropriation of surface water or on the tort of conversion; we reject these arguments. But as we explain below, we determine that the common law does recognize a tort claim by a surface water appropriator against a ground water user and that Spear T's complaint could be amended to state a claim.

(a) Prior Appropriation

As noted, under constitutional and statutory provisions, streamflows are allocated by priority in time. In its first attempt to state a claim, Spear T relies on prior appropriation. Spear T argues that because the water is hydrologically connected and because it has a prior surface water appropriation, it has priority to the water. According to Spear T, the water is all one "stream" and, as such, Spear T's prior appropriation takes priority over other users of the water, including those who withdraw the water from under its lands. Thus, Spear T essentially asks this court to apply legislatively created surface water priorities to ground water use without considering existing common-law rules. We decline to adopt this approach for several reasons.

First, an application of surface water priorities to ground water requires this court to agree with a legal fiction that considers the ground water to be an "underground stream." We take as true that the water is hydrologically connected, but water rarely runs in a true underground stream. See Richard S. Harnsberger & Norman W. Thorson, Nebraska Water Law & Administration § 1.07 at

13-14 (Butterworth Legal Publishers 1984). Adherence to such a view ignores reality.

Second, no statutory or case law authority supports applying surface water appropriations to ground water. We recognize that most legislatures in western states have developed comprehensive appropriation systems overseen by administrative agencies. See Restatement (Second) of Torts, ch. 41, topic 4 (1979). But in Nebraska, the Legislature has not developed an appropriation system that addresses direct conflicts between users of surface and ground water that is hydrologically connected.

[6] Finally, the prior appropriation rule that Spear T advocates would give first-in-time surface water appropriators the right to use whatever water they want to the exclusion of later-in-time ground water users. This could have the effect of shutting down all wells in any area where surface water appropriations are hydrologically connected to ground water. Richard S. Harnsberger et al., *Groundwater: From Windmills to Comprehensive Public Management*, 52 Neb. L. Rev. 179, 248 (1973) ("[i]f the doctrine of prior appropriation [was] carried to [its] logical conclusion, all Nebraska wells would be shut down"). This would unreasonably deprive many ground water users. Accordingly, we decline to apply the statutory surface water appropriation rules to conflicts between surface and ground water users.

(b) Conversion

[7] Next, Spear T contends that it has stated a claim for conversion. Tortious conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights. *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 618 N.W.2d 145 (2000).

[8,9] A right to appropriate surface water however, is not an ownership of property. Instead, the water is viewed as a public want and the appropriation is a right to use the water. As one article has stated in reference to ground water: "Trespass is unavailable in a typical well interference case because a physical invasion of the plaintiff's property is lacking. Similarly, an action in conversion is unavailable, since the plaintiff has no private property interest in groundwater, at least not prior to capture." Harnsberger

& Thorson, *supra*, § 5.27 at 266-67, citing *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), *reversed on other grounds* 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982). Because Spear T does not have a property interest in its surface water appropriation and only has a right to use, it cannot state a claim for conversion or trespass.

(c) Has Spear T Stated Claim Under Other Common-Law Doctrines or, Alternatively, Should It Be Given Leave to Amend?

Although Spear T cannot state a claim under the statutory surface water appropriation rules or for the tort of conversion, this does not end our analysis. The question remains whether it has stated a claim under other common-law principles or if it should be allowed leave to amend to state such a claim.

(i) Review of Common-Law Rules

We begin by reviewing common-law rules that courts have employed to adjudicate disputes between water users.

a. English Rule

[10] Under the English rule of water law—also referred to as the absolute ownership rule—a landowner had absolute ownership of the waters under his or her land. Therefore, the owner could withdraw any quantity of water for any purpose without liability, even though the result was to drain water from beneath surrounding lands. *Prather v. Eisenmann*, 200 Neb. 1, 261 N.W.2d 766 (1978). See, also, *Cline v. American Aggregates*, 15 Ohio St. 3d 384, 474 N.E.2d 324 (1984).

The English rule was predicated on protection for the property rights of landowners whose activities resulted in ground water diversion. See, *Cline v. American Aggregates, supra*; Restatement (Second) of Torts § 858 (1979) (describing English rule). The basis for the rule has also been described as a "feeling that the ways of underground water were too mysterious and unpredictable to allow the establishment of adequate and fair rules for regulation of competing rights to such water." *State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 290-91, 217 N.W.2d 339, 344 (1974). Thus, the English courts adopted the position

that everyone was permitted to take and use all the ground water of which they could get possession. *Id.*

Most American courts, however, have criticized the English rule, recognizing that the rule protected landowners from liability even when water was diverted for malicious purposes. *Maerz v U S Steel Corp*, 116 Mich. App. 710, 323 N.W.2d 524 (1982), citing *Huber v. Merkel*, 117 Wis. 355, 94 N.W. 354 (1903). The rule has also been criticized because, although a landowner theoretically had a property right in waters beneath his or her land, the overlying owner with the deepest well or largest pump could control water that would otherwise be available to all. *Maerz v U S Steel Corp, supra*. See, also, *Cline v. American Aggregates, supra*; *Meeker v. East Orange*, 77 N.J.L. 623, 74 A. 379 (1909).

An extreme minority of jurisdictions still adheres to the English rule or a rule that has the same effect as the English rule. See, *Maddocks v. Giles*, 728 A.2d 150 (Me. 1999); *Sipriano v. Great Spring Waters of America*, 1 S.W.3d 75 (Tex. 1999). These jurisdictions refuse to apply to ground water the rules applicable to surface water and treat ground water as an entirely separate and unconnected resource that may be used at will by the owner of the overlying land. In each case, the court recognized problems with the reasoning behind the English rule, but in *Maddocks*, the court deferred to the legislature, which was already taking some action. Likewise, in *Sipriano*, a constitutional amendment placed the regulation of water in the legislature's hands.

b. American Rule

[11] Because of disagreement with the English rule, American courts have modified it in different ways. Under what is termed the "American rule" of water law, the owner of the land is entitled to appropriate subterranean or other waters accumulating on the land, but cannot extract and appropriate them in excess of a reasonable and beneficial use of land, especially if the exercise of such use is injurious to others. *Prather v. Eisenmann, supra*.

[12] Under the American rule, the term "reasonable use" relates to the manner in which water is used upon the appropriator's land. The adjacent landowners' interests are in issue only when the appropriator uses water in excess of the reasonable and beneficial use of it upon his or her land and that excess use is

injurious to the adjacent landowner. *Prather v. Eisenmann*, 200 Neb. 1, 261 N.W.2d 766 (1978). The American rule has at times also been referred to as a rule of "reasonable use," although it does not consider a balancing of the parties' interests. Thus, one court has stated:

> This [reasonable use] designation is unfortunate and in no small measure responsible for the confusion concerning the rule. If applied to this rule, the words *reasonable use* cannot be given their inherent broad meaning of a use reasonable under all the circumstances. Instead, the words must be given the contrived meaning of a use reasonably related to enjoyment of the land from which the waters are taken.

Maerz v U S Steel Corp, 116 Mich. App. at 715 n.2, 323 N.W.2d at 527 n.2.

Under the American rule, a person who is deprived of surface water because of the use of ground water by a nearby landowner will recover only when the water was not used for a beneficial purpose on the ground water user's land.

c. Correlative Rights

[13] The correlative rights rule of water law originated in California and provides that the rights of all landowners over a common aquifer are coequal or correlative and that one cannot extract more than his or her share of the water even for use on his or her own land if other's rights are injured by the withdrawal. *Prather v. Eisenmann, supra*. The rule first arose in *Katz v. Walkinshaw*, 141 Cal. 116, 70 P. 663 (1902). Under the rule, the overlying landowners have no proprietary interest in the water under their ground and each owner over a common pool has a correlative right to make a beneficial use of the water on his or her land. Priority of use is irrelevant because in times of shortage, the common supply is apportioned among the landowners based on their reasonable needs. Richard S. Harnsberger et al., *Groundwater: From Windmills to Comprehensive Public Management*, 52 Neb. L. Rev. 179 (1973) (describing correlative rights rule).

The principal difficulty with the correlative rights rule is how to allocate the water, and courts have approached the question in different ways. See *id*. For example, some courts interpret the

correlative rights rule as essentially the same as the Restatement view described below. See *Maddocks v. Giles*, 728 A.2d 150 (Me. 1999). Others view the rule as providing apportionment in times only when there is an insufficient supply for all users. See *State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 217 N.W.2d 339 (1974).

Some courts, however, have adopted a reasonable use rule that combines the American rule and correlative rights rule. Under such rules, reasonableness is determined by both the use of the water and the rights of other landowners. Such cases still refer to correlative rights, but differ from the California doctrine. See *id.*

d. Restatement

The Restatement (Second) of Torts § 858 (1979) essentially adopts a correlative rights rule that allows for a balancing of many factors to determine reasonableness. Although the rule is initially stated in terms of "reasonable use" similar to the American rule, it adds exceptions that draw on principles of correlative rights. The Restatement rule finds its support in principles of nuisance law and has been suggested as the basic framework for well interference cases. See Richard S. Harnsberger & Norman W. Thorson, Nebraska Water Law & Administration § 5.27 (Butterworth Legal Publishers 1984).

The Restatement, § 858 at 258, states in part as follows:

> (1) A proprietor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless
>
> (a) the withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure,
>
> (b) the withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground water, or
>
> (c) the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.

Although § 858 is under chapter 41, topic 4, entitled "Interference With the Use of Water," *id.* at 253, a note on that

topic's scope shows that it is intended to apply to water that is hydrologically connected to ground water. The note states in part: "This Topic covers the rights and liabilities of possessors of land and others withdrawing ground water. It also states the rules governing the rights and liabilities of persons using water where ground water is interconnected with the water of watercourses and lakes." *Id*. Several courts have adopted the Restatement approach. *Cline v. American Aggregates*, 15 Ohio St. 3d 384, 474 N.E.2d 324 (1984); *State v. Michels Pipeline Construction, Inc., supra*; *Maerz v U S Steel Corp*, 116 Mich. App. 710, 323 N.W.2d 524 (1982).

In addition, the Restatement keeps older definitions of ground water and surface water, but abandons any common-law distinctions between underground watercourses and percolating water. Ground water is defined as "water that naturally lies or flows under the surface of the earth." Restatement, *supra*, § 845 at 198. See, also, *Maddocks v. Giles*, 728 A.2d 150 (Me. 1999). Comment *b*. of the Restatement, *supra*, recognizes that ground water may be connected to other forms of water. The comment states: "Most ground water is moving in the hydrologic cycle. It originates from infiltration of precipitation and inflow of streams; it discharges into springs, streams, lakes and oceans. Some ground water is sidetracked from the cycle in closed basins where geologic formations isolate it from recharge or discharge." *Id*. at 199.

Although the Restatement rule is derived from principles of reasonable use, the rule differs from the American rule because it balances the equities and hardships between competing users. *Maddocks v. Giles, supra*. The Restatement (Second) of Torts § 858, comment *b*. at 259 (1979), notes in part:

> The general rule is phrased in terms of nonliability in order to carry forward the policy of encouraging ground water use by permitting more or less unrestricted development of the resource by those who have access to it. The policy and the rule are justified by the fact that since most ground water basins are very large and contain vast quantities of water, it is usually impossible for a single water user to capture the entire supply and leave no water for others.

Comment *c*. at 259-60 provides:

Exceptions to the general rule are stated in Clauses (a), (b), and (c) of Subsection (1). They incorporate all grounds of liability for use of ground water recognized by the common law but remove some of the restrictions contained in those rules of liability. The majority "American rule of reasonable use" . . . was phrased in terms of the overlying landowner's right to capture ground water, limited by restrictions on the place of use of the water. In operation this protected small wells for domestic and agricultural uses from the harmful effects of large wells for municipal and industrial supply. The first exception to nonliability, contained in Clause (1)(a), continues this protection but follows a modern tendency to extend similar protection to cases of harm done by unreasonably large withdrawals for operations conducted on overlying lands.

The second exception, Clause (1)(b), imposes liability upon a landowner who withdraws more than his reasonable share of the common supply. This has always been a possible outcome of a controversy concerning ground water if the source could be classified as an underground stream or if the rule of correlative rights were applied. The concept of underground streams was unscientific and its application could be quite arbitrary and the applicability of the rule of correlative rights was in doubt in many states. This exception merges the two rules and makes it possible to apportion shares of the water in the source to the owners of overlying land whenever total withdrawals reach such magnitude that it is necessary to protect the share of an individual landowner from appropriation by others.

The last exception, Clause (1)(c), restates the conditions for recognizing that ground water and surface water are often closely interrelated and should be treated as a single source. In the past this took many forms. Withdrawals of ground water have been called unreasonable when they reduced the flow of springs. A variant of the underground stream concept has enabled the courts to regulate some ground water as the underground segment of a surface stream. The part of an aquifer in contact with the bed and banks of a stream has been called the underflow of the stream and treated as part of

> it. This Section substitutes a pragmatic test for determining the interconnection instead of employing these doubtful and unscientific categorizations.

Thus, under the Restatement, reasonableness of use is determined on a case-by-case basis and many factors can be considered; the test is flexible. The test for reasonableness is provided in the Restatement:

> The determination of the reasonableness of a use of water depends upon a consideration of the interests of the riparian proprietor making the use, of any riparian proprietor harmed by it and of society as a whole. Factors that affect the determination include the following:
>
> (a) The purpose of the use,
>
> (b) the suitability of the use to the watercourse or lake,
>
> (c) the economic value of the use,
>
> (d) the social value of the use,
>
> (e) the extent and amount of harm it causes,
>
> (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other,
>
> (g) the practicality of adjusting the quantity of water used by each proprietor,
>
> (h) the protection of existing values of water uses, land, investments and enterprises, and
>
> (i) the justice of requiring the user causing harm to bear the loss.

Restatement (Second) of Torts § 850A at 220 (1979).

e. Common-Law Claims in Disputes Between Ground Water Users in Nebraska

We have never been confronted with whether a surface water appropriator may bring a common-law claim against the user of hydrologically connected ground water. We have, however, recognized that a ground water user may bring a common-law claim against another ground water user. We generally have stated the common law in a manner consistent with the American rule blended with a rule of correlative rights. For example, we have stated:

> [T]he owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon

> the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is in our opinion, supported by the better reasoning.

Olson v. City of Wahoo, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933). See, also, *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966); *Luchsinger v. Loup River Public Power District*, 140 Neb. 179, 299 N.W. 549 (1941); *Osterman v. Central Nebraska Public Power and Irrigation District*, 131 Neb. 356, 268 N.W. 334 (1936), *overruled on other grounds, Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966). We have also discussed, but never applied, the Restatement, *supra*. *Prather v. Eisenmann*, 200 Neb. 1, 261 N.W.2d 766 (1978).

(ii) Adoption of Restatement for Disputes Between Surface Water Users and Ground Water Users

Having reviewed the common-law rules, we now consider whether we will recognize a common-law claim for interference with surface water by the user of hydrologically connected ground water.

Initially, we reject a rule that would bar a surface water appropriator from recovering in all situations. Such a rule would ignore the hydrological fact that a ground water user's actions may have significant, negative consequences for surface water appropriators.

Instead, the common law should acknowledge and attempt to balance the competing equities of ground water users and surface water appropriators; the Restatement approach best accomplishes this. The Restatement recognizes that ground water and surface water are interconnected and that in determining the rights and liabilities of competing users, the fact finder needs broad discretion. Thus, when applying the Restatement, the fact finder has flexibility to consider many factors such as those listed in § 850A, along with other factors that could affect a determination of reasonable use.

Adoption of the Restatement is the modern trend. See, *Cline v. American Aggregates*, 15 Ohio St. 3d 384, 474 N.E.2d 324

(1984); *State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 217 N.W.2d 339 (1974); *Maerz v U S Steel Corp*, 116 Mich. App. 710, 323 N.W.2d 524 (1982). Further, commentators have recommended the adoption of the Restatement to both this court and the Legislature. See Richard S. Harnsberger et al., *Groundwater: From Windmills to Comprehensive Public Management*, 52 Neb. L. Rev. 179 (1973).

[14-16] Accordingly, we adopt the Restatement to govern conflicts between users of hydrologically connected surface water and ground water. Specifically, we hold:

> A proprietor of land or his [or her] grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water of another, unless . . . the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.

Restatement (Second) of Torts § 858(1)(c) at 258 (1979). Whether a ground water user has unreasonably caused harm to a surface water user is decided on a case-by-case basis. In making the reasonableness determination, the Restatement, *supra*, § 850A, provides a valuable guide, but we emphasize that the test is flexible and that a trial court should consider any factors it deems relevant.

We digress momentarily to offer a word of caution. Although the issue of available remedies is not yet before us, courts should be cautious when considering remedies for interference with surface water. For example, because the recharge of a stream that has dried up because of well pumping could take years, an injunction against pumping might only serve to deprive everyone in a water basin. Such a remedy would be unreasonable and inequitable. Likewise, a court can consider a surface water appropriator's ability to obtain an exception to stays on drilling new wells, or any additional programs that might provide relief.

(iii) Has Spear T Stated Claim Under Restatement?

Having adopted the Restatement approach, we next consider whether Spear T has stated a claim upon which relief can be granted. Our review of Spear T's complaint shows that it did allege—although not precisely—that the appellees' withdrawal of

ground water has directly and substantially affected Pumpkin Creek. However, although Spear T alleged that it has suffered harm, it did not allege that the appellees have unreasonably caused that harm. Thus, Spear T has failed to state a claim upon which relief can be granted.

[17] We determine, however, that Spear T should be allowed to amend its complaint. Leave to amend should be granted liberally when justice so requires. *Frey v. City of Herculaneum*, 44 F.3d 667 (8th Cir. 1995). Accordingly, we determine that the district court erred when it dismissed Spear T's complaint with prejudice for failure to state a claim.

2. Abrogation

Having concluded that a common-law claim exists and that Spear T could amend its claim, we turn to the appellees' contention that by passing the GWMPA, the Legislature has abrogated the common-law claim. We have also asked the parties to brief whether 2004 Neb. Laws, L.B. 962, has abrogated any common-law claim.

(a) GWMPA

[18-20] The Legislature is free to create and abolish rights as long as no vested right is disturbed. *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982). But statutes which change or take away a common-law right must be strictly construed. Any statutory construction restricting or abolishing common-law rights should not be adopted, unless the plain words of the statute compel such result. *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984).

Nothing in the GWMPA expressly abrogates a common-law claim by a surface water user against a ground water user. Thus, any abrogation would have to be plainly compelled by the operation of the GWMPA.

We begin with the findings that the Legislature made in support of the GWMPA. The GWMPA initially states in part at § 46-656.02:

> The Legislature finds that ground water is one of the most valuable natural resources in the state and that an adequate supply of ground water is essential to the general welfare of

> the citizens of this state and to the present and future development of agriculture in the state. The Legislature recognizes its duty to define broad policy goals concerning the utilization and management of ground water and to ensure local implementation of those goals.
>
> *Every landowner shall be entitled to a reasonable and beneficial use of the ground water underlying his or her land subject to the provisions of Chapter 46, article 6, and the Nebraska Ground Water Management and Protection Act and the correlative rights of other landowners when the ground water supply is insufficient for all users.* The Legislature determines that the goal shall be to extend ground water reservoir life to the greatest extent practicable consistent with beneficial use of the ground water and best management practices.
>
> The Legislature further recognizes and declares that the management, protection, and conservation of ground water and the beneficial use thereof are essential to the economic prosperity and future well-being of the state and that the public interest demands procedures for the implementation of management practices to conserve and protect ground water supplies and to prevent the contamination or inefficient or improper use thereof. The Legislature recognizes the need to provide for orderly management systems in areas where management of ground water is necessary to achieve locally determined ground water management objectives and where available data, evidence, or other information indicates that present or potential ground water conditions, including subirrigation conditions, require the designation of areas with special regulation of development and use.

(Emphasis supplied.) The Legislature further provided at § 46-656.05:

> (1) The management, conservation, and beneficial use of hydrologically connected ground water and surface water are essential to the continued economic prosperity and well-being of the state, including the present and future development of agriculture in the state;
>
> (2) Hydrologically connected ground water and surface water may need to be managed differently from unconnected

> ground water and surface water in order to permit equity among water users and to optimize the beneficial use of interrelated ground water and surface water supplies;
>
> (3) Natural resources districts already have significant legal authority to regulate activities which contribute to declines in ground water levels and to nonpoint source contamination of ground water and are the preferred entities to regulate, through ground water management areas, ground water related activities which are contributing to or are, in the reasonably foreseeable future, likely to contribute to conflicts between ground water users and surface water appropriators or which may be necessary in order to resolve disputes over interstate compacts or decrees, or to carry out the provisions of other formal state contracts or agreements;
>
> (4) The Department of Natural Resources is responsible for regulation of water resources and local surface water project sponsors are responsible for much of the structured irrigation utilizing surface water supplies, and these entities should be responsible for regulation of surface water related activities which contribute to such conflicts or provide opportunities for such dispute resolution;
>
> . . . .
>
> (6) All involved natural resources districts, the department, and surface water project sponsors should cooperate and collaborate on the identification and implementation of management solutions to such conflicts or provide opportunities for mitigation or elimination of such disputes or difficulties.

These legislative findings do not indicate an intent to abrogate the common law. In fact, the language that we have italicized in § 46-656.02 indicates that, at least concerning disputes between multiple ground water users, the Legislature was aware of and meant to preserve the common law.

Further, if the Legislature wanted to preempt a common-law claim, then the GWMPA would contain adjudicative procedures and remedies designed to resolve individual disputes between water users. But that is not the case. Instead, a review of the GWMPA shows that it contains procedures meant to identify

areas where water issues exist and to create general regulations to address those issues.

To address issues involving the quantity and quality of ground water, the GWMPA requires the NRD's to prepare a ground water management plan. § 46-656.12. The plan's purpose is to set out each NRD's broad policy goals. In the plan, the NRD's are to set out their ground water supplies and needs. In addition, the NRD's are required to set out any proposals for conservation and or supply augmentation, as well as any proposed management areas. Once an NRD completes its management plan, the Department of Natural Resources (hereinafter Department) reviews it for approval. § 46-656.14. If the Department denies approval, then the NRD may either amend the plan or keep it the same. It must then submit the amended or original plan to the Department with explanations on how the changes, if any, have met the Department's concerns. § 46-656.15.

Once the Department has approved the management plan or the NRD has complied with § 46-656.15, the NRD may create a management area within the NRD, but it is not required to do so. The procedures for creating and modifying a management area are set out in §§ 46-656.19 through 46-656.21. After a public hearing on whether to create a management area, the NRD must determine whether to do so. If it decides to create the management area, then the GWMPA provides that it shall adopt a control from a list in § 46-656.25. This list, however, is not specifically tailored to adjudicate conflicts between ground water users and surface water appropriators. Instead, it contains a list of regulatory suggestions that can be used to meet an array of water issues.

In fact, the only provision of the GWMPA that might be construed as addressing individual conflicts between ground water users and surface water appropriators is § 46-656.28. But we do not read this as abrogating a common-law claim that a surface water user might have against a ground water user. Under § 46-656.28(1):

> If a district on its own motion or following a request by a *surface water appropriator*, surface water project sponsor, *ground water user*, the Department of Natural Resources, or another state agency has reason to believe that a management

> area should be designated for integrated management of hydrologically connected ground water and surface water or that controls in a management area should be adopted to include such integrated management, the district *may* utilize the procedures established in sections 46-656.19 to 46-656.21 or may request that the affected appropriators, the affected surface water project sponsors, and the Department of Natural Resources consult with the district and that studies and a hearing be held on the preparation of a joint action plan for the integrated management of hydrologically connected ground water and surface water.

Thus, under this section, surface water appropriators and ground water users can request that the NRD take action concerning disputes arising out of hydrologically connected ground water.

But § 46-656.28(1) is ambiguous as to what happens once a party requests that an NRD take action. The statute may be read in several ways. First, it could allow the NRD discretion to (1) use §§ 46-656.19 to 46-656.21 to either create a management area and adopt controls or modify controls in an existing management area, (2) begin the process for adopting a joint action plan under the remainder of § 46-656.28, or (3) do nothing. Alternatively, § 46-656.28(1) could be read to mean that if the NRD concludes there is a problem, then it must either (1) use §§ 46-656.19 to 46-656.21 to either create a management area and adopt controls or modify controls in an existing management area or (2) begin the process for adopting a joint action plan.

But regardless whether § 46-656.28 gives the NRD discretion or requires the implementation of a management area, the statute does not, as the appellees suggest, provide a surface water user with an administrative adjudication. Instead, it provides a method for the surface water user to commence administrative rulemaking. If, following a request by the surface water user, the NRD chooses to create a management plan, the goal is not to adjudicate a specific dispute with trial proceedings, but to develop controls to address the area's water problems by employing the traditional tools of rulemaking, i.e., studies and public meetings. The same is true if the NRD begins the process of creating a joint action plan, except that if the NRD chooses this route, the Department is also involved.

Moreover, regardless of which process is chosen, § 46-656.28 does not authorize the NRD or the Department to remedy any past harm done to a complaining party. The steps that the NRD and the Department can take are only prospective: This is consistent with rulemaking, not adjudication, and further demonstrates that § 46-656.28 does not abrogate the common law.

To the extent there is ambiguity regarding the GWMPA, the legislative history also shows that the Legislature did not intend for the GWMPA to abrogate a common-law claim. The GWMPA was significantly revised in 1996 to address the relationship between surface and ground water in response to concerns that the State of Kansas might file a lawsuit over issues arising from the Republican River Compact. A reading of the history as a whole shows that the concern was implementing a system that could reduce future conflicts. Nothing indicates an intent for the GWMPA to replace common-law tort actions or to provide a procedure to address disputes between individual parties. Instead, the intent was to allow the NRD greater flexibility to create plans in areas of conflict and create cooperation between the NRD's and the Department when necessary, but not to resolve specific existing conflicts. See, e.g., Floor Debate, 1996 Neb. Laws, L.B. 108, 94th Leg., 2d Sess. (Mar. 13, 1996). In the floor debate, it was recognized that "litigation . . . is out there, and the lawsuits are going to happen or not happen, separate and apart from the legislation . . . in 108." *Id.* at 12772. After a discussion recognizing that a person harmed by ground water use could sue, it was noted that the Legislature's goal was to mitigate litigation, but there was no discussion of abrogating claims. Instead, when asked about compensation for harm, the senator introducing the bill stated:

> [T]he question of compensation is something that is beyond this bill. The council approached it several times and was unable to address it. My position has been what we need to do now is to take care of the conjunctive use problem. If there are significant groups that are interested in talking about the whole question of compensation and who should be compensated when, that's certainly one I'd be willing to sit down and help organize and look at, but you have some very complicated questions there.

Id. at 12816.

[21] Thus, we determine that the GWMPA does not show either an express or implied abrogation of the common law. Although we believe the GWMPA is a step toward reducing future conflicts through general regulation and not an attempt to replace a common-law claim with a system of administrative adjudication, we do not intend to discourage the Legislature from acting in this area. Ideally, the Legislature would develop a comprehensive administrative appropriation system, including procedures and remedies, to adjudicate direct conflicts between ground water and surface water users in Nebraska. This would be consistent with how most legislatures in western states have addressed conflicts between water users. See Restatement (Second) of Torts, ch. 41, topic 4 (1979).

(b) L.B. 962

We asked the parties to also address 2004 Neb. Laws, L.B. 962, which allows further action by the NRD's and the Department to regulate ground water pumping and avoid overpumping in areas where depletion of surface water is a concern. Although we note that L.B. 962 takes further steps to help prevent conflicts, we do not address the application of L.B. 962 because the act does not operate retroactively and, thus, does not affect this appeal.

3. Primary Jurisdiction

Next, we consider the appellees' argument that the rule of primary jurisdiction requires this court to defer to the NRD before determining the issues presented in this appeal. The appellees' arguments on this issue are blurred. In their supplemental brief, the appellees contend that this court should defer deciding the issues presented and allow the NRD to decide them. The appellees, however, concede in their brief that the appeal involves questions of law that are not subject to the primary jurisdiction doctrine. Thus, the parties appear to agree that this court must decide what, if any, claim is available. But the appellees argue that issues of remedies for any given claim should be decided by the NRD, stating:

> Appellees' reliance upon the doctrine of primary jurisdiction relates more specifically to the second level of inquiry when evaluating the questions at hand. That level of inquiry relates to the nature of the remedies that are available to surface water users (or other ground water users) when the

> water supply in a particular basin . . . is inadequate for all of the demands. The primary jurisdiction doctrine requires that the resolution of the technical matters associated with the relative rights of surface water users and ground water users be made by the agencies that have the special competence, or administrative expertise, to make such decisions.

Consolidated supplemental brief for appellees at 23.

[22,23] The primary jurisdiction doctrine applies whenever enforcement of a claim, originally cognizable in the courts, requires the resolution of issues that have been placed within the special competence of an administrative body in accordance with the purposes of a regulatory scheme. *In re Interest of Battiato*, 259 Neb. 829, 613 N.W.2d 12 (2000). Whether the purposes of the administrative act require that the administrative agency should first pass on a question depends on whether the question raises policy issues that should be considered by the administrative agency in the interests of uniformity and administrative expertise. *Id.*

[24-26] Application of the primary jurisdiction doctrine does not excuse the court from deciding the issue. Instead, it delays the process pending referral of the issues to the administrative body for its views. See, e.g., *People v. Fremont Energy Corp.*, 651 P.2d 802 (Wyo. 1982). The controverted question and the inquiry necessary for its solution are the determining factors. *In re Interest of Battiato, supra*. But of most importance, the doctrine does not apply when a pure question of law is at issue. *Id.*

[27] Moreover, courts commonly hold that actions seeking damages for nuisance or other common-law tort actions for impairment of water rights are traditionally cognizable by the courts without reference to agency expertise or discretion. Accordingly, exercise of the primary jurisdiction doctrine is inappropriate in those cases. See, e.g., *Freels v. Northrup*, 678 S.W.2d 55 (Tenn. 1984); *G & A Contractors, Inc. v. Alaska Greenhouses, Inc.*, 517 P.2d 1379 (Alaska 1974).

Here, applying the primary jurisdiction doctrine is inappropriate for a number of reasons. First, as the appellees admit, the present appeal involves issues of law that are not subject to the primary jurisdiction doctrine. The primary issue in the action is

whether a common-law claim has been stated. Such a determination is appropriately made by the court.

Further, to the extent the appellees contend that the NRD should determine the remedy, the issue of appropriate remedy is not before this court. But, if it were, applying the primary jurisdiction doctrine would be inappropriate. The determination of facts and award of damages, an injunction, or other equitable remedy for a common-law tort or equity action is in the province of the judicial system. See *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003) (issue of available remedies is question of law). Moreover, as we discussed in the abrogation portion of our analysis, there is no statutory requirement that the NRD's provide a remedy to a surface water appropriator who has been denied water because of the use of ground water. In particular, there is no statutory authority for the NRD's to award damages. At most, the GWMPA appears to allow the NRD's the ability to take regulatory action to prevent future conflicts, and to issue cease and desist orders to enforce those regulations.

Moreover, policy considerations also make the application of the primary jurisdiction doctrine inappropriate. One of the principle considerations of the doctrine is to avoid inconsistent results. With 23 NRD's in Nebraska, all of which consist of elected officials, applying the primary jurisdiction doctrine would allow for the future possibility of up to 23 different rules and remedies in Nebraska for interference with surface water by a ground water user. See Nebraska Blue Book 2002-03 at 919-21. Instead of deferring jurisdiction to NRD's who might act inconsistently and apply differing rules, it is better to allow the courts, which are bound by legal precedent, to try the actions. Because of the questions of law involved and the lack of statutory authority to provide all forms of relief prayed for in the complaint, exercise of the primary jurisdiction doctrine is inappropriate.

4. Joinder of Parties

Spear T alleges that the district court erred when it dismissed for failure to join all necessary parties. The appellees argue that all well users in the Pumpkin Creek basin must be joined in the lawsuit.

[28,29] The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which could be affected by the judgment. *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997); *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). An indispensable or necessary party to a suit is one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents a court from making a final determination concerning the controversy without affecting such party's interest. See, Neb. Rev. Stat. § 25-323 (Cum. Supp. 2004); *Robertson v. School Dist. No. 17, supra*; *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

[30-31] A plaintiff, however, need not join all tort-feasors as defendants in an action for damages. Every joint tort-feasor is liable for all damages to which his or her conduct has contributed, and it is no defense that these damages would not have occurred without the concurring misconduct of another person. *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997).

We determine that all well users in the basin are not indispensable parties who would need to be joined to satisfy jurisdiction. Accordingly, the district court erred when it dismissed the complaint with prejudice for failure to join necessary parties.

V. CONCLUSION

We adopt Restatement (Second) of Torts §§ 858 and 850A (1979) for resolving disputes between users of hydrologically connected ground water and surface water. Because we adopt the Restatement, we determine that the district court erred when it dismissed the complaint with prejudice for failure to state a claim. Although Spear T did not precisely state a claim under the Restatement, it should be provided the opportunity to amend its complaint to state a claim. We further determine that the district court erred when it dismissed the complaint for lack of subject-matter jurisdiction and failure to join necessary parties. Accordingly, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. ROBERT M. PETTY, APPELLANT.

691 N.W.2d 101

Filed January 21, 2005. No. S-03-1046.

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.** When a defendant has commenced a period of delay due to his or her absence or unavailability, the period of time from the defendant's later availability to the next reasonably available trial date is excludable under Neb. Rev. Stat. § 29-1207(4)(d) (Reissue 1995).
4. **Speedy Trial: Evidence.** In determining whether time is excludable for speedy trial purposes under Neb. Rev. Stat. § 29-1207(4)(d) (Reissue 1995), a trial date that is scheduled within 6 months after the defendant's reappearance will be presumed to be the next reasonably available trial date without the State being required to present further evidence to justify the setting.

Petition for further review from the Nebraska Court of Appeals, INBODY, CARLSON, and MOORE, Judges, on appeal thereto from the District Court for Douglas County, GERALD E. MORAN, Judge, on appeal thereto from the County Court for Douglas County, LYN V. WHITE, Judge. Judgment of Court of Appeals affirmed as modified.

Thomas C. Riley, Douglas County Public Defender, and Richard A. Kubat for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Robert M. Petty was charged in Douglas County Court with driving under the influence (third offense), driving under suspension, and driving without lights. The county court denied Petty's motion to discharge on speedy trial grounds. The district court for Douglas County affirmed the denial, and Petty appealed to the

Nebraska Court of Appeals. The Court of Appeals affirmed. *State v. Petty*, No. A-03-1046, 2004 WL 1724900 (Neb. App. Aug. 3, 2004) (not designated for permanent publication). We granted the State's petition for further review. Although we disagree with the reasoning of the Court of Appeals with respect to time excludable due to Petty's failures to appear, we conclude that the Court of Appeals did not err in affirming the denial of Petty's motion to discharge. Accordingly, we affirm as modified.

STATEMENT OF FACTS

The State filed complaints in Douglas County Court on July 17, 2002, charging Petty with driving under the influence (third offense), driving under suspension, and driving without lights. Petty pled not guilty, and the case progressed, with the county court setting a trial date of September 10. Petty failed to appear on September 10. The court issued a capias for Petty's arrest. Petty was arrested on February 2, 2003, and posted bond on February 4. Petty appeared in court on February 24 and pled not guilty to an additional charge of failing to appear.

On March 6, 2003, the court scheduled Petty's trial for the jury term beginning April 1. The court also ordered Petty to appear for a pretrial hearing on March 14. Petty failed to appear at the March 14 pretrial hearing. Petty appeared at a hearing on March 20, where he waived his right to a jury trial and the court set a bench trial for July 14.

On July 2, 2003, Petty filed a motion to discharge, claiming he had been denied a speedy trial. On the same day, Petty filed a motion to suppress. Following a hearing on July 10, the county court denied Petty's motion to discharge. The county court noted Petty's failures to appear and, citing *State v. Letscher*, 234 Neb. 858, 452 N.W.2d 767 (1990), found that such absences tolled the time for speedy trial. Before the county court could consider the motion to suppress, Petty appealed the denial of the motion to discharge to the district court. On September 9, the district court affirmed the denial of Petty's motion to discharge.

Petty appealed to the Court of Appeals. Petty claimed he had been denied his 6-month statutory right to a speedy trial and argued that there were only two excludable time periods: (1) the period of 147 days from September 10, 2002, when he first

failed to appear for trial, until February 4, 2003, when he posted bond; and (2) the period of 6 days from March 14, when he failed to appear for the pretrial hearing, until March 20, when he next appeared in court. Petty asserted that by excluding these 153 days, the latest date he could have been brought to trial was June 19, 2003.

In analyzing Petty's appeal, the Court of Appeals cited to *State v. Rhoads*, 11 Neb. App. 731, 734, 660 N.W.2d 181, 184 (2003), for the proposition that "[w]hen a defendant is aware of the scheduled trial date and fails to appear on that date, the Nebraska speedy trial statute is tolled until such time as the defendant either willingly or unwillingly appears again in court." (Emphasis omitted.) The Court of Appeals noted that there was no indication in the record that Petty appeared in court when he posted bond on February 4, 2003, and the Court of Appeals therefore determined that the period commencing September 10, 2002, when Petty failed to appear for trial, should be deemed to have ended not on February 4, 2003, but on February 24 when Petty in fact appeared in court. The Court of Appeals determined that these additional 20 days extended the time for trial until July 9 and that the time was tolled again when Petty filed his motion to discharge and his motion to suppress on July 2. The Court of Appeals therefore concluded that Petty had filed his motion to discharge prematurely.

Although this conclusion could have resolved the appeal as it was being assessed by the Court of Appeals, the Court of Appeals proceeded to address the State's argument that there was additional excludable time. As a general matter, the State urged that the time between Petty's reappearance and the next available trial date should be excluded, because this period resulted from Petty's absence or unavailability. See Neb. Rev. Stat. § 29-1207(4)(d) (Reissue 1995). The State pointed to one such excludable period which ran from February 24, 2003, when Petty reappeared in court until April 1, the next available trial date. By excluding this period as urged by the State, the time for trial would have been extended until August 7. Although the State did not explicitly make the argument in its brief, the Court of Appeals noted that under the State's reasoning, a similar argument could be made for the period from March 20, when Petty

appeared in court after failing to appear at the March 14 hearing, until the July 14 date which was set for a bench trial.

In support of its position, the State relied on *State v. Letscher*, 234 Neb. 858, 861, 452 N.W.2d 767, 769 (1990), in which this court stated that "when a defendant has commenced a period of delay due to his or her absence or unavailability, the period of time from the defendant's later availability to the next reasonably available trial date is excludable." The Court of Appeals rejected the State's argument.

Relying on its decision in *Rhoads, supra*, in which the Court of Appeals had stated that the State had the burden under § 29-1207(4)(f) to show good cause for delay in setting the trial date after a defendant reappears, the Court of Appeals concluded that the State had the burden in this case to establish that there was good cause for setting Petty's trial on April 1, 2003. More specifically, the Court of Appeals determined that the State had presented no evidence that April 1 was the next reasonably available trial date following Petty's reappearance on February 24. The Court of Appeals noted that in *Letscher*, the court bailiff had testified at the hearing on the motion to discharge regarding the next available date for jury trial following the defendant's reappearance. Although the Court of Appeals rejected the State's argument that the first excludable period should have extended until April 1, it affirmed the denial of the motion to discharge because of its earlier conclusion that the motion was filed prematurely.

The State petitioned for further review of the Court of Appeals' decision and assigned error to the Court of Appeals' reasoning that additional time was not excludable. We granted the State's petition for further review.

ASSIGNMENTS OF ERROR

The State asserts that the Court of Appeals erred in (1) imposing a good cause burden on the State in order to exclude from the speedy trial calculation the time from the defendant's reappearance until the next reasonable trial date and (2) failing to hold that the speedy trial period was tolled from Petty's first failure to appear on September 10, 2002, until the rescheduled trial date of July 14, 2003.

STANDARDS 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. Covey*, 267 Neb. 210, 673 N.W.2d 208 (2004).

[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*.

ANALYSIS

At issue in this appeal are the provisions of the statutory 6-month speedy trial act found at § 29-1207. Particularly relevant are the provisions of § 29-1207(4)(d) and (f) relating to certain excludable periods. The statute provides:

> (4) The following periods shall be excluded in computing the time for trial:
>
> . . . .
>
> (d) The period of delay resulting from the absence or unavailability of the defendant;
>
> . . . .
>
> (f) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.

On further review, the State claims that the Court of Appeals erred in imposing a burden on the State which required it to prove good cause in order to exclude time after Petty reappeared in court until the trial date set by the court following Petty's reappearance. In sum, the State asserts that the language of § 29-1207(4)(d) which excludes the "period of delay resulting from the absence or unavailability of the defendant" requires that the period of time from the defendant's reappearance until the next reasonably available trial date be excluded. The State further asserts that the Court of Appeals erred in relying on the "good cause" language found in § 29-1207(4)(f) which excludes "[o]ther periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause" when it required the State to prove that the time between Petty's reappearance and the trial date should have been excluded. We agree with the State's reading of § 29-1207(4)(d), and we conclude that under the plain language of § 29-1207(4)(d),

the period of time from the defendant's reappearance until the next reasonably available trial date is ordinarily excludable pursuant to § 29-1207(4)(d) as "delay resulting from the absence or unavailability of the defendant" and that, therefore, the Court of Appeals erred when it reasoned that the State had a burden to prove, but had failed to demonstrate, good cause for such delay. In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004).

[3] This court has held that "when a defendant has commenced a period of delay due to his or her absence or unavailability, the period of time from the defendant's later availability to the next reasonably available trial date is excludable under § 29-1207." *State v. Letscher*, 234 Neb. 858, 861, 452 N.W.2d 767, 769 (1990). This court did not specify in *Letscher* whether such exclusion was pursuant to § 29-1207(4)(d) or (f). In announcing our holding in *Letscher*, this court cited to *State v. Kriegler*, 225 Neb. 486, 406 N.W.2d 137 (1987), and *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978).

In *Johnson*, this court stated that a defendant who has failed to appear for a trial set within the statutory time for trial "is not necessarily entitled to an immediate trial when he [or she] subsequently appears in court" but that "in many cases . . . a delay after the defendant's reappearance might be justified for good cause, such as a congested docket in the trial court, or scheduling difficulties on the part of the trial judge or the prosecutor." 201 Neb. at 329, 268 N.W.2d at 89. The court in *Johnson* further stated that in such cases, the court should "advise the defendant of his [or her] right to a speedy trial and ascertain whether the defendant wishes to waive that right; or otherwise set forth in the record the cause for the delay." *Id.* Although this court in *Johnson* used the expression "good cause" for delay after reappearance, we did not specifically state whether such delay was excludable under § 29-1207(4)(d) or (f). In *Kriegler*, this court quoted *Johnson* to the effect that delay after reappearance might be excludable if justified for good cause, and we then stated that such time period "should be excluded under the provisions of § 29-1207(4)(f)." 225 Neb. at 488, 406 N.W.2d at 138.

Despite our statement in *Kriegler* that delay after reappearance is excludable under § 29-1207(4)(f), we now determine that such time is more appropriately excludable under the language of § 29-1207(4)(d), which states that time is to be excluded from the speedy trial calculation for the "period of delay resulting from the absence or unavailability of the defendant." When a defendant fails to appear for a timely scheduled trial, the delay resulting from such absence or unavailability does not end immediately upon the defendant's reappearance. Instead, further delay inevitably results from the fact that the court, prosecutors, witnesses, and all others involved with the case must adjust their schedules and resume necessary preparations for trial after the defendant reappears. As noted in *Johnson*, a defendant is not entitled to an immediate trial upon his or her reappearance. Indeed, other criminal cases will invariably have been set for trial and will be required in some cases to proceed to trial to meet their own speedy trial constraints prior to the trial of the reappearing defendant. A defendant's failure to appear for trial has far-reaching effects on the schedules and preparations of all involved with the case and other cases, and such absence or unavailability results in delay. It is not required under § 29-1207(4)(d), nor would it be prudent, to permit an absconding defendant to set the calendar at the courthouse and expect a trial immediately upon his or her reappearance.

[4] Because we determine that the passage of time in setting a trial date which ensues after a defendant reappears is ordinarily excludable as resulting from the "absence or unavailability" provisions of § 29-1207(4)(d) rather than the "good cause" provisions of § 29-1207(4)(f), the State has no burden to show specific good cause to exclude such period. The cause of such period of delay is the defendant's absence or unavailability, which § 29-1207(4)(d) denotes as a valid reason to exclude time. As stated in *State v. Letscher*, 234 Neb. 858, 452 N.W.2d 767 (1990), the court must endeavor to schedule trial for the "next reasonably available trial date" after the defendant reappears. However, in determining whether time is excludable for speedy trial purposes under § 29-1207(4)(d), a trial date that is scheduled within 6 months after the defendant's reappearance will be presumed to be the next reasonably available trial date without the State being required to present further evidence to justify the setting.

In deciding this case, the Court of Appeals relied on its holding in *State v. Rhoads*, 11 Neb. App. 731, 660 N.W.2d 181 (2003). *Rhoads* involved facts similar to this case. The Court of Appeals stated in *Rhoads* that it was the State's burden to establish facts showing good cause to exclude any delay in setting a trial date following the defendant's reappearance. In *Rhoads*, the Court of Appeals noted that the State did not present evidence that the defendant's trial could not have been set sooner than it had been set after the defendant's reappearance and it, therefore, determined that the State had not proved "good cause" to exclude the delay under § 29-1207(4)(f). Contrary to the Court of Appeals' reasoning, we conclude that the time from a defendant's reappearance until the next reasonably available trial date is "a period of delay resulting from the absence or unavailability of the defendant" and that such period is excludable under § 29-1207(4)(d). Accordingly, we overrule *Rhoads* as well as *State v. Kriegler*, 225 Neb. 486, 406 N.W.2d 137 (1987), and *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978), to the extent these cases hold both that the period between a defendant's reappearance and the trial date is excludable only under § 29-1207(4)(f) and that the State has a burden to prove good cause to exclude such period in calculating time for speedy trial purposes.

In the present case, Petty failed to appear for trial on September 10, 2002. Petty next appeared in court on February 24, 2003, and trial was subsequently scheduled for the April 1 jury term. Petty again failed to appear for a pretrial hearing on March 14, and after Petty reappeared in court on March 20, a bench trial was scheduled for July 14. Because the period of delay in setting the trial date was a result of Petty's absence or unavailability under § 29-1207(4)(d), and because the July 14 trial date was within 6 months of both Petty's reappearance on February 24 and his reappearance on March 20, such trial date may be presumed to be the next reasonably available trial date, and Petty was not denied his statutory right to a speedy trial.

CONCLUSION

We conclude that, in analyzing Petty's speedy trial claim, the Court of Appeals erred in its reasoning when it stated that the

State was required but failed to prove good cause to exclude the period from Petty's reappearance until the next reasonably available trial date. We determine instead that the period from Petty's reappearances until the July 14, 2003, trial date, which is within 6 months of Petty's reappearances and may be presumed to be the next reasonably available trial date, is excludable pursuant to § 29-1207(4)(d). Although the Court of Appeals found less time than we find to be excludable, we agree with the Court of Appeals' ultimate conclusion that Petty's motion to discharge was filed prematurely on July 2, 2003. However, we find error in the Court of Appeals' calculation of remaining days, and we modify accordingly. We therefore affirm as modified the Court of Appeals' decision concluding that the district court did not err in affirming the county court's denial of Petty's motion to discharge.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
JUSTIN JENSEN, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V.
EARLEEN JENSEN, APPELLANT.

691 N.W.2d 139

Filed January 21, 2005. Nos. S-04-314, S-04-315.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a district court judgment for errors appearing on the record, an appellate court nonetheless has an obligation to resolve questions of law independently of the conclusions reached by the trial court.
4. **Domicile: Proof.** Domicile must be determined from all the circumstances taken together in a particular case, and in order to establish a domicile, two essential facts must be present: (1) residence, or bodily presence, in the locality and (2) an intention to remain there.
5. **Domicile: Words and Phrases.** No exact definition can be given of domicile. It depends upon no one fact or combination of circumstances, but from the whole taken together, it must be determined in each particular case.
6. **Domicile.** A person may have two places of residence, but only one of them may be his domicile.

7. **Domicile: Proof: Intent.** For adults, domicile is established by a physical presence in a place in connection with a certain state of mind concerning one's intention to remain there.
8. **Domicile.** One acquires a "domicile of origin" at birth, and that domicile continues until a new one, a "domicile of choice," is acquired.
9. **Domicile: Intent.** It is not residence alone, but it is the intention of the person, expressed or implied from the facts in evidence, conjoined with residence, that determines domicile.
10. ____: ____. The question of what is residence is one of law to be determined by a consideration of the intention and overt acts of the person whose acts are being examined.
11. **Domicile.** A change of residence for the purpose of benefiting one's health does not usually effect a change of domicile. Such a change is looked upon as temporary merely, even though the actual time spent in the new residence may be long.

Appeals from the District Court for Antelope County, PATRICK G. ROGERS, Judge, on appeal thereto from the County Court for Antelope County, KURT RAGER, Judge. Judgments of District Court reversed, and causes remanded with directions.

Amy A. Miller, of American Civil Liberties Union Foundation of Nebraska, for appellants.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

Danielle Nantkes for amicus curiae Nebraska Appleseed Center for Law in the Public Interest.

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

WRIGHT, J.

NATURE OF CASE

The Antelope County Court concluded that neither Earleen Jensen nor Justin Jensen was a resident of the village of Royal, Nebraska, for purposes of an election held there on November 5, 2002. The county court found them guilty of illegal voting, in violation of Neb. Rev. Stat. § 32-1528 (Reissue 2004). Earleen and Justin appeal from orders of the Antelope County District Court which affirmed the judgments of the county court.

SCOPE OF REVIEW

[1] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such,

its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992).

[2] Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *Id.*

FACTS

Earleen married Marlowe Jensen in 1962, and they lived on a farm located 1 mile north and 1 mile west of Royal, which at the time of trial had a population of 70 to 75 residents. The farm is located in the Verdigre township voting precinct, which is separate from the Royal township voting precinct.

Justin, one of Earleen and Marlowe's children, grew up on the farm and developed diabetes at a young age. In 1986, he purchased a home located on Ryan Street in Royal. He lived there for 1½ years and then moved out of town. His health subsequently deteriorated, and he moved back to Royal in 1996. He registered to vote using the Ryan Street address, and he voted regularly in both primary and general elections prior to November 2002.

Justin testified that he split his time between the Ryan Street home and his parents' farm. Justin has "brittle diabetes," which has caused him to have periodic hypoglycemic attacks. During these attacks, he may become violent and need to be restrained. Because of this health condition, Justin often required care during the night and, therefore, spent most nights at the farm.

Marlowe retired in 1994 and moved with Earleen into a home located on Johnson Street in Royal. However, Marlowe moved back to the farm after approximately 2 months. Earleen registered to vote using the Johnson Street address and voted regularly in the primary and general elections before November 2002.

Earleen testified that when Justin's health condition worsened, she started spending nights with him and taking care of him on a daily basis. They would spend the night at the farm when Justin's blood sugar was low, and she might need help from Marlowe to administer Justin's insulin injections. She stated that due to Justin's present medical condition, it was impossible for her to stay at the Johnson Street home.

At the May 2002 primary election, election officials questioned whether Earleen and Justin resided in Royal or in the Verdigre

township voting precinct. Helen Mitteis, an election official, was familiar with the voting records of Earleen and Justin. She testified that she had not known Justin to vote outside Royal. Justin was questioned again during the November 2002 general election. Regardless, Earleen and Justin were each allowed to cast a ballot in the November 2002 general election in the race for Royal village trustee. Their voting in the village trustee contest formed the basis for the criminal charges at issue.

Earleen and Justin were charged in separate complaints with unlawfully voting in a school district, a village, or a precinct of a city in which they did not actually reside or into which they came for merely temporary purposes. See § 32-1528. The cases were consolidated for trial in the county court for Antelope County.

The county court found that Justin had lived at several locations between 1987 and 1996. He purchased the Ryan Street home in 1986. He lived at that location for about 1½ years and had moved several times since then. The court noted that Justin had the house moved to a central location on the Ryan Street lot and had installed new siding and windows. The court found that according to Earleen, she and Justin needed to live at the farm so that Marlowe would be available if Earleen needed help with Justin. It found that due to Justin's diabetes, he could not live alone but that his stated intent was to live independently at some point. From 1996 to November 2002, Justin averaged, on a monthly basis, 5 to 10 nights sleeping at the Ryan Street home and 20 to 26 nights sleeping at the family farm. It was not disputed that Justin cast a ballot in the Royal village trustee election on November 5, 2002.

The county court concluded that Justin's testimony concerning the extent of his stays at the family farm demonstrated a lack of "habitual habitation" at the Ryan Street home, which the court stated was necessary to render the same his residence for voting purposes, and that Justin was not an actual resident of Royal for purposes of the village trustee election on November 5, 2002. It found Justin guilty of illegal voting as charged in the complaint.

As to Earleen, the county court found that her "residential activity" on or before November 5, 2002, established beyond a reasonable doubt that she was not a resident of the village of Royal. The court concluded that Earleen's statements that it was

impossible for her to live at the Johnson Street home and that she planned to have her domicile there did not indicate a present intention to reside at that location. It found that Earleen, by her own admission, was not habitually present at the Johnson Street home and that, thus, she lacked the coexistence of fact and intention to establish the Johnson Street home in Royal as her residence for purposes of voting in the November 2002 general election. The court found Earleen guilty of illegal voting as charged in the complaint.

The county court's decisions were appealed to the district court for Antelope County, which affirmed the convictions and sentences. Earleen and Justin appeal.

ASSIGNMENTS OF ERROR

Earleen and Justin assign the following errors to the Antelope County District Court, which affirmed the judgments of the Antelope County Court: (1) The court erred in finding that Earleen and Justin were not residents of the village of Royal, (2) the court erred in its application of the law, (3) the court erred in not considering Justin's disability, and (4) the court erred in finding Earleen and Justin guilty of illegal voting.

ANALYSIS

Earleen and Justin were convicted of violating § 32-1528, which states: "Any person who votes a ballot in any school district, village, or precinct of a city in this state in which he or she does not actually reside or into which he or she has come for merely temporary purposes shall be guilty of a Class III misdemeanor." The issue is whether Earleen and Justin resided in the Royal township voting precinct for purposes of the November 2002 village trustee election.

[3] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992). Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *Id.* When reviewing a district court judgment for errors appearing on the record, an appellate court nonetheless has an obligation to resolve questions of law

independently of the conclusions reached by the trial court. See *Vlasic Foods International v. Lecuona*, 260 Neb. 397, 618 N.W.2d 403 (2000).

Pursuant to Neb. Rev. Stat. § 32-116(1) (Reissue 2004), the term "residence" means

> that place in which a person is actually domiciled, which is the residence of an individual or family, with which a person has a settled connection for the determination of his or her civil status or other legal purposes because it is actually or legally his or her permanent and principal home, and to which, whenever he or she is absent, he or she has the intention of returning.

[4-6] In *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004), we stated that domicile must be determined from all the circumstances taken together in a particular case and that in order to establish a domicile, two essential facts must be present: (1) residence, or bodily presence, in the locality and (2) an intention to remain there. No exact definition can be given of domicile. It depends upon no one fact or combination of circumstances, but from the whole taken together, it must be determined in each particular case. *State v. Jones*, 202 Neb. 488, 275 N.W.2d 851 (1979). A person may have two places of residence, but only one of them may be his domicile. *Id.*

[7,8] "For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 48, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989). Accord *Texas v. Florida*, 306 U.S. 398, 59 S. Ct. 563, 83 L. Ed. 817 (1939). One acquires a "domicile of origin" at birth, and that domicile continues until a new one, a "domicile of choice," is acquired. See *In re Estate of Jones*, 192 Iowa 78, 81, 182 N.W. 227, 228 (1921).

[9] One fact of particular significance in ascertaining a person's domicile is the act of registering and voting. See *In re Estate of Meyers*, 137 Neb. 60, 288 N.W. 35 (1939).

> "In doubtful cases particular significance should be attached to the repeated exercise of the right to vote, because this right depends upon citizenship and domicile, and must be generally, if not universally, supported by the oath of the

> voter. [S]uch act is a distinct, unequivocal and public assertion by the voter of his legal domicile."

Id. at 66, 288 N.W. at 38 (quoting *Cooper's Adm'r v. Commonwealth*, 121 Va. 338, 93 S.E. 680 (1917)). " 'It is not residence alone, but it is the intention of the person, expressed or implied from the facts in evidence, conjoined with residence, that determines domicile.' " *In re Estate of Meyers*, 137 Neb. at 67, 288 N.W. at 38 (quoting *Reed's Will*, 48 Or. 500, 87 P. 763 (1906)).

Justin testified that when he returned to Royal in 1996, he moved his belongings to the Ryan Street home and registered to vote using the Ryan Street address. He stated that he intended to live there full time once his medical condition improved. His driver's license, which was issued prior to the 2002 general election, listed the Ryan Street home as his address. He testified as to improvements that he had made to the house, including a new foundation and basement. The house had been moved to a different location on the lot. He had installed siding on the exterior of the house. These improvements were made before the general election in November 2002.

The State showed that prior to the 2002 general election, Justin split his time between the Ryan Street home and the farm. He spent most of the days at the Ryan Street home but spent only 5 to 10 nights per month there due to his diabetic condition. The remaining nights were spent at the farm.

Earleen testified that her belongings had been at the Johnson Street home since she moved there in 1994. She intended for the Johnson Street residence to be her home even though it was impossible for her to stay there due to the daily care she was required to administer to Justin. She intended to return to the Johnson Street home once Justin's medical condition improved.

Earleen had been registered to vote in Royal since 1994 and had been a diligent voter. She had a newspaper delivered to the Johnson Street home, and her driver's license listed the home as her address. A number of her vehicles were registered using the Johnson Street address. She had made improvements to the Johnson Street home prior to the general election in November 2002.

[10] " 'The question of what is residence is one of law to be determined by the consideration of the intention and overt acts of

the person whose acts are being examined.' " *State, ex rel. Brazda, v. Marsh*, 141 Neb. 817, 828, 5 N.W.2d 206, 213 (1942). In *State v. Jones*, 202 Neb. 488, 275 N.W.2d 851 (1979), we recognized that a person may have two residences but that only one of them is his domicile. Domicile must be determined from all the circumstances taken together in a particular case. *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004).

The county court concluded that Justin's testimony concerning the extent of his stays at the family farm demonstrated a lack of "habitual habitation" at the Ryan Street home, which the court felt was necessary to render the home his residence for voting purposes. We conclude that the county court erred in concluding that "habitual habitation" was necessary to establish residence for voting purposes, because whether a voter is habitually present at a particular residence is not dispositive of the issue of domicile for purposes of § 32-1528.

Although § 32-1528 includes the phrase "actually reside," it does not require habitual presence. Prior to amendment, Neb. Rev. Stat. § 32-107 (Reissue 1993) provided: "Residence shall mean that place at which a person has established his home, where he is habitually present, and to which when he departs he intends to return." However, § 32-107 was amended in 1994, see 1994 Neb. Laws, L.B. 76, and the definition of residence for purposes of the Election Act is now found in § 32-116(1), which states that a residence is "that place . . . with which a person has a settled connection for the determination of his or her civil status or other legal purposes."

There were only two places where Justin had any type of "settled connection"—the family farm and the Ryan Street home. As noted in *In re Estate of Craven*, 265 Neb. 41, 654 N.W.2d 196 (2002), the term "domicile" is difficult to accurately define, and it has been stated that the concept cannot be successfully defined so as to embrace all its phases. Its meaning, in each instance, depends upon the connection in which it is used. See, also, *In re Estate of Meyers*, 137 Neb. 60, 288 N.W. 35 (1939).

[11] Considering all the circumstances taken together, see *Krajicek v. Gale, supra*, we conclude that the county court erred in its determination that Justin did not reside in the village of Royal. Justin had bodily presence at the Ryan Street home and

expressed his intention to remain there by making improvements to the house and spending 5 to 10 nights per month there. Although Justin split his time between the Ryan Street home and the farm, that fact does not establish that his residence was other than the Ryan Street home. Justin more than adequately explained that his reason for staying at the family farm was his diabetic condition, and he evidenced his intention to have the Ryan Street home as his domicile. In *In re Estate of Meyers*, 137 Neb. at 67, 288 N.W.2d at 38, we stated: " 'A change of residence for the purpose of benefiting one's health does not usually effect a change of domicile. Such a change is looked upon as temporary merely, even though the actual time spent in the new residence may be long.' " Further, Justin's repeated exercise of voting in the Royal elections since 1996 was a public assertion which clearly established his intent to have the Ryan Street home as his domicile.

As to Earleen, the county court concluded that her "residential activity" established beyond a reasonable doubt that she was not a resident of the village of Royal. The court based its conclusion in part upon Earleen's statement that it was physically impossible for her to stay in Royal because of the constant attention required by Justin's diabetic condition. It also concluded that Earleen was not habitually present at the Johnson Street home. It found that she and Justin stayed at the family farm so Marlowe could help her with Justin's care and that Earleen planned to have her legal domicile at the Johnson Street home in Royal.

The county court erred when it concluded that Earleen was not a resident of the village of Royal. Earleen had physical presence at the Johnson Street home since 1994, and she had an intention to remain there. The fact that her stay at this location was interrupted because of the constant attention required by Justin's medical condition did not establish that she resided at the family farm. Earleen had not abandoned the Johnson Street home despite the fact that she stayed at the family farm in order to care for Justin. She had a settled connection with the Johnson Street home, which connection she established in 1994, and she had the intention of someday returning to that location.

CONCLUSION

For the reasons set forth herein, we conclude that the county court erred in finding Earleen and Justin guilty of violating

§ 32-1528, and the district court erred in affirming the judgments of the county court.

The judgments of the district court are reversed, and the causes are remanded to the district court with directions to reverse the judgments of the county court and instruct the county court to dismiss the complaints against Earleen and Justin with prejudice.

REVERSED AND REMANDED WITH DIRECTIONS.

DARLENE BRUNKHARDT AND JUSTIN BRUNKHARDT, WIFE AND HUSBAND, APPELLANTS, V. MOUNTAIN WEST FARM BUREAU MUTUAL INSURANCE COMPANY, APPELLEE.

691 N.W.2d 147

Filed January 28, 2005. No. S-03-1087.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to determine the matter independently of the trial court.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
4. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.
5. **Due Process: Jurisdiction: States.** If the long-arm statute has been satisfied, a court must then determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
6. ____: ____: ____. To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.
7. ____: ____: ____. The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.

8. **Due Process: Jurisdiction.** A personal jurisdiction analysis requires a court to consider the quality and nature of the defendant's activities to ascertain whether the defendant has the necessary minimum contacts with the forum to satisfy due process.
9. **Jurisdiction: States.** Two types of personal jurisdiction may be exercised depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction. In the exercise of general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state, if the defendant has engaged in "continuous and systematic general business contacts" with the forum state.
10. ____: ____. If a defendant's contacts are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert "specific jurisdiction" over the defendant depending on the quality and nature of such contact.
11. ____: ____. Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant has acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state.
12. ____: ____. Contacts created by another's unilateral acts are insufficient to confer on the forum state court personal jurisdiction over a nonresident defendant.
13. ____: ____. Under a personal jurisdiction analysis, the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Harry R. Meister, of Meister & Segrist, P.C., for appellants.

Kay Lynn Bestol and Paul Kapp, of Sundahl, Powers, Kapp & Martin, for appellee.

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

CONNOLLY, J.

Darlene Brunkhardt and Justin Brunkhardt, wife and husband, appeal the district court's order dismissing their complaint seeking underinsured motorist benefits against Mountain West Farm Bureau Mutual Insurance Company (Mountain West). The court dismissed the complaint for lack of personal jurisdiction. We affirm because Mountain West lacked sufficient contacts in Nebraska to confer personal jurisdiction.

BACKGROUND

In January 2001, Darlene, a Wyoming resident, was injured in a motor vehicle collision in Scotts Bluff County, Nebraska. The

Brunkhardts later settled with the tort-feasor's insurance company. They next unsuccessfully sought underinsured motorist benefits from Mountain West and filed this action. Mountain West moved to dismiss for lack of personal jurisdiction.

The facts presented on the motion to dismiss are undisputed. Mountain West is located in Laramie, Wyoming, and sells insurance in Wyoming and Montana; it is not authorized or licensed to do business in Nebraska and has never sold insurance in Nebraska; it does not have property, employees, bank accounts, offices, telephone listings, or an agent for service of process in Nebraska; it has never advertised or solicited business in Nebraska; and it does not derive income from Nebraska.

Darlene lives in Wyoming and purchased her insurance in Wyoming, but regularly commutes to work in Nebraska. Her Mountain West agent was aware that she worked in Nebraska. The Brunkhardts presented evidence of two letters Mountain West sent to their attorney in Nebraska concerning this action. They also presented evidence about a Nebraska accident in 2001 involving their son. Regarding that accident, Mountain West sent two letters to a Nebraska attorney concerning its subrogation interest. The record contains evidence that when an insured is involved in an out-of-state accident, including Nebraska, Mountain West will sometimes demand that parties in the foreign state reimburse it. No lawsuits, however, have been filed because of those requests. Finally, the Brunkhardts presented evidence that on one occasion, Mountain West was sued in Nebraska and it defended the action.

The district court found that Mountain West did not have sufficient contacts with Nebraska to support the exercise of personal jurisdiction and dismissed the complaint.

ASSIGNMENTS OF ERROR

The Brunkhardts assign, rephrased, that the district court erred by dismissing their complaint for lack of personal jurisdiction.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to determine the matter independently of

the trial court. *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004); *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004).

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

ANALYSIS

The Brunkhardts argue that Mountain West had sufficient contacts with Nebraska for the court to exercise personal jurisdiction. They point to Mountain West's communications with Nebraska attorneys and the agent's knowledge that Darlene regularly commuted to work in Nebraska. Mountain West, however, argues that any contacts with Nebraska were the result of the unilateral actions of others and are insufficient to establish minimum contacts for the exercise of personal jurisdiction.

LONG-ARM STATUTE

[3,4] Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003). Nebraska's long-arm statute provides: "A court may exercise personal jurisdiction over a person . . . (2) Who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States." Neb. Rev. Stat. § 25-536 (Reissue 1995). Nebraska's long-arm statute, § 25-536, extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits. *Diversified Telecom Servs. v. Clevinger, supra*. Thus, we next address whether Mountain West had sufficient contacts with Nebraska so that the exercise of personal jurisdiction would not offend federal principles of due process.

Minimum Contacts

[5-7] If the long-arm statute has been satisfied, a court must then determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process. *Quality Pork Internat. v. Rupari Food Servs., supra*. To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice. *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004). The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. *Id*.

[8-10] A personal jurisdiction analysis requires a court to consider the quality and nature of the defendant's activities to ascertain whether the defendant has the necessary minimum contacts with the forum to satisfy due process. *Id*. Two types of personal jurisdiction may be exercised depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction. In the exercise of general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state if the defendant has engaged in " 'continuous and systematic general business contacts' " with the forum state. *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 483, 675 N.W.2d 642, 650 (2004), quoting *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 104 S. Ct 1868, 80 L. Ed. 2d 404 (1984). If the defendant's contacts are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert specific jurisdiction over the defendant, depending on the quality and nature of such contact. *Id*.

Here, general personal jurisdiction is not at issue. Mountain West did not have continuous and systematic general business contacts with residents of the state. It has not transacted business in the state, and its contacts have been limited to a small number of responses to claims initiated in the state. Thus, the question is

whether specific acts of Mountain West are sufficient to allow the district court to exercise jurisdiction. We determine that Mountain West's limited contacts with Nebraska residents are not sufficient to confer personal jurisdiction.

[11,12] Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant has acted in a manner which creates substantial connections with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the forum state. See *Diversified Telecom Servs. v. Clevinger, supra*. Contacts created by another's unilateral acts are insufficient to confer jurisdiction. *Id*.

[13] Under a personal jurisdiction analysis, the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. *Diversified Telecom Servs. v. Clevinger, supra*. Thus, when an insured travels to another state, his or her presence in the state is unilateral and does not serve to create purposeful contacts between the insurer and the state. See *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 736 P.2d 2 (1987). It has also been held that the requisite minimum contacts are not established when the plaintiff's actions require the insurer to send communications into the forum. *Id*., citing *Hunt v. Erie Ins. Group*, 728 F.2d 1244 (9th Cir. 1984).

Also, other jurisdictions have considered whether the act of insuring a person who travels to another state is sufficient to create a substantial connection with the forum state, resulting in the defendant's purposeful availment of the benefits and protections of the law of the state. Generally, those jurisdictions hold that the act of insuring a person who might travel to a nearby state is insufficient to find that the insurer purposely directed its activities at the forum state. See, e.g., *Ex Parte Georgia Farm Bur. Mut. Auto. Ins.*, 889 So. 2d 545 (Ala. 2004); *Batton v. Tennessee Farmers Mut. Ins. Co., supra*; *Tennessee Farmers Mut. Ins. v. Harris*, 833 S.W.2d 850 (Ky. App. 1992); *Zimmerman v. American Inter-Insurance Exch.*, 386 N.W.2d 825 (Minn. App. 1986); *United Farm Bur. Mut. Ins. v. U.S. Fid. & Guar.*, 501 Pa. 646, 462 A.2d 1300 (1983).

Here, all of Mountain West's Nebraska contacts were the result of others' unilateral actions. Although Darlene drove her automobile in Nebraska, the policy was issued in Wyoming. That the agent knew that Darlene would travel to Nebraska does not constitute purposeful contact with Nebraska. Also, when Mountain West contacted the Nebraska attorneys, it was in response to claims filed on policies issued in other states. The record does not show any action where Mountain West initiated the transaction of business in Nebraska. Instead, it responded to insurance issues that were initiated by its insureds. Nothing in the record supports a conclusion that Mountain West acted in a manner that would support a conclusion that it was actively conducting business in the state. Under these circumstances, when the insurance contract was issued in Wyoming by a Wyoming company to another Wyoming resident and when contacts with the forum are the result of others' unilateral actions, the contacts are not sufficient to exercise personal jurisdiction over the defendant.

CONCLUSION

Mountain West lacks sufficient minimum contacts with the state for the court to exercise personal jurisdiction. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
MICHAEL D. HALL, APPELLEE.

691 N.W.2d 518

Filed January 28, 2005. No. S-04-438.

1. **Statutes.** The meaning of a statute is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Criminal Law: Appeal and Error.** When the State appeals under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004), the scope of the appeal is set by the application for leave to docket an appeal and cannot be enlarged afterward when the State files its appellate brief.
4. **Statutes: Appeal and Error.** 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. **Evidence: Words and Phrases.** "Competent evidence" is evidence that is admissible and relevant on the point in issue.
6. **Criminal Law: Motor Vehicles: Rules of Evidence: Proof.** Once the State has proved the requirements of Neb. Rev. Stat. § 60-6,192(1)(a) through (d) (Reissue 2004), a court may treat the results from a radio microwave, mechanical, or electronic speed measurement device as admissible; the State need not show that the results from the speed measurement device were also admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995).
7. **Statutes: Words and Phrases.** 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.

Appeal from the District Court for Douglas County, W. MARK ASHFORD, Judge, on appeal thereto from the County Court for Douglas County, STEPHEN M. SWARTZ, Judge. Exception sustained.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for appellant.

Dennis E. Martin and Kevin J. McCoy, of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, L.L.P., for appellee.

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

CONNOLLY, J.

When a vehicle's speed is at issue, Neb. Rev. Stat. § 60-6,192(1) (Reissue 2004) requires that a peace officer's visual observations regarding speed be "corroborated by the use of a radio microwave, mechanical, or electronic speed measurement device." In addition, § 60-6,192(1)(a) through (d) sets out requirements that the State must prove before offering results from a speed measurement device into evidence. The issue is whether—in addition to proving the requirements of § 60-6,192(1)(a) through (d)—the State must show that the results from the speed measurement device are admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995). Rule 702 generally governs the admissibility of expert testimony.

The district court, in reversing Michael D. Hall's speeding conviction, ruled that the State, in addition to proving the requirements of § 60-6,192(1)(a) through (d), must show that the results from a speed measurement device are admissible under rule 702.

The State has taken exception to this ruling under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004). We determine that when the State has proved the requirements of § 60-6,192(1)(a) through (d), a trial court has the discretion to admit the results from a radio microwave, mechanical, or electronic speed measurement device, even if the State has not shown that the results are admissible under rule 702.

BACKGROUND

While enforcing the speed limit in Omaha, police officer Ronald W. Cline noticed Hall "driving at a real high rate of speed" and "passing all slower vehicle[s] on the interstate." To confirm his suspicion that Hall was speeding, Cline used a ProLaser III speed measurement device. The ProLaser III showed that Hall's vehicle's speed was 95 m.p.h. The posted speed limit was 60 m.p.h.; Hall was charged with speeding.

Cline is certified to use the ProLaser III; to become certified, he took a class and passed a test. Cline testified that when the ProLaser III is turned on, it conducts a series of internal tests to ensure that it is functioning properly. On the day that he ticketed Hall, this internal testing indicated that the ProLaser III was functioning properly.

Before going on duty, Cline also conducted an external test on the ProLaser III to ensure that the device was correctly measuring distance. He did this by pointing the ProLaser III at an object that he knew was a certain distance away. The test showed that the ProLaser III was correctly measuring distance. This was the only external testing that Cline conducted before he ticketed Hall. Nothing in the record suggests that Cline conducted either internal or external testing after he ticketed Hall.

At trial in county court, the State asked Cline at what speed the ProLaser III showed that Hall was traveling. Hall objected, but the county court allowed Cline to testify that the ProLaser III showed that Hall was traveling at 95 m.p.h. The county court found Hall guilty.

Hall appealed his conviction to the district court. He argued that the State had failed to comply with § 60-6,192(1) which provides:

> (1) Determinations made regarding the speed of any motor vehicle based upon the visual observation of any peace

> officer, while being competent evidence for all other purposes, shall be corroborated by the use of a radio microwave, mechanical, or electronic speed measurement device. The results of such radio microwave, mechanical, or electronic speed measurement device may be accepted as competent evidence of the speed of such motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue. Before the state may offer in evidence the results of such radio microwave, mechanical, or electronic speed measurement device for the purpose of establishing the speed of any motor vehicle, the state shall prove the following:
>
> (a) The radio microwave, mechanical, or electronic speed measurement device was in proper working order at the time of conducting the measurement;
>
> (b) The radio microwave, mechanical, or electronic speed measurement device was being operated in such a manner and under such conditions so as to allow a minimum possibility of distortion or outside interference;
>
> (c) The person operating the radio microwave, mechanical, or electronic speed measurement device and interpreting such measurement was qualified by training and experience to properly test and operate the radio microwave, mechanical, or electronic speed measurement device; and
>
> (d) The operator conducted external tests of accuracy upon the radio microwave, mechanical, or electronic speed measurement device, within a reasonable time both prior to and subsequent to an arrest being made, and the device was found to be in proper working order.

Specifically, Hall argued that the county court had erred in finding that the ProLaser III is a "radio microwave, mechanical, or electronic speed measurement device" and that Cline had conducted sufficient external accuracy tests on the ProLaser III before and after ticketing Hall as required by § 60-6,192(1)(d).

In addition to his § 60-6,192(1) arguments, Hall also argued in the district court that the results from the ProLaser III were inadmissible under rule 702 because the State had not offered expert testimony establishing that the ProLaser III produces reliable and relevant results. Rule 702 generally governs the admissibility of expert testimony. It provides: "If scientific, technical, or other

specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Under rule 702, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. See, *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Schafersman v. Agland Coop, supra*.

The district court reversed Hall's conviction. Its reasoning can be summarized into two main points. First, it concluded that the results from the ProLaser III were inadmissible under rule 702 because the State had failed to establish that the device produces reliable results. Second, the court ruled that the distance testing conducted by Cline did not constitute sufficient external accuracy testing under § 60-6,192(1)(d). The State was granted leave to docket an appeal under § 29-2315.01.

ASSIGNMENT OF ERROR

The State takes exception to the district court's ruling that in addition to the requirements of § 60-6,192(1)(a) through (d), the State was required to establish that the technology underlying the ProLaser III was reliable under rule 702.

STANDARD OF REVIEW

[1,2] The meaning of a statute is a question of law. *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Cave v. Reiser*, 268 Neb. 539, 684 N.W.2d 580 (2004).

ANALYSIS

Scope of Appeal

The State appealed the district court's decision under § 29-2315.01. Section 29-2315.01 is an exception to the general rule that the State has no right to appeal an adverse ruling in a

criminal case. See *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000). To take an exception under § 29-2315.01, the prosecuting attorney must file with the trial court an application for leave to docket an appeal concerning the erroneous rulings or decisions. The application must be accompanied by a copy of the ruling or decision complained of, the basis and reasons for the objection, and a statement by the prosecuting attorney as to the part of the record he or she intends to present to the appellate court. § 29-2315.01. The trial court then must indicate on the application whether it is in conformity with the truth and whether the part of the record the prosecuting attorney proposes to present to the appellate court is adequate for a proper consideration of the matter. *Id*. The application is then presented to the appellate court which determines whether to grant the application. *Id*.

Here, however, there is a discrepancy between the State's application for leave to file an appeal and the arguments in its brief. In its application for leave to docket an appeal, the State took exception only to the district court's holding that "the 'Daubert' analytical framework adopted in Nebraska in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862(2001) applie[s] in the context of a speeding trial in addition to the statutory foundation found at Neb. Rev. Stat. § 60-6,192." But in its brief, the State also requests that we reverse the trial court's determination that Cline failed to conduct sufficient external accuracy tests as required by § 60-6,192(1)(d). Thus, we must determine what controls the scope of this appeal: the State's application to file an appeal under § 60-6,192(1) or the assignments of error in the State's brief.

[3] The purpose of an appeal brought under § 29-2315.01 is "to provide an authoritative exposition of the law to serve as precedent in future cases." *State v. Detweiler*, 249 Neb. 485, 494, 544 N.W.2d 83, 90 (1996). Under § 29-2315.01, an appellate court determines whether authoritative exposition of the law is needed based upon the State's application for leave to docket an appeal. Thus, the scope of the State's appeal is set by the application and cannot be enlarged afterward when the State files its appellate brief.

In its application for leave to docket an appeal, the State did not take exception to the district court's conclusion that Cline

had failed to conduct sufficient external testing. Thus, we consider only the State's argument that the district court erred in ruling that the State—in addition to proving the requirements of § 60-6,192(1)(a) through (d)—must show that the results were relevant and reliable under rule 702.

An additional comment on the scope of this appeal is necessary. If the ProLaser III was not a "radio microwave, mechanical, or electronic speed measurement device," then the results from the ProLaser III could not have been used to corroborate Cline's visual observations of speed. Hall argued to the district court that the ProLaser III was not a radio microwave, mechanical, or electronic speed measurement device, but the court did not rule on this issue. Thus, for this appeal, we assume, without deciding, that the ProLaser III was a "radio microwave, mechanical, or electronic speed measurement device."

Rule 702 and Results From Radio Microwave, Mechanical, or Electronic Speed Measurement Device

The State contends that for results from a radio microwave, mechanical, or electronic speed measurement device to be admissible in proceedings when the vehicle's speed is in issue, it need only prove the four requirements of § 60-6,192(1)(a) through (d). Hall, on the other hand, argues that in addition to proving the requirements of § 60-6,192(1)(a) through (d), the State must also establish that the results were admissible under rule 702. As noted earlier, rule 702 requires a trial court to act as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. See, *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[4-6] We determine, however, that neither the State nor Hall correctly interprets § 60-6,192(1). 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. *Midwest Neurosurgery v. State Farm Ins. Cos.*, 268 Neb. 642, 686 N.W.2d 572 (2004). The key sentence in § 60-6,192(1) provides, "The results of such radio microwave, mechanical, or electronic speed measurement device *may be accepted as competent evidence* of the speed of such motor vehicle in any court or legal proceeding when the

speed of the vehicle is at issue." "Competent evidence" is evidence that is admissible and relevant on the point in issue. *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987), *overruled on other grounds, State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). See, also, Black's Law Dictionary 596 (8th ed. 2004) (equating term "competent evidence" to admissible evidence). Accordingly, § 60-6,192(1) is a legislative determination that once the State has proved the requirements of § 60-6,192(1)(a) through (d), a court may treat the results from a radio microwave, mechanical, or electronic speed measurement device as admissible even if the State has laid no other foundation. Thus, if the State has proved the requirements of § 60-6,192(1)(a) through (d), it need not show that the results from the speed measurement device were also admissible under rule 702. See Richard Collin Mangrum, *Interpreting Nebraska Rule of Evidence 702 After the Nebraska Supreme Court Adopted the Federal* Daubert *Standard for the Admissibility of Expert Testimony in* Schafersman v. Agland Coop, 35 Creighton L. Rev. 31, 99 (2001) (noting that § 60-6,192(1) permits results from radio microwave, mechanical, or electronic speed measurement devices "to be admitted into evidence even without any foundational evidence regarding the reliability of the underlying theory or the accuracy of the methodology incorporated into the alternative speed devices").

[7] We point out, however, that the admission of results from a speed measurement device is not—as the State seems to suggest—mandatory once the State has proved the requirements of § 60-6,192(1)(a) through (d). The statute does not say that the court *shall* accept the results as competent evidence, but, rather, that the results "*may be accepted.*" The word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002). Thus, § 60-6,192(1) grants discretion to trial courts; if the trial court is skeptical about the technology underlying the speed measurement device, it has the discretion to require further evidence on the technology before admitting the results into evidence.

Also, the admission of results from a radio microwave, mechanical, or electronic speed measurement device does not guarantee a

conviction. The defendant remains free to offer evidence calling into question the validity of the technology underlying the device. Further, how much weight to give the results remains a determination solely for the fact finder. See *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998).

Effect of Our Ruling on District Court's Vacation of Hall's Conviction

In the conclusion portion of its brief, the State claims

> The foundation before the trial court was adequate under Neb. Rev. Stat. [§] 60-6,192 to support the trial court's exercise of sound discretion in allowing the speed reading from the Pro Laser 3 [sic] to be admitted at trial.
>
> It follows that the judgment of the district court should be reversed and the matter remanded to that district court with directions to affirm the original judgment of the county court.

Brief for appellant at 33. But as we have already explained, the State failed to preserve its argument that the district court erred in ruling that the distance testing conducted by Cline did not constitute sufficient external testing of accuracy under § 60-6,192(1)(d). Thus, even though the district court incorrectly ruled that the State is required to show that results from a radio microwave, mechanical, or electronic speed measurement device are reliable under rule 702, an alternative basis for affirming the district court's judgment remains intact.

CONCLUSION

We hold that when a vehicle's speed is at issue, a trial court may admit results from a radio microwave, mechanical, or electronic speed measurement device if the State proves the requirements of § 60-6,192(1)(a) through (d). This is so even if the State has not shown that the results are admissible under rule 702. However, the admission of the results is discretionary and the trial court may require further evidence if it doubts the underlying technology.

Exception sustained.

STATE OF NEBRASKA, APPELLEE, V. ROMONA ANGLEMYER, ALSO KNOWN AS ROMONA WERNER, APPELLANT.

691 N.W.2d 153

Filed January 28, 2005. No. S-04-579.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Trial: Evidence.** Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis.
3. **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.
4. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
5. **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.
6. **Rules of Evidence.** The plain language of Neb. Evid. R. 901 is directory rather than mandatory.
7. ____. Where a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.
8. **Rules of Evidence: Proof.** The proponent of evidence pursuant to Neb. Evid. R. 901 is not required to rule out all possibilities inconsistent with authenticity or to prove beyond any doubt that the evidence is what it purports to be.
9. ____: ____. The authentication requirement of Neb. Evid. R. 901 does not demand that the proponent of a piece of evidence conclusively demonstrate the genuineness of his or her article, but only that he or she make a showing sufficient to support a finding that the matter in question is what its proponent claims.
10. **Trial: Evidence: Photographs: Witnesses.** Under the illustrative model of authenticating photographic evidence, a photograph, motion picture, videotape, or other recording is viewed merely as a graphic portrayal of oral testimony and is admissible only when a witness testifies that it is a correct and accurate representation of facts that the witness personally observed.
11. **Trial: Evidence: Photographs.** Under the "silent witness" theory of admission, photographic evidence may draw its verification not from any witness who has actually viewed the scene portrayed, but from other evidence which supports the reliability of the photographic product.
12. ____: ____: ____. Even if direct, eyewitness testimony is absent, the contents of photographic evidence itself, together with such circumstantial or indirect evidence as bears upon the issue, may serve to explain and authenticate the evidence sufficiently to justify its admission.
13. ____: ____: ____. Photographic evidence is admissible when it is shown that it is a correct reproduction of what it purports to show; the showing may be made by any

evidence that bears on whether the photographic evidence correctly depicts what it purports to represent.

14. **Sentences.** In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors.
15. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
16. ____. Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
17. **Sentences: Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.

Appeal from the District Court for Lancaster County, STEVEN D. BURNS, Judge, on appeal thereto from the County Court for Lancaster County, Gale Pokorny, Judge. Judgment of District Court affirmed.

Robert Wm. Chapin, Jr., of Chapin Law Offices, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

GERRARD, J.

Romona Anglemyer, the defendant-appellant, was convicted in a bench trial of one count of indecency with an animal, in violation of Neb. Rev. Stat. § 28-1010 (Reissue 1995), and she was sentenced to 90 days in jail and fined $500 plus costs. The primary issue in this case is whether sufficient foundation was provided for the admission of the videotape which depicted the alleged offense.

FACTUAL BACKGROUND

The prosecution in this case is based on a videotape recovered from a search of Mataya's Babydolls, a club that had been

located in Lincoln, Nebraska. Because the videotape is central to the issues presented in this case, we begin with a general description of what is depicted on the videotape. The videotape was filmed in what appears to be a motel room. Three people and a male dog are seen on the videotape, and a fourth, unseen person's voice is heard, presumably from behind the camera. On the videotape, a woman, allegedly Anglemyer, engages in various types of sexual activity with the dog. Anglemyer does not contest that the activity depicted on the videotape, if the videotape is admissible, would constitute indecency with an animal, in violation of § 28-1010. Consequently, a detailed description of the sexual activity is not necessary to our analysis of the issues presented in this case.

Jeri Roeder, a detective sergeant with the Lincoln Police Department, testified that she participated in the execution of a search warrant at Mataya's Babydolls on January 3 or 4, 2003. The purpose of the search was to locate videotapes, and several VHS and 8-millimeter videotapes were found, including the 8-millimeter videotape at issue in this case, which was labeled at trial as exhibit 15. Roeder testified that she and another investigator viewed the videotapes and recognized some of the individuals depicted in exhibit 15. Roeder said that three people were seen in exhibit 15 and that the voice of a fourth, unseen person can be heard. Roeder recognized Anglemyer in exhibit 15 and made an in-court identification of Anglemyer. Roeder identified the unseen person, by voice, as being John Ways, Jr.

Roeder testified that it did not appear to her that the videotape had been altered in any way. Roeder also explained that based on her experience as a detective familiar with video cameras, a "date stamp" is imbedded on the videotape for several seconds after the camera begins recording. The date stamp on exhibit 15 indicated that it was filmed on May 27, 2002.

Roeder stated that exhibit 15 was apparently recorded in a motel room, and an imperfection on the wall of the room led her to believe that the location of the recording could be determined. Roeder also stated that in exhibit 15, the participants discussed walking over to "the club" to watch some shows and that from her past experience with Anglemyer and Ways, she knew that they were associated with Mataya's Babydolls. Based on that

information, Roeder contacted the manager of a motel located "right next" to Mataya's Babydolls.

Ketan Patel, manager of the motel, testified that he was responsible for checking people into the motel and also had trained other employees on the check-in procedure. Patel testified that a customer checking into the motel was required, in the regular course of business, to present positive identification and to pay at check-in. Patel also testified that he inspected rooms after any reports of damage, so he was familiar with the individual guest rooms at the motel.

Patel testified that in January 2003, he cooperated with a Lincoln Police Department investigation looking for a particular motel room. The police were seeking a room with two beds on the left side of the room and a defect on the wall. Based on that description, Patel was able to identify room No. 123 at the motel as the room described. Patel also testified that he had reviewed the first few seconds of exhibit 16 and recognized the color of the motel's bedspreads and the motel's "strip on the headboard." Patel was able to identify room No. 123 on the basis of the layout and the unique defect in the wall. According to Patel, the wall was damaged in late 2001 or early 2002 and was not repaired until February or March 2003.

Patel also produced the motel's "Guest Folio print out" for May 25 and 26, 2002, which Patel explained would list guests who checked out of the motel on May 27. Patel testified that according to that record, Paul Beck of Wichita, Kansas, was the guest in room No. 123 on May 27. Patel stated that no other guest stayed in room No. 123 until another person, whose identity is not relevant to the investigation, checked in on May 29 and out on May 30. Roeder testified that after receiving this information, she contacted the Wichita Police Department, which provided photographs of Beck and Glenda Yancey Beck, whom Roeder was able to identify as the other two people on exhibit 15. Roeder went to Wichita to make contact with the Becks. Roeder testified that when she arrived at their address, she saw and recognized the dog from exhibit 15.

At trial, Roeder testified that exhibit 16, a VHS videotape, was a copy made of exhibit 15. Roeder testified that it was an accurate copy of exhibit 15 from the beginning to the "end of the part

involving an animal." Roeder explained that exhibit 15 continued with people involved that are not included on exhibit 16. The State explained that the purpose of exhibit 16 was to provide a copy that could be played on the audiovisual equipment available at the courthouse.

As previously stated, Anglemyer was convicted of indecency with an animal, was sentenced to 90 days in jail, and was fined $500 plus costs. At sentencing, the trial court noted that "Ways figures very prominently in the events that bring . . . Anglemyer before this Court." The court noted the probation officer's characterization of Ways as the "provocateur" of the offense. But the trial court also stated, "Ways is not on trial here . . . Ways' character is not a factor here. And more importantly . . . Anglemyer's friendship, and or romantic involvement if there was any or general association with . . . Ways is simply not important to me, it is not a factor here." The trial court did explain, however, that the evidence persuaded it that Anglemyer was engaged in a broader commercial enterprise with Ways. The court rejected Anglemyer's testimony that she was embarrassed by her participation in the videotape and concluded, based upon materials in the presentence investigation report, that Anglemyer was part of a larger venture for the production of bestiality. The court based its sentence on its conclusion that "[t]his is not an isolated incident, and I don't think the citizens of this community want that happening here." The court sentenced Anglemyer as previously stated, and the judgment was affirmed by the district court on appeal.

ASSIGNMENTS OF ERROR

Anglemyer assigns that the district court erred in not finding that the county court erred by (1) admitting exhibits 15 and 16 and (2) sentencing Anglemyer based on her association with Ways and making findings of fact about Anglemyer that were "not supported by the facts in the PreSentence Report of [sic] the evidence presented at trial."

STANDARD OF REVIEW

[1] 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. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004).

[2,3] Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002). A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *Id*. Cf. *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992) (admission or exclusion of photographs under Neb. Evid. R. 901 within discretion of trial court).

[4] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004).

[5] 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. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004).

ANALYSIS

Foundation for Videotapes

Anglemyer's primary argument on appeal is that the State did not present adequate foundation for the admission of exhibits 15 and 16. Anglemyer argues that the videotapes should not have been admitted without the testimony of a witness who actually saw the events depicted and could testify that the videotapes accurately represented what the witness saw. Since Roeder had no personal knowledge of the events shown on the videotapes, Anglemyer argues that Roeder was unable to provide the necessary foundational testimony.

Anglemyer's argument implicates the requirements of rule 901, which rule provides, in relevant 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:

> (a) Testimony that a matter is what it is claimed to be;
>
> . . . .
>
> (d) Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances;
>
> . . . .
>
> (i) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result . . . .

[6,7] The plain language of rule 901 is directory rather than mandatory. *State v. Ferris*, 212 Neb. 835, 326 N.W.2d 185 (1982). We are also guided in our application of rule 901 by federal court decisions explaining Fed. R. Evid. 901, which is effectively identical to Nebraska's rule 901 and upon which it was based. Where a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule. *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003).

[8,9] It has been said that federal rule 901 "does not erect a particularly high hurdle." *U.S. v. Ortiz*, 966 F.2d 707, 716 (1st Cir. 1992). "[T]he proponent of the evidence is not required 'to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be.' " *U.S. v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001). The authentication requirement does not demand that the proponent of a piece of evidence conclusively demonstrate the genuineness of his or her article, but only that he or she make a showing " 'sufficient to support a finding that the matter in question is what its proponent claims.' " *Los Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924, 935 (9th Cir. 2002), *amended on other grounds on denial of rehearing* 313 F.3d 1093. See, also, *State v. Ferris, supra*. Cf. *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997).

[10] Rule 901 incorporates two traditional models of authenticating photographic evidence: the illustrative or "pictorial testimony" model and the "silent witness" model. See, generally, 2 McCormick on Evidence § 214 (John W. Strong et al., 5th ed. 1999 & Supp. 2003). Under the illustrative model, a photograph,

motion picture, videotape, or other recording is viewed merely as a graphic portrayal of oral testimony and is admissible only when a witness testifies that it is a correct and accurate representation of facts that the witness personally observed. *Id.* See, e.g., *State v. Stephenson*, 199 Neb. 362, 258 N.W.2d 824 (1977). It is this type of foundation that Anglemyer claims is lacking in this case.

[11,12] But under the "silent witness" theory of admission, photographic evidence may draw its verification not from any witness who has actually viewed the scene portrayed, but from other evidence which supports the reliability of the photographic product. 2 McCormick on Evidence, *supra*. Most commonly, such evidence has been directed at establishing the validity of the photographic process; however, other types of foundation may properly support the admission of "silent witness" evidence. See *id*. See, e.g., *U.S. v. Rembert*, 863 F.2d 1023 (D.C. Cir. 1988); *United States v. Stearns*, 550 F.2d 1167 (9th Cir. 1977); *Ex parte Weddington*, 843 So. 2d 750 (Ala. 2002); *Dept. of Safety v. Cole*, 342 Md. 12, 672 A.2d 1115 (1996); *Midland Steel v. U.A.W. Local 486*, 61 Ohio St. 3d 121, 573 N.E.2d 98 (1991); *Kindred v. State*, 524 N.E.2d 279 (Ind. 1988); *State v. Pulphus*, 465 A.2d 153 (R.I. 1983); *State v. Holderness*, 293 N.W.2d 226 (Iowa 1980); *People v. Bowley*, 59 Cal. 2d 855, 382 P.2d 591, 31 Cal. Rptr. 471 (1963); *Brooks v. Com.*, 15 Va. App. 407, 424 S.E.2d 566 (1992). Even if direct, eyewitness testimony is absent, the contents of photographic evidence itself, together with such circumstantial or indirect evidence as bears upon the issue, may serve to explain and authenticate the evidence sufficiently to justify its admission. See *United States v. Stearns, supra*. As the advisory committee notes to federal rule 901 explain, "[t]he characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety." See 28 U.S.C. app. rule 901 (2000).

Based on those principles, courts have found sufficient foundation for the admission of still photographs under circumstances presenting foundation comparable to that in the instant case. For example, in *Torres v. State*, 442 N.E.2d 1021 (Ind. 1982), the defendant was convicted of child molestation based upon several Polaroid photographs that were anonymously sent to police. No

witness corroborated the events depicted in the photographs. However, the victim's mother identified her daughter, the defendant, and the defendant's girl friend in the photographs, and based on her knowledge of the defendant's apartment, the victim's mother identified the background of the photographs as the defendant's residence. Based on this foundation, the Indiana Supreme Court concluded that there was sufficient evidence to support the conclusion that the photographs accurately depicted what they were purported to depict. See *id.*

In *State v. Holderness, supra*, the victim of a burglary had left a camera containing 12-exposure film in a briefcase left in his car parked in his garage. The garage was burglarized, and the briefcase stolen. Later that day, a neighborhood child brought the victim a roll of film of the kind that had been in the camera. The victim had the film developed, and the first eight pictures were ones which the victim had taken. Another picture, however, showed an unknown man on his knees looking sideways toward the camera, holding a partially open black briefcase. The victim was unable to identify the man, but the victim was able to testify that the briefcase looked exactly like his, and he identified the objects in the background of the picture as being in his backyard. The photograph was then used to identify the defendant and convict him of the burglary. The Iowa Supreme Court concluded that the prosecution had presented sufficient evidence to support a finding that the photograph was not distorted or inaccurate and was a picture of the burglar. See *id*.

Similarly, in *People v. Doggett*, 83 Cal. App. 2d 405, 188 P.2d 792 (1948), the defendants were charged with "sex perversion" based upon photographs seized from the defendants' apartment. The landlord of the apartment building identified the persons in the photographs as the defendants and testified that the photographs accurately represented the interior of the apartment, but that he had not witnessed the defendants' conduct as depicted in the photographs. Other photographic evidence demonstrated the similarity between the furnishings in the apartment and those in the photographs of the defendants. An expert witness testified that in his opinion, the photographs were genuine and had not been faked. The California Court of Appeals held that the photographs were properly admitted.

[13] The general rule, gleaned from the above cases, is that photographic evidence is admissible when it is shown that it is a correct reproduction of what it purports to depict. This is often proved by the testimony of the one who took the photograph. However, this is not necessary, and it is well settled that the showing may be made by any evidence that bears on whether the photographic evidence correctly depicts what it purports to represent. The essential element is that the photographic evidence be verified or authenticated as a genuine representation of what it purports to depict. See *People v. Doggett, supra.* This being the purpose, it is not required that an eyewitness be produced where other evidence is available to accomplish the same end. The effect and probative value of such other evidence is the important consideration, and not that the manner of making the requisite showing should be exactly the same in all cases. See *id.*

Here, it was conclusively shown by testimony that exhibit 15, with an embedded "date stamp," correctly represented and depicted the parties who occupied a certain motel room. The surroundings, furniture, and a particular imperfection on the wall of the room and other identifying features of the motel were shown to have been in part of that motel room at the time in question. There is an absence of anything which might tend to raise doubt about the matter. Under those circumstances, the verification or authentication was as satisfactory and reliable as that in the ordinary case where it depends upon the memory and integrity of a third party who may be directly interested in the result. In such a case, it can be said neither that other evidence is entirely lacking nor that proof of the requisite element was not sufficient to support the trial court's action in receiving such a videotape in evidence. Compare *People v. Doggett, supra*.

Although we did not specifically discuss rule 901, this court applied similar reasoning in *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997). In that case, police saw marijuana plants growing on the defendant's property and obtained and executed a search warrant. Police seized a photograph album from the defendant's residence, containing several Polaroid photographs of the defendant and her husband with marijuana plants, and the photographs were admitted at trial over the defendant's objection.

On appeal, we concluded that the photographs were properly admitted. We explained:

> The fact that the officers obtained possession of the album prior to [the defendant's] arrest establishes that the photographs were developed at a time pertinent to the inquiry, that is, at a time prior to when [the defendant] was charged with knowingly and intentionally possessing marijuana. The fact that [the defendant] and the marijuana could be identified establishes that the photographs accurately portrayed those subjects. Thus, the record establishes an adequate foundation for those five photographs.

Id. at 741-42, 566 N.W.2d at 747.

While each of these cases involved still photographs, it is well established that the same evidentiary principles apply to videotapes. See, *Dept. of Safety v. Cole*, 342 Md. 12, 672 A.2d 1115 (1996); *Midland Steel v. U.A.W. Local 486*, 61 Ohio St. 3d 121, 573 N.E.2d 98 (1991); *Kindred v. State*, 524 N.E.2d 279 (Ind. 1988); *Straughn v. State*, 876 So. 2d 492 (Ala. Crim. App. 2003); *Brooks v. Com.*, 15 Va. App. 407, 424 S.E.2d 566 (1992). In the instant case, the State presented sufficient foundation to support the finding that the videotapes depicted what they were purported to depict. Roeder's testimony, summarized above, connects the people on the videotapes with the likely time and location of the creation of the videotapes. There is no evidence to suggest that exhibit 15 or 16 was tampered with or altered, particularly given that the videotapes were in possession of Mataya's Babydolls until they were seized by police. There is no evidence from which to infer that the State deliberately tampered with the videotapes, particularly given the presumption of regularity in the handling of exhibits by public officials. See *United States v. Stearns*, 550 F.2d 1167 (9th Cir. 1977) (finding photographs accurate when they were in possession of persons in privity with defendant until seized by police).

The county court did not abuse its discretion in admitting the videotapes at issue in this case. The contents of the videotapes, together with the information obtained from the police investigation, provided "evidence sufficient to support a finding that the matter in question is what its proponent claims." See rule 901. Anglemyer's first assignment of error is without merit.

Excessive Sentence

Anglemyer argues that the county court imposed an excessive sentence, because "it is obvious from a reading of the Order of Sentencing that the Court focused on [Anglemyer's] relationship with . . . Ways and appears to sentence [Anglemyer] due to that relationship." Brief for appellant at 7. Anglemyer claims that "[t]he County Court Judge repeatedly indicated [Anglemyer's] relationship with . . . Ways and repeatedly referred to the things that . . . Ways did and thus, she must be doing the same things and must now receive a maximum sentence." Brief for appellant at 7-8. Anglemyer also argues that the court failed to consider mitigating factors.

[14-17] An examination of the sentencing order does not support Anglemyer's argument. In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004). Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *Id*. A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000).

The trial court in this case appropriately considered evidence from the presentence investigation report indicating the scope of the enterprise in which Anglemyer was engaged. To the extent that the court considered Anglemyer's association with Ways, the "guilt by association" is limited to Anglemyer's association with an ongoing commercial venture to produce illegal material of the type presented in this appeal. Obviously, that consideration is neither irrelevant nor inappropriate. Our review of the

record reveals no abuse of the trial court's discretion in sentencing. Anglemyer's second and final assignment of error is without merit.

CONCLUSION

The videotapes pursuant to which Anglemyer was convicted were sufficiently authenticated and were properly admitted into evidence. The district court also did not err in affirming the county court's sentencing of Anglemyer. Consequently, the judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF AARON D., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. LORENA D., APPELLANT.

691 N.W.2d 164

Filed January 28, 2005. No. S-04-590.

1. **Parental Rights: Evidence: Appeal and Error.** In an appeal from a judgment or order terminating parental rights, an appellate court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code.
2. **Juvenile Courts: Parental Rights.** A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
3. **Parental Rights.** A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one.
4. **Parental Rights: Evidence: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
5. **Parental Rights: Evidence: Proof: Words and Phrases.** The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
6. **Parental Rights: Evidence: Proof.** Where termination of parental rights is sought solely pursuant to Neb. Rev. Stat. § 43-292(7) (Reissue 2004), proof that termination is nonetheless in a juvenile's best interests will, necessarily, require clear and convincing evidence of circumstances as compelling and pertinent to a child's best interests as those enumerated in the other subsections of § 43-292.

7. **Parental Rights: Rules of Evidence: Due Process.** While the Nebraska Evidence Rules do not apply in juvenile proceedings, the basic requirements of due process oblige a court to consider the type of evidence used by the State in order to determine the weight to be given to that evidence.
8. **Parental Rights: Juvenile Courts: Pleadings.** Because the primary consideration in determining whether to terminate parental rights is the best interests of the child, a juvenile court should have at its disposal the information necessary to make the determination regarding the minor child's best interests regardless of whether the information is in reference to a time period before or after the filing of the termination petition.
9. **Parental Rights.** The State cannot prove that termination of parental rights is in a child's best interests by implementing an unreasonable rehabilitative plan.
10. **Juvenile Courts: Parental Rights.** Termination of parental rights is permissible in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code.
11. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Reversed.

Richard Register and Christina C. Boydston for appellant.

Jeri L. Grachek, Deputy Dodge County Attorney, for appellee.

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

GERRARD, J.

Aaron D. was removed from the residence of his mother, Lorena D., on May 20, 2002, following a report that he had inappropriately touched his younger sister, Carmen S. The State petitioned to terminate Lorena's parental rights on October 22, 2003, on the sole ground that Aaron had been in out-of-home placement for 15 or more months of the most recent 22 months. See Neb. Rev. Stat. § 43-292(7) (Reissue 2004). The county court, sitting as a juvenile court, terminated Lorena's parental rights, and she appeals.

BACKGROUND

Aaron was born on August 12, 1994, and was 9 years old at the time of trial. Aaron had first been removed by law enforcement from Lorena's residence in Fremont, Nebraska, on October 22, 1998, because of some bruises reported on Aaron's older brother,

Irving D., but was out of the home only until December 9. However, the Department of Health and Human Services (the Department) continued to monitor the family. Irving was 7 years old at the time and had been diagnosed with Duchenne's muscular dystrophy, making him a special needs child. In August 2001, Irving was placed in a group home because of Lorena's difficulties in meeting his needs. Irving remained in this placement at the time of trial because of his medical needs; Irving's disposition and Lorena's parental rights with respect to Irving are not at issue in this appeal. The record reflects that Aaron has three younger siblings, including Carmen, whose respective dispositions are not at issue in this proceeding. The parental rights of Aaron's father have also been terminated and are not at issue in this appeal.

Lorena testified in her own behalf, through an interpreter. Lorena testified that she had completed her education in Mexico and had tried to learn English in the United States, but "it doesn't stick." Lorena testified that Aaron was born in Mexico but that she brought Aaron to the United States with Irving because she was seeking better medical care for Irving. Irving's condition could be fatal at an early age. Lorena's immigration status is not relevant to our analysis of this appeal, except insofar as it has affected her ability to obtain transportation and employment.

The Department increased family support services to Lorena in January 2002 due to Aaron's inappropriate behaviors and Lorena's inability to control them. The State adduced testimony from Nancy Wright, a protection and safety worker for the Department. Wright was the caseworker for Aaron and Irving. Wright testified that Aaron's behaviors included running away from his house, stealing bicycles from school, and physical aggression toward other children at school and that Lorena had been unable to control those behaviors. Lorena testified that Aaron had been a "good kid" but that his behavior had changed. Lorena said that Aaron's behavior had changed as Irving's health deteriorated and that Aaron became jealous when Lorena gave birth to Carmen on December 2, 1998. Lorena testified that Aaron's behavior again became worse after Irving left the home, explaining that " '[h]e became more — like I don't know, maybe he wanted to let people know — or wanted to let it be known how he was feeling because his brother had left.' "

Aaron was again removed from Lorena's home on May 20, 2002, by law enforcement, immediately after a report that Aaron had inappropriately touched Carmen. Lorena testified that when Carmen was about 3 years old and Aaron was about 7 years old, Carmen reported that Aaron had, with his finger, touched her "colita," which can mean "rear end," but which Lorena understood to refer to Carmen's genitals. Carmen had clothes on at the time. Lorena said that she told Aaron that Carmen was his sister; that he needed to protect her, not harm her; and that if Carmen was touched again, Lorena would have to call the police. Lorena also testified that after the incident, she paid more attention to what Aaron and Carmen were doing. Lorena did not report this incident to anyone from the Department, but about 2 weeks later, Carmen told the family support worker. Lorena testified that she was not given a chance to explain what she had done in response to the incident and that " '[t]hey didn't let me say anything. They just came and took him and that was that.' "

Aaron was adjudicated on July 10, 2002, pursuant to Neb. Rev. Stat. § 43-247(3)(b) (Cum. Supp. 2002). No appeal was taken from the adjudication. Aaron was initially placed in treatment foster care, which involves constant evaluation and psychological or psychiatric care. Aaron was then placed in agency-based foster care, which is intended to respond to children with more severe behavioral problems by providing foster parents with an agency that provides additional training and support. Wright testified that Aaron's behaviors had improved by the time of trial and that while he still had occasions of "acting out" in school, his behavior was not as violent, consisting more of attention-seeking rather than assault. Lorena testified that according to the Department, Aaron's behavior became worse after he had been removed from her home, but that she did not see that behavior during visits.

After Aaron's adjudication, the Department developed case plans for Lorena. No appeals were taken from any dispositional orders. Wright testified that Lorena's case plans had included two general goals: to provide a safe and appropriate living environment for herself and her children, and to parent her children in an effective and appropriate manner. The goal of providing a safe environment included finding and maintaining appropriate

housing, with which Wright testified Lorena had some difficulty, having been evicted from her residence twice during Wright's management of the case. Lorena was also expected to obtain and maintain sufficient employment to financially support her family, which goal Wright said Lorena was also unable to consistently achieve. Lorena said she was unable to obtain consistent employment because of her immigration status.

Lorena received food stamps, Medicaid, and assistance with her utility bills. The case plan required Lorena to prepare a household budget, which she was unable to do. Lorena had been providing a residence for the family by living with her boyfriend, Rigoberto S. (Rigo), who paid the rent and bills and provided food and clothing for Lorena and her children. Rigo and Lorena had lived together for 6 years, and he was the father of her two youngest children. Wright testified that Rigo had, at the time of trial, been incarcerated for 6 to 7 months, but Lorena testified that Rigo had been deported to Mexico. Lorena testified she was paying the rent with the help of welfare and by selling " 'noodle and tamales' " to other Hispanic families.

Lorena's second goal of effective parenting included identification and elimination of risk conditions or behaviors in her home, including domestic violence issues and single parenting issues. According to Wright, Lorena was to learn and consistently implement age-appropriate and effective discipline and communication skills, develop household rules, and obtain materials to educate herself about child growth and development. Wright testified that there had been an incident in which Rigo had pushed Lorena, and Lorena had broken a beer bottle over his head, cutting him. Rigo was apparently arrested and incarcerated on August 26, 2003; his charges, according to the Department's report, included "Failure to Appear—Driving under Suspension, No Proof of Insurance; Fugitive from Justice/Failure to Pay Costs/Fines—DUI (Douglas County); and Fugitive from Justice/Failure to Appear—DUI 3rd (Platte County)." The record suggests that Rigo had a problem with alcohol prior to his incarceration.

Wright testified that Lorena had been asked to see a therapist, but that Lorena had never sought an authorization from the Department to see a particular provider. Wright said, however, that Lorena might have seen Maria Goede, who had been the

therapist for the family and the individual therapist for Irving and Aaron. Wright testified that the Department's family support worker had tried to provide Lorena with classes or instruction on parenting skills, but that despite "all of her attempts to work on parenting education and parenting skills, Lorena just did not seem to be interested in [working on those skills] at the time." Lorena testified that her first family support worker had been helpful to her in learning parenting skills, but that the replacement family support worker had not been helpful. Lorena also testified that the Department had tried to get her to take parenting classes in Sioux City, a considerable distance from Fremont, despite her lack of reliable transportation. Wright stated that Lorena had reported, in May 2003, that she was going to work with Goede on parenting skills, but had not yet started. Lorena testified that she met with Goede for counseling sessions and had worked with Goede on parenting skills, although they had stopped the classes after Lorena's baby was born in July 2003.

Goede testified that she had a master's degree in counseling and was a certified professional counselor and licensed mental health practitioner. She had been a caseworker with the Department from 1997 to 2001. Goede was first referred to Lorena's family to treat Aaron when he was placed in foster care in Norfolk, Nebraska, where Goede's practice was located. Goede later began treating Irving, Lorena, and Carmen. Goede testified that she had been making progress with Aaron, but that her treatment of Aaron was terminated in June 2003 following a meeting with Lorena and representatives of the Department. Goede stated that she had opined that Lorena's visits with Aaron did not need to be supervised and that the Department then terminated her services as Aaron's therapist based on a "conflict of interests." Wright testified that Goede was "not following with all of the therapy goals that we had requested her to do," because Goede disagreed with a proposal to change the reunification plan.

Goede also testified that she had worked with Lorena on parenting skills. Goede stated that Lorena watched a series of Spanish-language videotapes that modeled different types of parenting skills. Goede was also able to obtain a Spanish-language parenting program from Girls and Boys Town called "Common Sense Parenting," and Lorena participated in that as well. Goede

testified that Lorena had actively participated in that training, did her homework and reading assignments, and successfully completed all of the materials that Goede had given to her. Goede explained that she had set up situations in family sessions with Lorena and Carmen and that Goede had seen improvement in Carmen's behavior and how Lorena handled Carmen. Goede also testified that she had done home visits with Lorena and Carmen and had observed "growing structure in her home" environment as a result of the parenting skills instruction.

Goede testified that prior to the termination of her treatment of Aaron, he had been having behavioral issues, including sexual issues—for instance, pulling up a dress of another child in school. Goede opined that Aaron's behavioral issues were due, in large part, to the lack of structure in the home and that "Aaron was a very distressed kid certainly, especially during that time. And children will do some pretty funky things when they're distressed." Goede opined that Aaron could be harmed if his relationship with Carmen was cut off, because Aaron felt guilty about hurting Carmen, and would be unable to deal with that issue. Goede further opined that Aaron would be harmed by discontinuation of his relationship with Irving. Wright testified that termination of Lorena's parental rights would not affect the sibling relationship between Aaron and Irving because Aaron's foster parents were willing to provide visitation between the brothers.

Goede testified that she had seen Lorena and Aaron together twice before her treatment of Aaron was terminated. Goede described Lorena and Aaron's relationship as playful, warm, and comfortable. Goede opined that terminating Lorena's parental rights could result in a sense of abandonment for Aaron and that Aaron might blame himself. Goede did not opine on whether Aaron should be allowed to live with Lorena, because Goede was not, at the time of trial, "prepared to be able to answer that without knowing where things are with [Lorena] and what she is able to provide Aaron." Goede said that in her treatment of Aaron, he had consistently expressed a desire to live with Lorena, although he wanted to visit his foster mother. During Aaron's testimony, however, the following colloquy took place with the guardian ad litem:

Q- Do you remember me talking to you about whether you'd like to live with your [foster mother] or mom, Lorena, and visit the other one?

A- Yeah.

Q- Do you remember what you told me?

A- No.

Q- Okay. Is it possible that you told me you wanted to live with [your foster mother] and visit your mom, Lorena? You might have said that? Does that mean yes?

A- Yes.

Q- You love both [your foster mother] and mom Lorena?

A- Yes.

Q- And you don't want to hurt either one of their feelings?

A- Yeah.

Q- You agree with me, you don't want to hurt their feelings? Is that yes?

A- Yes.

Wright testified that Lorena's visitation with Aaron was initially set up as weekly, but that Lorena was inconsistent in that visitation. Wright stated that because Aaron had been placed in Norfolk, which is located some distance from Fremont, transportation services had been provided to Lorena. Lorena later testified that it was "an hour and a half, no less" from Fremont to Norfolk and that she did not have a driver's license, but she admitted that the Department had provided transportation after Aaron was placed in Norfolk. Visitation between Lorena and Aaron was also provided in Wayne, Nebraska, where Irving is placed, because Irving is wheelchair-bound and it was difficult to transport Irving to another location to allow the boys to be together for their visits with Lorena.

Between May 12 and October 22, 2003, Lorena missed 16 of 27 in-person visits and 17 of 21 telephone visits. At the request of Lorena and her attorney, Lorena's visitation with Aaron was reduced to monthly, although Lorena requested an increase to two visits per month shortly before trial. Lorena testified that she missed visitation "when I had the baby," because she got an infection and "the doctor said that I just couldn't be some place where I might pick up a bacteria." Lorena also testified that sometimes when she called to speak to Aaron, he was not available to

speak to her. The parties disputed the circumstances surrounding the cancellation or failure of particular scheduled visits. Wright admitted that Lorena had given birth in July 2003 and that Lorena had told Wright that Lorena was not permitted to travel on a few occasions before the child was born.

Lorena said that when she visited with Aaron, she was told by the family support worker that she was supposed to speak English to the children. Lorena claimed that she was not allowed to speak Spanish to Aaron, although the children speak Spanish and Lorena's English is very limited. The family support worker interpreted between Lorena and Aaron. Lorena also testified that the family support worker's Spanish was poor.

Wright admitted that a Spanish-language copy of Lorena's case plan had not been prepared for her until 2003. Lorena testified that she had been provided with case plans in English, that the requirements had been explained to her in Spanish, "and [that] they basically just told me what they wanted, and it wasn't until [the interpreter] actually read the whole thing to me in Spanish, that I thought that maybe I had made some mistakes." Even after the case plans were provided in Spanish, Lorena testified that there were still many words she did not understand.

Wright concluded her testimony with her opinion that the best interests of Aaron required permanency, which could only be provided by termination of Lorena's parental rights. Wright admitted, on cross-examination, that she had not been present for all of Lorena's visits with Aaron; Wright testified that she had been present "at least twice" during Lorena's visits "some time ago." Wright stated that her opinion was based on reports from the family support worker or visitation supervisor, although she admitted that one of the most recent supervisors did not speak Spanish. Wright was the State's only witness.

On April 23, 2004, the court ordered the termination of Lorena's parental rights. The court found that Aaron was wayward or habitually disobedient, uncontrolled by Lorena, and habitually truant. The court's order refers to an incident in January 2002 in which Aaron was suspended from school for striking another student, although this incident does not appear to be otherwise reflected in the appellate record. The court concluded that Lorena had not made progress in preparing her home or

circumstances for reunification. The court concluded that Aaron had been in out-of-home placement for 15 or more of the most recent 22 months and that it was in his best interests that Lorena's parental rights be terminated. Consequently, the court terminated Lorena's parental rights. Lorena perfected this timely appeal.

ASSIGNMENTS OF ERROR

Lorena assigns, as consolidated and restated, that the court erred in (1) determining that Lorena's parental rights should be terminated pursuant to § 43-292(7) and that it was in Aaron's best interests to terminate Lorena's parental rights, (2) not requiring the State to prove noncompliance with a reasonable rehabilitation plan prior to termination, (3) refusing to declare § 43-292(7) unconstitutional as violative of Lorena's substantive due process rights, (4) refusing to allow testimony about the history of Lorena's parental care, and (5) refusing to allow the testimony of Irving. Lorena also contends that the court had no jurisdiction to enter any order with respect to Lorena or Aaron due to the State's failure to notify her country of origin pursuant to the Vienna Convention on Consular Relations.

STANDARD OF REVIEW

[1] In an appeal from a judgment or order terminating parental rights, an appellate court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

ANALYSIS

[2-5] We turn first to whether the State proved by clear and convincing evidence that termination of Lorena's parental rights was in Aaron's best interests. It is well established that a juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. *In re Interest of*

Kassara M., 258 Neb. 90, 601 N.W.2d 917 (1999). Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests. *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003). The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999).

The State sought to terminate Lorena's parental rights solely on the basis of § 43-292(7). Section 43-292 provides:

> The court may terminate all parental rights . . . when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> (1) The parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition;
>
> (2) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection;
>
> (3) The parents, being financially able, have willfully neglected to provide the juvenile with the necessary subsistence, education, or other care necessary for his or her health, morals, or welfare or have neglected to pay for such subsistence, education, or other care when legal custody of the juvenile is lodged with others and such payment ordered by the court;
>
> (4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the juvenile;
>
> (5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period;

> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts to preserve and reunify the family if required under section 43-283.01, under the direction of the court, have failed to correct the conditions leading to the determination;
>
> (7) The juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months;
>
> (8) The parent has inflicted upon the juvenile, by other than accidental means, serious bodily injury;
>
> (9) The parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse; or
>
> (10) The parent has (a) committed murder of another child of the parent, (b) committed voluntary manslaughter of another child of the parent, (c) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent, or (d) committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child of the parent.

Section 43-292(7) operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent. Because the State proceeded solely under § 43-292(7), we must be particularly diligent in our de novo review of whether termination is, in fact, in Aaron's best interests. Generally, when termination is sought under other subsections of § 43-292, the evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interests of the juvenile, as it would show abandonment, neglect, unfitness, or abuse. Section 43-292(7) requires no such proof; thus, it is in the context of analyzing the best interests of the juvenile that courts must respect a parent's "commanding" interest in the accuracy and justice of the decision to terminate parental rights. See *In re Interest of Kassara M.*, 258 Neb. 90, 94, 601 N.W.2d 917, 922 (1999). As we stated in *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 257, 674 N.W.2d 442, 463 (2004):

> The 15-month condition set forth in § 43-292(7) serves the purpose of providing a reasonable timetable for parents to rehabilitate themselves. . . . But termination based on the ground that a child has been in out-of-home placement for 15 of the preceding 22 months is not in a child's best interests when the record demonstrates that a parent is making efforts toward reunification and has not been given a sufficient opportunity for compliance with a reunification plan.

(Citation omitted.)

[6] We do not mean to suggest that termination solely on the basis of § 43-292(7) cannot be appropriate. Obviously, there will be cases in which clear and convincing evidence to that effect will be presented. But that may prove difficult in cases where the record is insufficient to prove any of the other statutory grounds—i.e., where the parent did not abandon the child, did not neglect to protect or provide for a child, was not unfit or unable to parent, did not fail to participate in necessary rehabilitation, and was not abusive. In such cases, where termination of parental rights is sought solely pursuant to § 43-292(7), proof that termination is nonetheless in a juvenile's best interests will, necessarily, require clear and convincing evidence of circumstances as compelling and pertinent to a child's best interests as those enumerated in the other subsections of § 43-292.

Such evidence is lacking in this case. We acknowledge that the record does not reflect that Lorena has accomplished all of the goals set forth in her case plan. However, the record indicates she has progressed, and, as will be explained below, her "opportunities for compliance [with the case plan] may have been limited." See *In re Interest of Rebecka P.*, 266 Neb. 869, 881, 669 N.W.2d 658, 667 (2003). Most significant, however, is the failure of the State to produce the clear and convincing evidence required to show that termination would be in Aaron's best interests.

As previously stated, the sole witness to testify for the State at trial was Wright. Obviously, the Department's caseworker for a particular family is likely to be an important witness for all the parties. But here, the State used Wright as a proxy for all of the other witnesses whose expertise and testimony would have been helpful, and perhaps essential, in determining what was in Aaron's best interests. Wright's testimony was based to some

extent on her own observations, but in large measure on Wright's review of the records and reports generated by the family support workers, therapists, foster parents, and others who directly observed the parties.

[7] In short, much of Wright's testimony—and thus, much of the State's case—was based on hearsay. While the Nebraska Evidence Rules do not apply in juvenile proceedings, the basic requirements of due process oblige a court to consider the type of evidence used by the State in order to determine the weight to be given to that evidence. See, *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999); *Johanson v. Board of Ed. of Lincoln Cty.*, 256 Neb. 239, 589 N.W.2d 815 (1999). It is very difficult, with the record presented in this case, to give substantial weight to some of the key allegations made by Wright.

For instance, in Wright's final "Court Report," filed on the same date as the State's petition to terminate parental rights, one of the primary reasons cited for the decision to change Aaron's "permanency objective" to adoption—i.e., to terminate Lorena's parental rights—was that "it is reported that [Lorena] is unable to parent/manage her 4-yr old daughter during visits, forcing service providers to intervene." In other words, the State's evidence is Wright's report that *someone else* reported that Lorena was unable to manage Carmen. This hearsay contrasts sharply with Goede's testimony, which was based on her treatment of Lorena and Carmen and personal observation of the two of them together. As noted above, Goede testified that Lorena had participated in exercises intended to teach parenting skills, that Goede had seen improvement in Carmen's behavior and how Lorena handled Carmen, and that Goede had, on visits to Lorena's home, seen the home structure changing as a result of her parenting skills instruction. The foundation presented for Goede's testimony makes it more credible and persuasive than the hearsay evidence adduced by the State.

Similarly, Goede's testimony about her treatment of Aaron was not matched by the State with equally well-founded evidence. Goede admittedly had not treated Aaron for 7 to 8 months before trial, but testified, based on that treatment, that Aaron would be harmed by termination of his relationship with Lorena

and Carmen. We are mindful of Goede's conclusion. See *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003). Yet, the State presented no evidence to the contrary. The State did not present testimony from, or even reports or records authored by, any of Aaron's therapists subsequent to Goede. Absent a few instances during Wright's testimony where she referred to events occurring after the filing of the State's termination petition, the record is devoid of evidence showing what was happening in Aaron's life between the filing of the petition in October 2003 and trial in February 2004.

[8] Because the primary consideration in determining whether to terminate parental rights is the best interests of the child, a juvenile court should have at its disposal the information necessary to make the determination regarding the minor child's best interests regardless of whether the information is in reference to a time period before or after the filing of the termination petition. *In re Interest of Andrew M., Jr., & Marceleno M.*, 9 Neb. App. 947, 622 N.W.2d 697 (2001). Yet, the juvenile court in this case, and this court for its de novo review, was not provided with such evidence. Aaron's therapists did not testify. The Department's family support workers, who actually observed Aaron and Lorena, did not testify, nor did Aaron's foster parents, nor Aaron's teachers. The State seems to have forgotten that the focus of this proceeding is not Lorena, but Aaron, and the State thus did not present evidence directly adduced from many of the people most able to testify as to Aaron's condition, circumstances, and best interests, both before and after the filing of the termination petition. The standard for proving that termination of parental rights is in a juvenile's best interests is clear and convincing evidence, and the evidence in this record is, simply stated, neither clear nor convincing.

This is not to suggest that we are not concerned by some of the State's evidence, which raises doubts about Lorena's ability to be an effective parent. Lorena's unemployment, living situation, and failure to consistently visit Aaron are certainly troubling. But the record also suggests that those circumstances are mitigated by factors that were beyond Lorena's control. For instance, while Lorena's failure to observe her visitation arrangements is not completely explained by the record, the State did not contradict

Lorena's testimony, summarized above, that she was unable to reach some of her scheduled visits because of pregnancy and the needs of her other children. This would not be surprising, given the distance between Lorena's home and Aaron's foster home in Norfolk. It may well have been necessary, as Wright testified, to place Aaron in Norfolk in order to provide him with the services he required. Nonetheless, in determining the weight to be given to Lorena's inconsistent visitation, we cannot overlook the fact that Lorena's visitation plan was, from the outset, likely to fail, "not necessarily because she was unfit, but because she was poor and because she was located at such a great distance from the children." See *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 110, 368 N.W.2d 474, 480 (1985).

[9] Furthermore, the record does not contain any dispositional orders setting forth court-ordered rehabilitation plans, and we cannot review the reasonableness of case plans that are not contained in the record. The inadequacy of this record is not due to Lorena's failure to provide a record in support of claimed errors. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). Rather, the State failed to introduce that evidence in support of its contention that Lorena failed to meet the requirements of her rehabilitative plan, and is relying on Lorena's alleged failure to comply with requirements that are not fully evidenced by the record. The record contains only one "Case Plan and Progress Report," and that is the October 22, 2003, case plan that was attached to the court report filed by the State on the same day as its petition to terminate parental rights. We cannot determine from this record whether, or to what extent, Lorena's case plans were the subject of court order or court review. Compare *In re Interest of L.J., J.J., and J.N.J., supra*. The State cannot prove that termination of parental rights is in a child's best interests by implementing an unreasonable rehabilitative plan, see *id.*, and because no court-ordered plan is part of our record, the reasonability of the requirements imposed on Lorena is uncertain. Under those circumstances, we cannot find Lorena's alleged noncompliance with the requirements of her rehabilitation plan to be clear and convincing evidence that termination of her parental rights is in Aaron's best interests.

We also note Goede's uncontradicted testimony that Aaron would be harmed by the termination of his relationship with Carmen, which would be a de facto result of terminating Lorena's parental rights. Juvenile courts must recognize, if possible, the interests of siblings. *Id.* The benefits to Aaron of potentially maintaining a relationship with Carmen and his other siblings also weigh against termination of parental rights, in the absence of clear and convincing evidence that termination is nonetheless in Aaron's best interests.

[10] We have stated that termination of parental rights is permissible " '[i]n the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code . . . .' " *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 467, 598 N.W.2d 729, 741 (1999). Accord *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). After our de novo review of the record, we do not find clear and convincing evidence that termination was in Aaron's best interests. "[T]he law does not require perfection of a parent. Instead, we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child." *Id.* at 465, 676 N.W.2d at 384. Those things are present here.

[11] We conclude that the county court erred in finding that the State established, by clear and convincing evidence, that termination of Lorena's parental rights was in Aaron's best interests. Having so concluded, we do not address Lorena's remaining assignments of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Burke v. McKay*, 268 Neb. 14, 679 N.W.2d 418 (2004). However, because she contends that it presents a jurisdictional issue, we note Lorena's argument that the county court lacked jurisdiction because of the State's failure to notify the Mexican consulate of these proceedings pursuant to the Vienna Convention on Consular Relations, *signed* Apr. 24, 1963, art. 37, 21 U.S.T. 77, 102 (hereinafter the Convention), which provides:

> If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

> . . . .
>
> (b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State.

We are aware of authority contrary to Lorena's position that compliance with the Convention presents a jurisdictional prerequisite to an action. See *In re Stephanie M.*, 7 Cal. 4th 295, 867 P.2d 706, 27 Cal. Rptr. 2d 595 (1994). Cf. *Breard v. Greene*, 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998) (suggesting claimant must show prejudice resulting from alleged violation of Convention); Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 1, No. 128 (March 31, 2004) (courts must determine if violation of Convention caused actual prejudice).

But regardless of whether it is jurisdictional, we cannot analyze this issue because the only indication before this court of a violation of the Convention is the argument contained in Lorena's brief. In the absence of any evidence with respect to whether the State informed the Mexican consulate of Lorena's case, we cannot conduct a meaningful analysis.

CONCLUSION

The State did not present clear and convincing evidence that termination of Lorena's parental rights was in Aaron's best interests. The most persuasive evidence presented to the county court showed that while Lorena's improvement was sporadic, she had made progress toward being a capable parent for her children, despite significant impediments, some of which were Lorena's own doing, but some of which were placed in her path by the Department and other circumstances. The only expert testimony present in the record pertinent to how termination would affect Aaron indicated that he would be harmed by the termination of Lorena's parental rights. The State almost completely failed to provide the county court, and by extension this court, with testimony from many of the people whose opinions and observations would have been most pertinent to the principal issue—Aaron's best interests. The evidence the State did present

was largely based on hearsay and was simply not "clear and convincing."

The judgment of the county court is reversed.

REVERSED.

MARLIN E. RAUSCHER, APPELLEE, V.
CITY OF LINCOLN, APPELLANT.

691 N.W.2d 844

Filed February 4, 2005. No. S-03-894.

1. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **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.
4. **Equity: Estoppel.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.
5. **Equity: Estoppel: Limitations of Actions.** Equitable estoppel may be successfully asserted when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed.
6. **Equity: Estoppel: Fraud: Limitations of Actions.** Equitable estoppel is not limited to circumstances of fraud. The doctrine of equitable estoppel may be applied to prevent an inequitable resort to a statute of limitations as well, and a defendant may, by its representations, promises, or conduct, be so estopped where the other elements of estoppel are present.
7. **Equity.** Equity is determined on a case-by-case basis when justice and fairness so require.

8. **Equity: Estoppel.** Equity may be used under appropriate circumstances, and equitable principles may prevent one from asserting a particular defense when it would be unfair or unjust to allow that person to do so.
9. **Equity: Estoppel: Political Subdivisions: Limitations of Actions.** The State and its political subdivisions can be equitably estopped from relying on the statute of limitations upon a showing that the elements of equitable estoppel have been met, as well as compelling circumstances, where right and justice so demand in the interest of preventing manifest injustice.
10. **Equity: Estoppel.** A claim of equitable estoppel rests in equity.
11. **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.
12. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
13. **Actions: Pleadings: Wages: Attorney Fees.** In a wage claim brought under Neb. Rev. Stat. § 15-841 (Reissue 1997) against a city of the primary class, there is nothing in the plain language of Neb. Rev. Stat. § 48-1231 (Reissue 2004) that requires an employee to plead a specific cause of action for attorney fees or to file a separate proceeding for attorney fees in order to receive an award of attorney fees under the Nebraska Wage Payment and Collection Act.

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

Dana W. Roper, Lincoln City Attorney, and Joel D. Pedersen for appellant.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

The City of Lincoln (City) appeals the order of the district court for Lancaster County reversing the City's decision to deny the claim for unpaid wages filed by Marlin E. Rauscher, a retired City police officer. Following an evidentiary hearing, the district court ordered the City to pay Rauscher $2,685.79 in unpaid wages. The district court also ordered the City, in accordance with the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. § 48-1228 et seq. (Reissue 2004), to pay Rauscher's attorney fees. The City appeals.

We agree with the district court's ruling that the record in this case demonstrates that the City was equitably estopped from asserting the statute of limitations defense to Rauscher's wage claim. We further determine that the district court did not err in its determination that the City owed Rauscher $2,685.79 in unpaid wages. We conclude that the district court did not err in ordering the City to pay Rauscher's attorney fees in accordance with the Nebraska Wage Payment and Collection Act. Attorney fees are also awarded to Rauscher in connection with this appeal. We therefore affirm the district court's decision and enter orders accordingly.

STATEMENT OF FACTS

Rauscher worked as a police officer in the City's police department. He was employed by the City as a police officer during two separate time periods. His initial employment began in April 1962 and continued until March 31, 1963, when he terminated his employment. He rejoined the police department in late summer 1965 and continued his employment with the department until his retirement on February 14, 2001. Although there was some dispute at the district court level concerning Rauscher's first day of employment in 1965, the district court found that Rauscher began working on August 30, a finding the City does not directly dispute on appeal. The two wage-related issues in this appeal occurred during Rauscher's second period of employment with the City's police department. The first issue involves an alleged failure to pay Rauscher for his first 40 hours of employment, and the second issue involves an alleged failure to pay Rauscher for 56 hours of employment due to the implementation of a pay lag.

On February 22, 2001, Rauscher received his final paycheck from the City. Upon receipt of his check, Rauscher determined certain wages he believed were owed to him were not included in the paycheck. On February 28, Rauscher filed a claim with the City for unpaid wages pursuant to Neb. Rev. Stat. § 15-840 (Reissue 1997). The claim was later amended on July 16.

Section 15-840 governs cities of the primary class and provides:

> All liquidated and unliquidated claims and accounts payable against the city shall: (1) Be presented in writing; (2) state the name of the claimant and the amount of the claim; and (3) fully and accurately identify the items or services for

> which payment is claimed or the time, place, nature, and circumstances giving rise to the claim. The finance director shall be responsible for the preauditing and approval of all claims and accounts payable, and no warrant in payment of any claim or account payable shall be drawn or paid without such approval. In order to maintain an action for a claim, other than a tort claim as defined in section 13-903, it shall be necessary, as a condition precedent, that the claimant file such claim within one year of the accrual thereof, in the office of the city clerk, or other official whose duty it is to maintain the official records of a primary-class city.

Rauscher's claim, as amended, sought a total of 96 hours of unpaid wages, arising from two distinct periods of time. The first time period was from August 30 to September 3, 1965, during which Rauscher stated that the City withheld 40 hours of pay from his paycheck. The second time period began in September 1975 and continued through December of that year. Rauscher asserted that in September 1975, the City implemented a "pay lag" and withheld a total of 56 hours of pay from his paychecks over a 16-week period. Rauscher's claim, as amended, sought a total of $2,685.79 in back wages, representing 96 hours at the rate of $27.977 per hour.

In a letter dated November 7, 2001, the City stated that it had engaged in "a thorough review of [Rauscher's] claim [as amended]" and concluded that Rauscher had "not been harmed in any manner, either with respect to . . . payment received for work in 1965 or thereafter when the City instituted a pay lag." The City denied Rauscher's claim.

Rauscher appealed the City's denial of his wage claim pursuant to Neb. Rev. Stat. § 15-841 (Reissue 1997), which controls the appeal process relative to cities of the primary class. Section 15-841 provides that "[a]ny . . . claimant, after the disallowance in whole or in part of any such claim, may appeal therefrom to the district court of the county in which the city is situated in accordance with the procedures set forth in sections 15-1201 to 15-1205." Pursuant to Neb. Rev. Stat. § 15-1204 (Reissue 1997), Rauscher filed a petition with the district court. On June 7, 2002, Rauscher filed his second amended petition (petition), the operative petition for purposes of this appeal. In his petition, Rauscher

sought, inter alia, unpaid wages in the amount of $2,685.79. In his prayer for relief, Rauscher sought his court costs and attorney fees pursuant to the Nebraska Wage Payment and Collection Act, § 48-1228 et seq.

On August 9, 2002, the City filed an answer to Rauscher's petition. In its answer, the City denied it owed Rauscher unpaid wages and asserted as an affirmative defense that Rauscher's claim for wages was barred by the 1-year statute of limitations contained in § 15-840.

On April 1 and 2, 2003, the district court held an evidentiary hearing on Rauscher's petition pursuant to Neb. Rev. Stat. § 15-1205 (Reissue 1997), which provides, inter alia, that "[t]he district court shall hear the appeal as in equity and without a jury and determine anew all questions raised before the city." A total of five witnesses testified, and numerous exhibits were received into evidence, including Rauscher's pay stubs from his 1975 and 1976 paychecks and several memoranda prepared in 1975 by various City officials explaining the pay lag and the accounting for pay due when an employee left the City's service.

At trial, Rauscher testified concerning his claim for unpaid wages. As to the 40 hours of wages in 1965 that Rauscher claimed the City owed him, Rauscher explained that upon rejoining the City's police force on August 30, 1965, his first 40 hours of pay, from August 30 to September 3, were withheld and not paid to him. Rauscher stated that when he did not receive these wages, he spoke with Walter Mitchell, who was at that time the City's personnel director. As a result of his conversation with Mitchell, Rauscher testified as to his understanding to the effect that this withholding of wages was "a standard withholding that [the City did] with all of the employees" and that the 40 hours of wages would be paid to him in his final paycheck after he terminated his employment with the City.

In this regard, Rauscher testified that during his employment with the City from 1962 to 1963, his first 40 hours of wages had also been withheld by the City. He stated that after he ended this first period of employment on March 31, 1963, he received the previously withheld 40 hours of pay in his final paycheck.

Rauscher acknowledged that he knew in September 1965 that the City owed him for 40 hours of wages. Rauscher stated,

however, that based upon his understanding, partly as a result of his discussion with Mitchell and his previous experience with the City, he believed the 40 hours of wages withheld in 1965 would be paid to him when he terminated his employment with the City.

As to the 1975 wages that Rauscher claimed the City had withheld as a result of a pay lag, Rauscher explained that in September 1975, the City implemented a new schedule for calculating pay periods and releasing paychecks. As part of that process, Rauscher stated that Mitchell met with the City's police officers to explain the new schedule. According to Rauscher, he understood that as a result of the new schedule, the City was implementing a pay lag in which the City would withhold 7 hours of pay from 8 separate pay periods, or 16 weeks, beginning in September 1975 and ending in December 1975, for a total of 56 hours of pay.

Rauscher testified that as a result of the comments by Mitchell, Rauscher understood he would receive the wages withheld as a result of implementation of the pay lag when he terminated his employment with the City. Rauscher also testified that at the time Mitchell met with the police officers, Mitchell distributed a memorandum describing the pay lag. The memorandum, a copy of which was entered into evidence, explained the new pay schedule as well as the pay lag. The memorandum provided in part that "[a]t such time as an employee may leave the City service, there will be an accounting for all pay due." Rauscher also introduced into evidence copies of his pay stubs from this September to December 1975 time period, showing the pay withheld as a result of the pay lag. Rauscher testified that neither his 1975 pay stubs nor his 1976 pay stubs, the latter of which were also introduced into evidence, showed payment of the wages withheld as a result of the pay lag.

Rauscher acknowledged that he knew by December 29, 1975, that the wages withheld as a result of the 1975 pay lag had not been paid to him. Rauscher explained, however, that based upon his meeting with Mitchell and the memoranda Mitchell distributed to the police officers, Rauscher was led to believe that the 56 hours of wages withheld as a result of the 1975 pay lag would be paid to him when he terminated his employment with the City.

Rauscher testified that following his retirement on February 14, 2001, he received his final paycheck from the City. He stated

that when reviewing that check, he determined that the 40 hours of wages the City had withheld in 1965 and the 56 hours of wages the City had withheld in 1975 were not included. On February 28, he filed his claim with the City which he later amended for his total unpaid wages in the amount of $2,685.79.

In its order filed May 5, 2003, the district court reversed the City's decision denying Rauscher's claim. The district court concluded that based upon the evidence in the record, Rauscher had relied upon the City's representations that the unpaid wages would be paid to him upon the termination of his employment with the City and that he had relied upon these representations in not filing his claim until he did not receive the unpaid wages following his retirement. The district court concluded that the City was "estopped from now asserting a limitations issue on such [claim] when it was [the City's] affirmative representations that caused any delays in asserting the claim." The district court further determined that Rauscher was entitled to the wages he sought, and it entered an order in Rauscher's favor in the amount of $2,685.79. In its order, the district court also directed Rauscher to file a request for attorney fees.

On May 9, 2003, Rauscher filed an "Application for Attorney Fees and Expenses," which came on for hearing on June 20. In an order filed July 10, the district court sustained Rauscher's application for attorney fees and ordered the City to pay Rauscher $3,450 in attorney fees and $485.51 in costs. The City appeals the district court's award of unpaid wages and attorney fees to Rauscher. It has not appealed the award of costs.

ASSIGNMENTS OF ERROR

The City assigns various errors. In summary, the City claims, restated, that the district court erred (1) in determining that the City was equitably estopped from asserting the statute of limitations and (2) in determining that Rauscher was entitled to an award of attorney fees under the Nebraska Wage Payment and Collection Act.

STANDARDS OF REVIEW

[1] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided

that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

[2,3] Statutory interpretation presents a question of law. *Semler v. Sears, Roebuck and Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004). When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *City of Gordon v. Ruse*, 268 Neb. 686, 687 N.W.2d 182 (2004).

ANALYSIS

Timeliness of Claim Under § 15-840 and Evidence of Unpaid Wages

The City asserts that Rauscher's claim for unpaid wages was barred by the statute of limitations. We agree with the ruling of the district court that the City is equitably estopped from asserting a statute of limitations defense. The City also asserts that the evidence failed to establish unpaid wages were owed. We agree with the district court that Rauscher satisfactorily established that the City owed him unpaid wages of $2,685.79.

Section 15-840 provides in part as follows: "In order to maintain an action for a claim . . . it shall be necessary, as a condition precedent, that the claimant file such claim within one year of the accrual thereof . . . ." The City argues that Rauscher's claim for unpaid wages accrued within 1 year of the City's alleged failure to pay Rauscher those wages. In this regard, the City notes that Rauscher acknowledged that he knew by September 1965 and December 1975, respectively, that the City owed him unpaid wages. The City claims that the 1-year statute of limitations in § 15-840 had already run when Rauscher filed his claim in 2001.

Relying on the record which included admissible evidence of the City's actions and representations, the district court determined that Rauscher was possessed of a good faith belief that he would receive the withheld wages when he terminated his employment with the City. As a result, the district court concluded

that the City was estopped from asserting that the statute of limitations had run on Rauscher's claim.

[4,5] The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003). We have observed that equitable estoppel may be successfully asserted when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed. *Id.*

[6-8] We have recently noted that equitable estoppel is not limited to circumstances of fraud. The doctrine of equitable estoppel may be applied to prevent an inequitable resort to a statute of limitations as well, and a defendant may, by its representations, promises, or conduct, be so estopped where the other elements of estoppel are present. *Id.* Equity is determined on a case-by-case basis when justice and fairness so require. Equity may be used under appropriate circumstances, and equitable principles may prevent one from asserting a particular defense when it would be unfair or unjust to allow that person to do so. *Id.*

[9] We have previously recognized that the State and its political subdivisions can be equitably estopped from relying on the statute of limitations upon a showing that the elements of equitable estoppel have been met, as well as compelling circumstances, where right and justice so demand in the interest of preventing manifest injustice. See *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999) (concluding that City of Lincoln

could be equitably estopped from asserting statute of limitations defense against suit brought pursuant to Political Subdivisions Tort Claims Act).

[10] A claim of equitable estoppel rests in equity. *Olsen v. Olsen, supra*. Additionally, pursuant to § 15-1205, Rauscher's appeal of the City's denial of his wage claim "shall [be heard by the district court] as 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 trial court. *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

We have reviewed the record and note that there is evidence in the record, some of which we have summarized, showing that in 1965 and again in 1975, the City withheld wages from Rauscher's paycheck. Rauscher introduced documentary evidence in the form of a City memorandum and pay stubs in support of his testimony that wages of $2,685.79 were withheld and not paid. Rauscher testified that by virtue of the City's conduct and statements, he believed he would receive his unpaid wages when he terminated his employment with the City. There is also evidence in the record that during his period of employment from 1962 to March 31, 1963, the City had withheld wages from Rauscher's paycheck and that the withheld funds were paid to Rauscher when he left the City's employment. The record supports the district court's determination that Rauscher relied upon the assurances he received from the City, as well as his previous experience with the City, and as a result, did not pursue a wage claim when the City initially failed to pay Rauscher the wages he was due.

We have considered the parties' arguments and the record presented on appeal. It can be fairly said, based upon Rauscher's testimony, that he was lulled into a false sense of security that his unpaid wages would be paid upon the termination of his employment by the City, thereby causing Rauscher to subject his claim to a statute of limitations defense. We agree with the district court that the elements of equitable estoppel have been established and that Rauscher has demonstrated compelling circumstances, such that equitable estoppel should be applied to prevent the City from asserting the statute of limitations, because it would be unjust to allow the City to raise that defense when its own actions led to

Rauscher's delay in pursuing his claim. See *Woodard v. City of Lincoln, supra*.

On appeal, the City claims that it does not owe Rauscher wages attributable to the implementation of the pay lag in 1975. The City notes that it presented evidence intended to show that the wages withheld as a result of the 1975 pay lag had been repaid to Rauscher in December 1975. This evidence conflicts with Rauscher's evidence. The district court heard and observed the witnesses and accepted one version of the facts rather than another, and we give weight to the district court's resolution of this issue and its findings for which there is evidence that the City owed Rauscher $2,685.79. See *Trieweiler v. Sears, supra*.

Because equitable estoppel is appropriate in this case and the City cannot assert the statute of limitations as a defense, we agree with the district court that Rauscher's claim for unpaid wages was not barred by the statute of limitations. Further, the district court did not err in ordering the City to pay Rauscher unpaid wages in the amount of $2,685.79.

Attorney Fees Under Nebraska Wage Payment and Collection Act

After the district court entered judgment in his favor as to his unpaid wages, Rauscher filed an application for attorney fees in the amount of $3,450. The district court sustained the application. The City contends on appeal that the district court erred in awarding Rauscher attorney fees under the Nebraska Wage Payment and Collection Act, § 48-1228 et seq., in this proceeding brought under § 15-841.

With regard to an award of attorney fees, § 48-1231 provides in relevant part as follows:

> An employee having a claim for wages which are not paid within thirty days of the regular payday designated or agreed upon may institute suit for such unpaid wages in the proper court. If an employee establishes a claim and secures judgment on the claim, such employee shall be entitled to recover (1) the full amount of the judgment and all costs of such suit and (2) if such employee has employed an attorney in the case, an amount for attorney's fees assessed by the court, which fees shall not be less than twenty-five percent

> of the unpaid wages. If the cause is taken to an appellate court and the plaintiff recovers a judgment, the appellate court shall tax as costs in the action, to be paid to the plaintiff, an additional amount for attorney's fees in such appellate court, which fees shall not be less than twenty-five percent of the unpaid wages.

The City claims the district court erred in awarding Rauscher attorney fees under § 48-1231, because Rauscher either did not plead a separate cause of action for attorney fees in the instant case or failed to file a separate lawsuit under the Nebraska Wage Payment and Collection Act. According to the City's argument, "§ 48-1231 provides a separate and independent cause of action for the recovery of wages . . . . Rather than proceed with a claim for unpaid wages under . . . § 48-1231, [Rauscher] chose to submit a claim to the City . . . and appealed from the denial of that claim." Brief for appellant at 33. The City also asserts that because Rauscher did not bring a separate "action under the [Nebraska] Wage Payment and Collection Act," *id.* at 32, he is not entitled to an award of attorney fees. The City misperceives the provisions of the Nebraska Wage Payment and Collection Act. We conclude that the district court did not err in awarding Rauscher attorney fees in the district court under the Nebraska Wage Payment and Collection Act in this case.

At the outset, we note that in his prayer for relief in the petition, Rauscher sought attorney fees against the City under the Nebraska Wage Payment and Collection Act. We further note that we have approved an award of attorney fees under the Nebraska Wage Payment and Collection Act in a wage claim against a city of the metropolitan class brought under Neb. Rev. Stat. § 14-813 (Reissue 1997). *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001). The parties do not dispute that the Nebraska Wage Payment and Collection Act applies to wage claims against the City. Compare *Thompson v. City of Omaha*, 235 Neb. 346, 455 N.W.2d 538 (1990) (noting that in 1988, Nebraska Wage Payment and Collection Act was amended to include political subdivisions as employers covered by act).

Although our comments were made prior to the inclusion of political subdivisions as employers under the Nebraska Wage Payment and Collection Act, we find our observations made in

Thompson v. City of Omaha, supra, instructive here. Indeed, in *Thompson*, we rejected an argument similar to that raised by the City in the instant appeal. In *Thompson*, the appellants claimed that the Nebraska Wage Payment and Collection Act was a "special provision in regard to wage claims" and was an alternate proceeding to the statutory provisions regarding filing claims with the city. 235 Neb. at 349, 455 N.W.2d at 540. We disagreed, and observed that in that action against a city of the metropolitan class, an "[a]pplication of the [Nebraska] Wage Payment and Collection Act would not alter the need to satisfy the requisites of the claims statutes." 235 Neb. at 350, 455 N.W.2d at 540. More importantly, in *Thompson*, we stated that the "[Nebraska] Wage Payment and Collection Act provides for the award of attorney fees and costs to a successful wage claimant and does not concern conditions governing claims against a city." 235 Neb. at 350, 455 N.W.2d at 540.

[11-13] We are asked to apply § 48-1231 to the instant case. 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. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004). Furthermore, it is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. *Hall v. City of Omaha*, 266 Neb. 127, 663 N.W.2d 97 (2003). Contrary to the City's argument, in a wage claim brought under § 15-841 against a city of the primary class such as the case before us, there is nothing in the plain language of § 48-1231 that requires an employee to plead a specific cause of action for attorney fees or to file a separate proceeding for attorney fees in order to receive an award of attorney fees under the Nebraska Wage Payment and Collection Act. It is consistent with the language of § 48-1231 that an employee pursue his or her claim against a city of the primary class in the district court under § 15-841 and, if successful in that proceeding, apply for an award of attorney fees under the Nebraska Wage Payment and Collection Act as a successful wage claimant therein.

In the instant case, Rauscher satisfied the requirements of the Nebraska Wage Payment and Collection Act. He "establishe[d] a

claim and secure[d] judgment on the claim" as required under § 48-1231 of the act. As such, he was "a successful wage claimant." See *Thompson v. City of Omaha*, 235 Neb. at 350, 455 N.W.2d at 540. Under the provisions of the Nebraska Wage Payment and Collection Act, Rauscher was entitled to an award of attorney fees, and we conclude that the district court did not err in ruling in favor of Rauscher and against the City in the amount of $3,450 for Rauscher's attorney fees incurred in the district court in this matter.

Remaining Assignments of Error

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

Attorney Fees on Appeal

Rauscher has filed an "Application for Attorney Fees and Expenses" in connection with this appeal pursuant to § 48-1231. The application is limited to a claim of attorney fees and is supported by an affidavit. See Neb. Ct. R. of Prac. 9F (rev. 2001). As noted above, § 48-1231 provides for an award of attorney fees "[i]f the cause is taken to an appellate court" and the employee is the successful party. Because we have determined that the district court's judgment in favor of Rauscher should be affirmed, Rauscher's application for attorney fees in this appeal is granted. Rauscher's application for attorney fees in this court in the amount of $3,540 is granted.

CONCLUSION

We agree with the district court that the City was equitably estopped from asserting the statute of limitations, and therefore the district court did not err in determining that Rauscher's claim for unpaid wages was not barred by the statute of limitations. The evidence supports the district court's judgment in Rauscher's favor in the amount of $2,685.79. We further determine that the district court did not err in awarding Rauscher his attorney fees incurred in this action in the district court pursuant to the Nebraska Wage Payment and Collection Act. We, therefore, affirm the decision of the district court in its entirety. Rauscher's application for attorney fees on appeal to this court made under the Nebraska Wage

Payment and Collection Act is granted, and we award Rauscher $3,540 pursuant to that application.

AFFIRMED.

CHRISTOPHER RANGE, APPELLANT, V. ABBOTT SPORTS COMPLEX, AN UNINCORPORATED ASSOCIATION, ET AL., APPELLEES.

691 N.W.2d 525

Filed February 4, 2005. No. S-03-1148.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in 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. ____: ____. 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.
4. **Negligence: Liability: Proximate Cause.** A possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the defendant should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.
5. **Negligence: Liability: Invitor-Invitee: Notice.** In order for a defendant to have constructive notice of a condition, the condition must be visible and apparent and it must exist for a sufficient length of time prior to an accident to permit a defendant or the defendant's employees to discover and remedy it.
6. **Negligence: Evidence: Liability: Juries.** In the absence of evidence to support an inference of the possessor's actual or constructive knowledge of a hazardous condition, the Nebraska Supreme Court has refused to allow a jury to speculate as to the possessor's negligence.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded for further proceedings.

Jeffry D. Patterson, of Bartle & Geier Law Firm, for appellant.

David A. Dudley, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees Ethel S. Abbott Charitable Foundation and Capital Sports Foundation.

John C. Brownrigg and Travis A. Ginest, of Erickson & Sederstrom, P.C., for appellee Lincoln Adult Soccer Association.

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

WRIGHT, J.

NATURE OF CASE

Christopher Range was injured while playing in a soccer match at the Abbott Sports Complex in Lincoln. He sued the Abbott Sports Complex; the Ethel S. Abbott Charitable Foundation, Inc. (Abbott Foundation); the Capital Sports Foundation, Inc. (CSF); and the Lincoln Adult Soccer Association (LASA). (The Abbott Foundation, the CSF, and the LASA are collectively referred to herein as "the appellees." The CSF was responsible for building and developing the Abbott Sports Complex, which is a site name only.) The Lancaster County District Court granted the appellees' motions for summary judgment, and Range appeals.

SCOPE OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

[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. *Id.*

FACTS

Range injured his right knee on April 26, 1998, while competing in a soccer match at the Abbott Sports Complex, a soccer facility operated by the Abbott Foundation. The event was sponsored by the LASA and the CSF. In his petition, Range alleged that he stepped in a hole with his right foot and that the hole was

a defective condition in the athletic field, not a condition created by use of the field for purposes of the soccer match. Range alleged that the appellees either knew of the hole or, in the exercise of reasonable care, would have discovered the hole. He claimed that as a proximate result of the appellees' negligence, he suffered serious and permanent injuries, including a rupture of his right patellar tendon and superior displacement of his patella. He sought damages of $16,000 for medical care and treatment; loss of earnings in excess of $10,000; future expenses for medical care and treatment; damages for impairment of future earning capacity; and past and future expenses for physical pain, mental suffering, disability, and embarrassment.

The trial court sustained the appellees' motions for summary judgment. It found that Range was a participant in the LASA division II soccer league in the spring of 1998 and that on April 26 at 1 p.m., his team was scheduled to play on field 13 at the Abbott Sports Complex. Range arrived at the complex 20 to 30 minutes before the match and warmed up. During this time, he did not notice any problems with the field. The center referee, Steven Stepanek, and the linesman referee, Nathan Sestak, also inspected the field prior to the match and did not notice any problems.

The trial court found that the first 80 to 85 minutes of the soccer match were played without incident. It noted that Range did not know how long the hole had existed. The court concluded that Range had failed to establish that the appellees had constructive knowledge of the hole. It found that Range had not submitted evidence from which it could be inferred that the hole had existed for a sufficient length of time prior to the injury and which would create a genuine issue of material fact as to whether the appellees had constructive knowledge of the hole. The court opined that Range had the burden to establish a prima facie case of premises liability. Since Range had admitted that there was no way of knowing how long the hole had existed, the court determined that the appellees were entitled to judgment as a matter of law. Range timely appealed.

ASSIGNMENTS OF ERROR

Range assigns as error the trial court's conclusion that the appellees were entitled to judgment as a matter of law and the

trial court's failure to conclude that a genuine issue of material fact existed regarding the appellees' constructive knowledge of the hole that allegedly caused Range's injury.

ANALYSIS

[3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). 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. *Washington Mut. Bank v. Advanced Clearing, Inc.*, 267 Neb. 951, 679 N.W.2d 207 (2004). 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. *Blue Cross and Blue Shield v. Dailey, supra*.

Range stated in his deposition that on the day of the injury, he arrived 20 to 30 minutes before the soccer match in order to warm up. He did not notice any problems with the condition of the field or any holes and did not hear anyone complain about the field's condition. Prior to that day, he had never observed a hole on any of the fields at the Abbott Sports Complex, nor had anyone else ever mentioned seeing a hole there.

Range described the incident as follows:

> I was 20 yards ahead of everybody, running straight down the field. The goalkeeper didn't come out, so I decided to veer off to the southwest corner to get an angle on the goal.
>
> . . . .
>
> . . . And before I had a chance — I was probably two or three steps away from taking a shot. I was running along. I felt — it felt similar to what you would feel if you were walking down stairs in the dark, you thought you were on the last stair, but there's still another one. It was just like I went to put my foot down and there was nothing there. Next thing I know, my kneecap is halfway up my thigh.

After the fall, Range rolled once or twice and tried to straighten his leg. He said that as he lay on the ground, he could see a hole

3 to 5 yards away, and he described it as "a small burrowing animal hole," about 4 to 5 inches wide. However, he did not talk to anyone about the hole. Range said he did not know how long the hole had been on the field, and he admitted there was no way of knowing how long it had been there.

Range said he was not aware of any defender in physical contact with him immediately prior to his fall, and the central defender was 10 yards behind him. After Range fell, he started cursing. He said one of his teammates tried to get him to stand up and get off the field, but when the teammate saw that Range's leg was injured, an ambulance was called. Range ruptured his patellar tendon and had surgery the next day. He has had five additional surgeries on the knee.

Stepanek, the center referee, stated that referees are taught to examine the field before a match. They walk through the penalty box area, across the field, and to the other end of the field. He said that he completed a walk-through inspection of the field on the day Range was injured. Stepanek did not see a hole in the penalty box or anywhere else on the field at any time on that date. He stated that it was the general practice for soccer players to report unsafe conditions to the referees and that no one reported to him that they had seen a hole prior to the match. If anyone had reported a hole in the field, the situation would have been addressed.

Sestak, another referee, served as the linesman. He said he customarily inspected the penalty box and goal area of the soccer fields prior to allowing a match to start. In this case, he inspected the areas and found no holes. Sestak agreed with Stepanek that it was the general practice among soccer players in Lincoln and Omaha to report unsafe conditions to the referees. Prior to the match, no one reported seeing a hole.

[4] A possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the defendant should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4)

the defendant failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff. *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003).

In granting summary judgment, the trial court opined that the dispute between the parties was whether Range could establish constructive notice to the appellees of the hole on the soccer field. To satisfy this burden, Range had to provide some evidence that the appellees either created the hole, had actual knowledge of it, or should have discovered it by the exercise of reasonable care. The court found there was no evidence that would sustain this burden.

According to Range, the issue is resolved by determining whether the referees, in their inspection of the field prior to the match, conformed their conduct to the appropriate standard of care in order to detect any problems on the soccer field. The trial court found that Nebraska case law disagreed with Range's position.

[5,6] In order for a defendant to have constructive notice of a condition, the condition must be visible and apparent and it must exist for a sufficient length of time prior to an accident to permit a defendant or the defendant's employees to discover and remedy it. *Cloonan v. Food-4-Less*, 247 Neb. 677, 529 N.W.2d 759 (1995). In the absence of evidence to support an inference of the possessor's actual or constructive knowledge of the hazardous condition, this court has refused to allow the jury to speculate as to the possessor's negligence. *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995).

The trial court reasoned that the appellees could be held liable only if the hole was visible and apparent for a sufficient length of time prior to Range's injury in order to impute to them constructive notice of the hole. Relying on our decision in *Herrera v. Fleming Cos., supra*, it concluded that Range could not establish that the appellees had constructive knowledge of the hole because he admitted there was no way of knowing how long the hole had existed and therefore the appellees were entitled to judgment as a matter of law.

In *Herrera*, a customer, Lorena Herrera, brought a slip-and-fall action against a grocery store after she slipped on a wet floor in the store's restroom. The district court granted the store's motion

for summary judgment. It found that Herrera had failed to establish that the store knew of the water on the floor or should have known of the water. The Nebraska Court of Appeals reversed, holding that the store had failed to make a prima facie showing that it had exercised reasonable care.

We reversed the decision of the Court of Appeals and held that a plaintiff in a premises liability case is required to adduce evidence showing that there was a negligent act on the part of the defendant and that such act was the cause of the plaintiff's injury. The evidence of negligence is insufficient if the finder of fact must guess at the cause of the accident.

At the summary judgment hearing, the store offered Herrera's deposition, in which she stated that she did not know how long the water had been on the floor. The store had a policy of keeping the floors clean, and the floors were regularly inspected for spills. Based on this evidence, we concluded that no reasonable inference could be drawn as to the length of time the water had been on the floor. There was no evidence or reasonable inference that the store created the condition, knew of the condition, or should have known of the condition. If those facts remained uncontroverted, the store was entitled to judgment as a matter of law. Herrera failed to produce any evidence from which a reasonable inference could be drawn that the store knew or by the exercise of reasonable care should have known of the water on the floor.

In the case at bar, the trial court concluded that *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003), was applicable because the appellees established that no one knew or should have known of the hole prior to Range's injury. This shifted the burden to Range to establish that the appellees knew or by the exercise of reasonable care should have known of the hole on the soccer field prior to the injury.

The question is whether Range is entitled to an inference that the hole was present on the soccer field prior to the start of the match. Before considering whether the appellees had constructive knowledge of the hole, the evidence must at least create a reasonable inference that a hole did in fact exist prior to the start of the match.

For purposes of summary judgment, we view the evidence in a light most favorable to Range and give him the benefit of all

reasonable inferences deducible from the evidence. Range testified that a hole caused his injury. From Range's description of the hole, it is reasonable to infer that the hole was not recently created. Although Range said he did not know how long the hole had been there, he described it as somewhat round and 4 to 5 inches in diameter with grass growing around it but not inside it. It appeared to be a hole made by a small burrowing animal, but Range did not observe loose dirt around the perimeter of the hole. From these facts, Range is entitled to an inference that the hole did not come into existence during the match.

In *Herrera v. Fleming Cos., supra*, it was not possible to infer how long the water had been on the restroom floor before Herrera entered the restroom and slipped. The puddle of water could have formed very quickly. A previous user of the restroom could have created the puddle. The length of time that the water was on the floor could not be determined, and no inference that it was there for a long period of time could be given in favor of Herrera. Inferences based upon guess or speculation do not create material issues of fact for purposes of a summary judgment. See *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004).

Range testified that the hole appeared to have been created by a small burrowing animal and that there was grass growing around it. In responses to interrogatories, he stated that there was no fresh or loose dirt around the perimeter of the hole. These facts support a reasonable inference, not mere speculation, that the hole existed prior to the start of the soccer match.

Therefore, giving Range the benefit of all reasonable inferences deducible from the evidence regarding the existence of the hole, we conclude that a genuine issue of material fact does exist as to whether the appellees had constructive knowledge of the hole. For this reason, the trial court erred in sustaining the appellees' motions for summary judgment.

CONCLUSION

For the reasons set forth herein, the judgment of the trial court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JAMES WIDTFELDT, RESPONDENT.

691 N.W.2d 531

Filed February 4, 2005. No. S-03-1312.

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.
2. ____: ____. When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the Nebraska Supreme Court may, at its discretion, adopt the findings of the referee as final and conclusive.
3. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
5. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
6. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
7. ____. To determine 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 disciplinary proceeding.

Original action. Judgment of suspension and probation.

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

George H. Moyer, of Moyer, Moyer, Egley, Fullner & Warnemunde, for respondent.

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

PER CURIAM.

The Counsel for Discipline of the Nebraska Supreme Court filed formal charges against James Widtfeldt alleging ethical violations. A referee was appointed who heard evidence and made recommendations. We order an indefinite period of suspension followed by a period of probation.

BACKGROUND

Widtfeldt was admitted to the practice of law in Nebraska in 1978 and entered practice in Holt County. He has a general practice and spends half of each day managing personal business affairs and the remainder practicing law. He has previously received a private reprimand for representing both sides of a controversy in a tax case that is unrelated to the current action.

This complaint arose after Widtfeldt filed improper motions and pleadings in several cases, stemming from difficulties he had with Attorney Forrest Peetz and the city of O'Neill. At the hearing before the referee, Widtfeldt admitted that he does not get along with Peetz and that his animosity toward Peetz had crept into his pleadings at times. The animosity stems from Peetz' 1979 purchase of a home from a judge (now deceased) and Widtfeldt's strong feelings against financial transactions between judges and attorneys. Widtfeldt stated that he remains troubled that the transaction occurred and that when he sees a judicial decision that he believes is incorrect, he worries there may be other transactions he is unaware of which may be influencing the decisions between attorneys and judges.

Widtfeldt also admitted that he experienced "significant friction" with the city of O'Neill over rental property and admitted that pleadings and motions in that case could appear to be based on personal animosity. However, he believes that his relationship with the city has improved.

The record contains examples of poorly drafted pleadings and motions that are lengthy and contain numerous, rambling, irrelevant details, making the pleadings difficult to understand. In one instance, Widtfeldt filed a motion in limine that had no relation to the alleged facts of the action. In another instance, a motion for a protective order filed by Widtfeldt against the city of O'Neill included three pages of allegations about perceived violations of various inspection laws or ordinances by the city attorney, Peetz, and another attorney.

In response to the complaint filed with the Counsel for Discipline, Widtfeldt filed lengthy responses containing irrelevant and inflammatory material. For example, Widtfeldt continued to malign Peetz and a judge about the sale of the house. In another instance, Widtfeldt's responses included multiple pages

of inflammatory allegations about Peetz' alleged drinking habits and behavior at bar association meetings. Widtfeldt compared Peetz to Adolf Hitler, stating: "Peetz['] mustache is not the only resemblance to a certain famous dictator who liked to circumvent the law, extract oaths of allegiance to himself personally, and exterminate defenseless civilians, religious and racial minorities in the 1940s." The responses also contained allegations about irrelevant sexual activity.

Widtfeldt underwent a psychological evaluation for this action. Mark P. Hannappel, a psychologist, concluded that while Widtfeldt has superior intelligence, he is likely to have difficulty understanding nonverbal interactions, is likely to " 'get caught up in the details,' " and sometimes misses the " 'big picture.' " Hannappel noted narcissistic and obsessive-compulsive personality features and concluded that personality issues interfere with Widtfeldt's ability to reason through certain issues and form working alliances with others. According to Hannappel, Widtfeldt can understand the disciplinary actions against him and can complete a plan to modify his behavior so that there is a much greater chance that the problems will not reoccur.

After a hearing, the referee found that the pleadings contained "irrelevant, immaterial and sometimes scandalous allegations" and that they included "vast quantities of verbiage having nothing whatever to do with the captioned matters." The referee further found that the pleadings were unnecessarily detailed and complex. They took a long time to read and were unnecessarily difficult to interpret, answer, or otherwise respond to. The referee also found, however, that Widtfeldt did not plead the cases with bad intent, but instead did so in an effort to zealously represent his client and rectify problems he saw in government and the judicial branch; a finding that we disagree with. The referee agreed that counseling would benefit Widtfeldt. Widtfeldt is willing to take additional coursework or continuing legal education and work with a mentor. He also agrees to undergo further evaluation and attend followup counseling.

The referee next found that Widtfeldt's actions interfered with the administration of justice and adversely affected his fitness to practice law in violation of Canon 1, DR 1-102(A)(1), (5), and (6), of the Code of Professional Responsibility, which states:

"DR 1-102 Misconduct. (A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (5) Engage in conduct that is prejudicial to the administration of justice. . . . (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law." The referee further concluded that Widtfeldt violated his oath of office as an attorney licensed to practice law in Nebraska under Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended that Widtfeldt (1) receive a public reprimand; (2) attend appropriate continuing education involving pretrial litigation; (3) consult for 1 year with a mentor, who will review Widtfeldt's pleadings and filings and file a report at the end of the year; (3) attend further counseling for 1 year; (4) be on probation for 1 year; and (5) pay costs and fees associated with the disciplinary proceeding. No exceptions have been filed.

ASSIGNMENTS OF ERROR

Neither Widtfeldt nor the Counsel for Discipline takes exception to the factual findings of the referee.

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. *State ex rel. Counsel for Dis. v. Janousek*, 267 Neb. 328, 674 N.W.2d 464 (2004).

ANALYSIS

[2] Because neither party has taken exception to the referee's factual findings, the sole issue is the appropriate discipline to be imposed. When no exceptions to the referee's findings of fact are filed by either party in a disciplinary proceeding, the court may, at its discretion, adopt the findings of the referee as final and conclusive. *Id*.

[3] To sustain a charge in a disciplinary proceeding against an attorney, the charge must be established by clear and convincing evidence. *Id*. Based on our review of the record and the undisputed findings of the referee, we determine that the facts have been established by clear and convincing evidence. Based on that evidence, we conclude that Widtfeldt has violated DR 1-102(A)(1), (5), and (6), as well as the attorney's oath required by § 7-104.

[4,5] The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Janousek, supra*. 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 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. *Id.*

[6,7] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases. *Id.*; *State ex rel. NSBA v. Flores*, 261 Neb. 256, 622 N.W.2d 632 (2001). To determine the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the disciplinary proceeding. *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002).

Here, the record shows that Widtfeldt has repeatedly filed irrelevant and abusive motions and pleadings. In addition—even while under investigation—his written responses to the Counsel for Discipline included irrelevant and abusive material. Widtfeldt admits that his actions were improper and violated provisions of DR 1-102. He is, however, willing to seek further counseling and education and work with a mentor. And we note that despite his bizarre responses to the Counsel for Discipline, Widtfeldt later sought psychological counseling and was cooperative in the disciplinary process. But we cannot ignore that Hannappel found that personality issues interfere with Widtfeldt's ability to reason through certain issues and form working alliances with others. It is clear that Widtfeldt requires further treatment. Thus, our main concern is fashioning a sanction that serves to protect the public. See *State ex rel. Counsel for Dis. v. Thompson, supra*.

We have said that in cases involving depression as a mitigating factor, a period of mandatory suspension coupled with terms of reinstatement will often be appropriate. *Id*. The suspension is not designed as punishment. Instead, it is meant as a time period in which the respondent can seek treatment without imposing a

danger to his or her clients. Once the respondent can demonstrate that treatment has resulted in a meaningful and sustained recovery, he should then be placed on a period of probation with treatment and practice monitoring components. See *id*.

Although Widtfeldt was not diagnosed with depression, he was found to be in need of psychological treatment. To ensure that Widtfeldt is properly treated before he returns to the practice of law, we disagree with the referee's recommendation of ordering solely probation and instead order a period of indefinite suspension followed by a period of probation of not less than 1 year. Widtfeldt may apply for reinstatement subject to the terms of probation. Upon application for reinstatement, Widtfeldt will have the burden of proving that he is fit to practice law under the terms of his probation. He will need to establish that counseling has resulted in behavioral changes that will allow him to practice law within the disciplinary rules. Such proof shall include a showing that he has continued counseling with a qualified therapist unless he is released from treatment.

Following readmission, Widtfeldt shall be subject to probation for not less than 1 year, which will include a monitor to review his pleadings. The Counsel for Discipline shall serve as the monitor. However, a practicing attorney may be substituted if Widtfeldt and the Counsel for Discipline can agree upon a practicing attorney who is willing to serve. See *State ex rel. Counsel for Dis. v. Thompson, supra*. If a practicing attorney does serve as the monitor, he or she shall not be compensated for his or her duties, but shall be reimbursed by Widtfeldt for actual expenses incurred. *Id*. At the end of the 1-year probationary period, it will be Widtfeldt's burden to show cause why the period of probation should not be extended for an additional year before he is released from probation.

CONCLUSION

We order that effective immediately, Widtfeldt be indefinitely suspended from the practice of law. He may apply for reinstatement consistent with the terms outlined above. Following reinstatement, he shall be subject to a term of probation for not less than 1 year, consistent with the terms outlined above. Widtfeldt shall comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and

upon failure to do so, he shall be subject to punishment for contempt of this court. In addition, Widtfeldt 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.

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
HEATHER R. WESTER, APPELLANT.

691 N.W.2d 536

Filed February 4, 2005. No. S-03-1382.

1. **Statutes.** The meaning of a statute is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve questions independently of the conclusion reached by the trial court.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **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.
5. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Statutes: Legislature: Intent: Words and Phrases.** The laxity in the use of the conjunctive "and" and the disjunctive "or" is so frequent that the doctrine has been accepted that they are interchangeable and that one may be substituted for the other if to do so is necessary to give effect to any part of a statute or to effectuate the intention of the Legislature.
7. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Reversed and remanded for further proceedings.

Julie E. Bear, of Reinsch & Slattery, P.C., for appellant.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

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

WRIGHT, J.

NATURE OF CASE

Heather R. Wester appeals from the order of the Cass County District Court which denied her motion to have certain convictions set aside. This appeal presents the issue of whether a person who is sentenced to a fine only may, after payment of the fine, petition the sentencing court to set aside the conviction.

SCOPE OF REVIEW

[1] The meaning of a statute is a question of law. *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004).

[2] When reviewing questions of law, an appellate court has an obligation to resolve questions independently of the conclusion reached by the trial court. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

FACTS

Wester was charged with one count of acting as a motor vehicle dealer without a license and one count of forging a title, both of which are Class IV felonies. See Neb. Rev. Stat. §§ 60-116 (Reissue 2004) and 60-1416 (Reissue 1998). The charges stemmed from Wester's selling too many motor vehicles during a calendar year without having an automobile dealer's license.

Prior to trial, the parties reached a plea agreement whereby the State would file an amended petition charging Wester with five Class I misdemeanors to which she would plead no contest. She entered the plea as a "best interest plea," which the district court accepted, and she was found guilty on all five counts. Wester was sentenced to a $250 fine for each of the counts of which she was convicted. She paid the fines the day of sentencing.

On September 18, 2003, Wester filed a motion to set aside her convictions pursuant to Neb. Rev. Stat. § 29-2264 (Supp. 2003). A hearing was held, and the district court issued an order denying the motion. The court reasoned that § 29-2264 allowed for the setting aside of a conviction only if a person had been sentenced to probation. Wester had been sentenced to a fine only, and therefore, the court concluded that her convictions could not be set aside pursuant to § 29-2264. Wester perfected a timely appeal.

ASSIGNMENTS OF ERROR

Wester argues that the district court erred by (1) finding that a sentence of probation is a necessary prerequisite to setting aside a conviction pursuant to § 29-2264 and (2) refusing to set aside her convictions pursuant to § 29-2264.

ANALYSIS

We are asked to determine whether a person who has been sentenced to a fine only is included within the class of those persons who may have their convictions set aside pursuant to § 29-2264.

The meaning of a statute is a question of law. *Cox Nebraska Telecom v. Qwest Corp., supra*. When reviewing questions of law, an appellate court has an obligation to resolve questions independently of the conclusion reached by the trial court. *Blue Cross and Blue Shield v. Dailey, supra*.

At all times relevant to this case, § 29-2264 provided in part:

> (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.

(Emphasis supplied.)

The district court construed § 29-2264 to allow the setting aside of a conviction in two distinct situations: (1) when the defendant has satisfactorily fulfilled the conditions of probation for the entire time and (2) when the defendant has been discharged from probation prior to termination of the period of probation and after the payment of any fine imposed. The court noted that the statute falls within the Nebraska Probation Administration Act and concluded that the defendant's being placed on probation is a prerequisite to having a defendant's conviction set aside.

Wester argues that the district court ignored the plain meaning of § 29-2264 and failed to consider the effect that a 1993 amendment to the statute had on its current interpretation. She asserts that the amendment expanded the statute to include circumstances in which a person has been sentenced to pay a fine only. She argues that the addition of the language "or is sentenced to a fine

only" has no significance unless it was intended to permit the setting aside of a conviction when the defendant has been sentenced to a fine only.

The State argues that the amendment has resulted in an ambiguity in § 29-2264(2). It claims that the phrase "or is sentenced to a fine only" conflicts with the portion of the statute stating that § 29-2264(2) applies only after fulfillment or discharge from probation and after payment of any fine. It therefore argues that the phrase "and after payment of any fine" must be construed as conjunctive. The State claims that if the Legislature intended for § 29-2264 to be applicable to those who have been fined only, the phrase would have to be disjunctive and would read " '**or** after payment of any fine.' " Brief for appellee at 5.

In *State v. Spady*, 264 Neb. 99, 645 N.W.2d 539 (2002), we held that § 29-2264 was constitutional and did not violate the separation of powers clause of the Nebraska Constitution. We stated: "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." *State v. Spady*, 264 Neb. at 104, 645 N.W.2d at 543.

[3-5] *Spady* is distinguishable from the case at bar in that the defendant in *Spady* was sentenced to probation. However, statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). 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. *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004). 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. Spady, supra*.

Prior to its amendment, § 29-2264 (Reissue 1989) stated, in relevant part:

> (2) Whenever any person is convicted of a crime and is placed on probation by the court, he may, after satisfactory fulfillment of the conditions of his probation for the entire

> period thereof, or after discharge from probation prior to the termination of the period thereof, petition the sentencing court to set aside the conviction.

The 1993 amendment added the language "or is sentenced to a fine only." We believe the purpose of such amendment was to include those persons who were sentenced to a "fine only" in the class of persons who are eligible to have their convictions set aside.

Part of the language in § 29-2264 (Supp. 2003) ("after discharge from probation . . . and after payment of any fine") may appear to exclude those who have been sentenced to a fine only. This interpretation would necessitate two conditions as prerequisites for the setting aside of a conviction: (1) the fulfillment or discharge of probation and (2) the payment of any fine. However, this interpretation fails to give effect to the language of the 1993 amendment which included those defendants who have been sentenced to a fine only.

[6] We have previously discussed the use of the words "and" and "or" in the context of statutory interpretation. The laxity in the use of the conjunctive "and" and the disjunctive "or" is so frequent that the doctrine has been accepted that they are interchangeable and that one may be substituted for the other if to do so is necessary to give effect to any part of a statute or to effectuate the intention of the Legislature. *Ledwith v. Bankers Life Ins. Co.*, 156 Neb. 107, 54 N.W.2d 409 (1952). See, also, *State ex rel. City of Grand Island v. Union Pacific R. R. Co.*, 152 Neb. 772, 785, 42 N.W.2d 867, 875 (1950) (" '[c]ourts will, when necessary to effectuate the obvious intention of the legislature, construe conjunctive words as disjunctive' "); *Carlsen v. State*, 127 Neb. 11, 19, 254 N.W. 744, 748 (1934) ("[i]n criminal statutes, when necessary to give effect to any part of a statute or to the intention of the legislature, the word 'and' may be substituted for 'or' and *vice versa*").

The meaning of a statute is a question of law, and we resolve this question independently of the conclusion reached by the trial court. It appears obvious that when the Legislature enacted the 1993 amendment to § 29-2264(2), it intended to include those who had been fined only within the class of those who could have their convictions set aside. In order to effectuate this intent, we conclude that § 29-2264(2) applies after (1) the satisfactory fulfillment of the conditions of probation for the entire period, (2)

the discharge from probation prior to termination of the period of probation, or (3) after the payment of any fine if the defendant has been sentenced to a fine only. Thus, the district court erred in concluding that Wester's being placed on probation was a prerequisite to the application of § 29-2264.

Wester also assigns as error the district court's refusal to set aside her convictions pursuant to § 29-2264. She asks us to remand the cause to the district court with instructions to do so.

Section 29-2264 indicates that it is the province of the sentencing court to set aside a conviction. Further, the statute gives guidelines to the sentencing court for determination of whether to set aside a conviction. In the present case, the district court was the sentencing court. However, the court denied Wester's motion for the reason that the statute did not apply because she had not been sentenced to probation. Therefore, the court never performed the analysis for setting aside convictions pursuant to § 29-2264.

[7] An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Scurlocke v. Hansen*, 268 Neb. 548, 684 N.W.2d 565 (2004). The district court did not analyze whether Wester's convictions should be set aside under the dictates of § 29-2264, and therefore, we are unable to reach the second assignment of error.

CONCLUSION

For the reasons stated above, the district court's order overruling Wester's motion to set aside her convictions is reversed and the cause is remanded for further proceedings to determine whether Wester is entitled to have her convictions set aside pursuant to § 29-2264.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LOUIS K. LIVINGSTON, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT, A MUNICIPAL CORPORATION, AND MUTUAL OF OMAHA INSURANCE COMPANY, APPELLEES.

692 N.W.2d 475

Filed February 11, 2005. No. S-02-310.

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. **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.
3. **Wages: Words and Phrases.** Deferred compensation is defined as compensation which is earned in exchange for services rendered.
4. **Statutes: Presumptions: 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. When the word "may" appears, permissive or discretionary action is presumed.
5. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
6. **Trial: Evidence: Appeal and Error.** An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.
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 Douglas County: GARY B. RANDALL, Judge. Affirmed.

Howard Kaiman and Edward W. Hasenjager for appellant.

Tijiuana R. Smith-Secret and A. Justin Cooper for appellee Metropolitan Utilities District.

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

MCCORMACK, J.

NATURE OF CASE

Louis K. Livingston brought a declaratory judgment action seeking a determination of the rights, duties, and obligations of the parties relating to his claim for lifetime long-term disability

(LTD) benefits pursuant to a policy of insurance issued by his former employer, Metropolitan Utilities District (MUD). At the conclusion of Livingston's case in chief, the district court granted a motion for directed verdict in favor of MUD. The district court subsequently denied Livingston's motion for new trial. Livingston appeals.

BACKGROUND

Livingston began employment with MUD on December 1, 1964. At trial, Livingston testified that he applied for the job with MUD in 1964. He claimed that MUD told him that the board of directors of MUD would be approving a lifetime LTD program the following year. Livingston testified that as a result of an automobile accident in 1963, he and his wife both sustained injuries. The prospect of becoming eligible for such a policy with a lifetime benefit, therefore, played a significant role in his decision to accept employment with MUD. Livingston also testified that he turned down another job offer for the reason that MUD offered better overall compensation and that the benefits package included the lifetime LTD plan.

In December 1965, Livingston became eligible for and enrolled in MUD's LTD plan. The 1965 LTD policy provided in relevant part:

> **Benefit for Loss of Time During Total Disability Due to Sickness or Accidental Bodily Injury**—If total disability of a protected person due to sickness or accidental bodily injury commences while the protected person is insured under the policy and is under the regular care and attendance of a legally qualified physician, and the protected person remains continuously so totally disabled throughout a duration equal to the Elimination Period, the Company will pay to the protected person the Monthly Income Benefit applicable to the protected person in accordance with the Plan of Insurance for each month . . . throughout which such total disability continues beyond the applicable Elimination Period, but not beyond the Benefit Expiration Date specified in the Plan of Insurance.

The policy defines "Benefit Expiration Date" as the "Lifetime of the protected person."

On June 17, 1991, Livingston became disabled and unable to work and received biweekly accident and sickness benefits from MUD. On or around June 5, 1992, Livingston received and read a certified letter from MUD stating that effective June 22, his accident and sickness benefits from and employment with MUD would end. The letter gave Livingston the option of applying for LTD benefits through its LTD carrier, retiring from MUD, or becoming a vested term employee under MUD's pension plan. Selecting the first option, Livingston, who was 59 years old at the time, applied for and was placed on LTD in July 1992 and began receiving a disability benefit of $2,023.93 per month. Notwithstanding his continuing disability, Livingston's LTD benefits terminated on April 13, 1998, his 65th birthday.

Livingston brought suit against MUD and the LTD carrier. He contended that he was entitled to lifetime LTD benefits as promised to him by MUD in 1964 and as provided in the LTD policy in effect in 1965 when he enrolled in the plan.

At trial, MUD argued that revisions were made to MUD's LTD policy between 1965 and 1992 and that those revisions were applicable to Livingston. The human resources manager for MUD, John Hemschemeyer, testified for MUD regarding a revision to the LTD policy effective September 1, 1967. Hemschemeyer testified that under the 1967 LTD policy, benefits expired when covered persons reach age 65. Hemschemeyer noted that there was no lifetime benefits language in the 1967 LTD policy. The 1967 policy was not offered into evidence.

Offered and received into evidence was a notice to all MUD employees from the compensation and benefits administrator dated November 30, 1979. The 1979 notice stated that the board of directors passed a resolution amending the LTD contract in several respects, but left in place the provision terminating benefits at age 65 for active employees who sustain total disability before age 60. Livingston acknowledged that if the 1979 notice was posted on an MUD office bulletin board, then he had seen it.

Hemschemeyer further testified regarding a revised LTD policy effective in 1989. Hemschemeyer testified that the 1989 policy provided a maximum benefits period extending to age 65 for covered persons sustaining total disability prior to age 60. Livingston testified that he received, but apparently did not read,

a copy of the 1989 insurance policy booklet setting forth the above-described provisions. The 1989 policy was offered and admitted into evidence.

At the close of Livingston's case in chief, MUD moved for a directed verdict, which the district court granted. The court found that the 1965 LTD policy was not ambiguous and that as a matter of law, the LTD benefits Livingston received were those guaranteed by the provision in the 1965 policy for benefits after age 65. The district court found that MUD made both the company's and Livingston's contributions to his retirement plan while he was on disability leave as required by the 1965 policy. The court further found that as a matter of law, MUD had the right to change its LTD policy as long as notice of the change was provided to employees. The court found that in this case, Livingston received sufficient notice of any purported change to the 1965 policy. Livingston filed a motion for new trial, which the district court denied. Livingston appeals. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Livingston assigns, renumbered and restated, that the district court erred in (1) finding that MUD had the right to change or modify the 1965 LTD policy; (2) finding that the 1965 LTD policy was not ambiguous and that it provided him with the same benefits he was currently receiving; (3) excluding from evidence photographs of Livingston's wife taken in the summer of 1963, showing injuries she sustained in an automobile accident; (4) receiving into evidence the June 5, 1992, letter from MUD; (5) allowing MUD to cross-examine beyond the scope of the pleadings, thereby allowing MUD to raise an affirmative defense not pled in its operative answer; (6) allowing MUD to cross-examine Hemschemeyer beyond the scope of direct examination; (7) participating in the cross-examination of Hemschemeyer beyond the scope of direct examination; and (8) making its ruling in reliance on certain testimony of Hemschemeyer.

STANDARD 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. *Saberzadeh v. Shaw*, 266 Neb. 196, 663 N.W.2d 612 (2003); *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003).

[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, when an issue should be decided as a matter of law. *Williams v. Allstate Indemnity Co.*, 266 Neb. 794, 669 N.W.2d 455 (2003); *Kinney v. H.P. Smith Ford*, 266 Neb. 591, 667 N.W.2d 529 (2003).

ANALYSIS

MUD's Ability to Modify LTD Policy

In his first assignment of error, Livingston argues that the district court erred in concluding that MUD had the right to modify the 1965 LTD policy. In support of his position, Livingston relies on *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982), and *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000). Both *Halpin* and *Miller* were decided under the Contracts Clause of the U.S. Constitution; thus, we interpret Livingston's first assignment of error as arguing that MUD's modification of the LTD policy was a violation of that clause.

Livingston's claim essentially argues that at the time he was offered and accepted employment with MUD, he was promised that he would have the option to obtain lifetime LTD coverage. He claims that he relied upon that promise in accepting employment with MUD and that he, in fact, applied for lifetime LTD coverage as soon as he was eligible. Livingston argues that his contractual rights were interfered with when MUD eliminated the portion of the LTD coverage which provided for lifetime benefits. In response, MUD argues that Livingston's reliance on the 1965 LTD policy was not reasonable and that Livingston suffered no detriment as a result of his reliance. MUD further argues that it had the right to modify the policy and that it provided sufficient notice to Livingston that modifications had been made.

Livingston's claim presents three issues: (1) whether the LTD policy at issue is akin to a pension or deferred compensation such that Livingston had a contractual right for the purposes of the Contracts Clause; (2) if Livingston did have such a right, then when did this right vest; and (3) whether MUD's modification violated the Contracts Clause.

We first turn to the issue of whether the LTD policy at issue is a pension. In *Halpin*, which Livingston cites in support of his argument that his contractual rights were unconstitutionally modified, we held that Nebraska has long recognized that pensions are not gratuities. In *Halpin*, the court held that a pension plan offered to officers of the Nebraska State Patrol was not a gratuity, but instead was "deferred compensation, earned in exchange for services rendered [and creates] in the employees reasonable expectations entitled to legal protection." *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. at 898, 320 N.W.2d at 914. As a result of the finding that the plaintiffs had expectations in the pension plan entitled to legal protection, this court went on to conduct a Contracts Clause analysis. In doing so, we concluded that the State Patrol's modification of the plaintiffs' pensions unconstitutionally interfered with the plaintiffs' contractual rights.

In *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995), this court was asked to determine whether a supplemental cost-of-living benefit offered by the city to its firefighters was a pension. In concluding that it was a pension, we noted that "the benefits were fixed when conferred, and only the *payment* of those benefits was deferred to a later date." (Emphasis in original.) *Id.* at 963, 531 N.W.2d at 548. In response to the city's argument that the supplemental benefit plan was not a pension but a gift, we noted further that

> if the city wanted to classify the supplemental benefit as a gift, it could have stated such in the ordinance enacting the supplemental benefit. Nothing in the enacting ordinance puts employees or potential employees on notice that the supplemental benefit could be taken away with the stroke of a pen. . . .
>
> . . . We find that due to the lack of information from which an employee could ascertain that the supplemental benefit plan was a mere gratuity from the city, the city treated the

> supplemental benefit plan like a pension. As noted above, if the city wanted to limit the scope of the supplemental benefit plan to that of a mere gratuity, it could have plainly stated so in the enacting ordinance.

Id. at 963-64, 531 N.W.2d at 548-49.

[3] Deferred compensation, again, is defined as compensation which is earned in exchange for services rendered. See, *Calabro v. City of Omaha, supra*; *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982). Unlike the pension plan in *Halpin* and the supplemental benefit plan in *Calabro*, the LTD policy at issue does not meet this definition. Enrollment in this LTD plan was purely voluntary on the part of MUD employees. The accrual of coverage under this policy was not contingent upon the rendering of services, but instead depended upon the payment of premiums and the occurrence of an injury. We determine that the LTD policy in this case is not a pension.

Further supporting our conclusion that the LTD plan is not a pension is Neb. Rev. Stat. § 14-1022 (Reissue 1962) (now codified at Neb. Rev. Stat. § 14-2111 (Cum. Supp. 2004)). That section provides, in relevant part:

> The board of directors of any metropolitan water or metropolitan utilities district *may* also provide benefits for, insurance of, and annuities for the present and future employees and appointees of the district covering accident, disease, death, total and permanent disability, and retirement, *all or any of them, under such terms and conditions as the board may deem proper and expedient from time to time.*

(Emphasis supplied.) § 14-2111(1). This section has remained substantively unchanged from 1962 to the present.

[4] 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. When the word "may" appears, permissive or discretionary action is presumed. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002). Thus we conclude that the use of the word "may" in this statute implies that the MUD board of directors has discretion with regard to whether any LTD plan is implemented. We further conclude that the use of the word "may," as well as the phrase "as

the board may deem proper and expedient from time to time," gives the board the discretion to modify those terms of employment enumerated in the statute, should the board see fit to do so.

Also relevant when analyzing the impact of former § 14-1022 is *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995). There, this court noted that the supplemental benefit plan was a pension and not a gratuity due in part to the lack of language in the enacting ordinance informing "employees or potential employees . . . that the supplemental benefit could be taken away with the stroke of a pen." *Id.* at 963, 531 N.W.2d at 548. The language required by *Calabro* regarding notice to employees and potential employees was provided by § 14-1022, which stated that a board of directors may provide benefits "under such terms and conditions as the board may deem proper and expedient from time to time." Thus, the board of directors retained the discretion to modify the terms of MUD's LTD coverage.

Having found that the LTD policy at issue was not a pension or deferred compensation, we conclude that Livingston had no contractual right in that policy for Contracts Clause purposes. For the sake of completeness, we note that *Omer v. Tagg*, 235 Neb. 527, 455 N.W.2d 815 (1990), appears to hold, with little analysis, that health insurance is akin to deferred compensation. To the extent that *Omer* is inconsistent with this opinion, it is disapproved.

Given the above conclusion, we need not undertake a Contracts Clause analysis in determining whether MUD unconstitutionally impaired Livingston's contractual rights. Such a conclusion does not end our inquiry, however. We must still determine whether MUD was otherwise prohibited from modifying the terms of the LTD policy.

As noted above, § 14-1022 (now codified at § 14-2111) provided that the MUD board may provide disability insurance to its employees and that the terms and conditions of such insurance may be set and modified by the board as the board deems proper. A review of the record shows that such terms and conditions were modified periodically throughout Livingston's employment, including, significantly, the elimination of the lifetime LTD benefits. We conclude that MUD was within its statutory authority in modifying the terms of the LTD policy it offered to its employees.

The district court did not err in finding that MUD had the right to modify the 1965 policy. Livingston's first assignment of error is without merit.

Policy Ambiguity

In his second assignment of error, Livingston argues that the district court erred in finding that the 1965 LTD policy was not ambiguous and that it provided him with the same benefits he was currently receiving.

[5] Having concluded that MUD had the authority to modify the LTD policy at issue, any change in Livingston's benefits was permissible. We need not, therefore, decide whether the 1965 policy benefits would be the same as Livingston's current benefits. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003).

Exclusion of Photographs

In his third assignment of error, Livingston argues that the district court erred in not admitting certain photographs taken of his wife following a 1963 automobile accident. Livingston argues that these photographs help establish his credibility with respect to his wife's injuries as being foremost in his mind when he accepted MUD's offer of employment.

[6] The district court refused to admit the photographs of Livingston's wife taken following the 1963 accident. At trial, however, Livingston was permitted to testify regarding that accident; he testified that his wife suffered injuries and that MUD's LTD benefits policy was a significant factor in his decision to accept MUD's offer of employment. Furthermore, Livingston's wife was also permitted to testify regarding the accident and the fact that she suffered injuries in that accident. We also note that our review of the record indicates that MUD presented no evidence or testimony which tended to call Livingston's credibility on the issue of his wife's injuries or his desire for LTD benefits into question. An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection. *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002). As a result, we conclude that even if the district court erred in the exclusion of the photographs, an issue we

do not decide, said error is without prejudice. Livingston's third assignment of error, therefore, is without merit.

Remaining Assignments of Error

[7] Livingston assigns five additional errors. In his brief, Livingston fails to raise or argue assignments of error Nos. 4 and 5. Errors that are assigned but not argued will not be addressed by an appellate court. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003). With respect to assignments of error Nos. 6 through 8, Livingston's argument consists of a few sentences which, in essence, restate Livingston's assignment of error with respect to that particular issue. These statements do not constitute the required argument in support of the assigned error. See *State ex rel. City of Alma v. Furnas Cty. Farms, supra*. We conclude that assignments of error Nos. 4 through 8 are without merit.

CONCLUSION

We determine that the court did not err in concluding that MUD had the ability to modify the LTD policy at issue. For the reasons set forth above, we conclude that the decision of the district court should be affirmed.

Affirmed.

Stephan, J., not participating.

In re Trust of Monroe D. Rosenberg, deceased. Marilyn J. Tipp, appellant and cross-appellee, v. William L. Reinbrecht, Successor Trustee and Personal Representative, appellee and cross-appellee, and Maynard Rosenberg, appellee and cross-appellant.

693 N.W.2d 500

Filed February 18, 2005. Nos. S-03-563, S-03-612.

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.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **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.
5. **Actions: Statutes.** Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
6. **Actions: Final Orders.** For purposes of Neb. Rev. Stat. § 25-1902 (Reissue 1995), a special proceeding includes every special statutory remedy which is not in itself an action.

Appeals from the County Court for Douglas County: LAWRENCE BARRETT, Judge. Vacated and remanded with directions.

Jerry W. Katskee, of Katskee, Henatsch & Suing, for appellant.

Howard N. Epstein, of Liakos, Epstein & Matukewicz, L.L.P., for appellee Maynard Rosenberg.

William L. Reinbrecht, of Car & Reinbrecht, P.C., L.L.O., pro se.

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

MCCORMACK, J.

NATURE OF CASE

These consolidated cases present issues related to the administration of the Monroe D. Rosenberg Trust Agreement. We conclude that we do not have jurisdiction over one of the issues presented on appeal. We further conclude that the county court's failure to hold an evidentiary hearing requires us to vacate, and remand for such a hearing.

BACKGROUND

In 1984, Monroe D. Rosenberg executed the primary instruments of his estate plan: a last will and testament and a trust agreement. Monroe's will made no provision for his wife or his three children from a prior marriage: Marilyn J. Tipp, Maynard

Rosenberg, and Howard Rosenberg. Instead, Monroe devised his estate to the trustee of his trust. Article VI of the trust created by Monroe provided that upon his death:

> [T]he Trustee shall transfer the trust estate as then constituted (including but not limited to any insurance proceeds, death benefits, or property receivable by the Trustee by reason of the Grantor's death and any property receivable by the Trustee pursuant to the will of the Grantor) into a separate trust, to be known as the "Family Trust" . . . .

The trust further provided that the assets of the family trust be divided equally between Monroe's living children. The trust's stated objective was to ensure that "the Grantor's issue will enjoy the benefits of and ultimately receive a substantial portion of the Grantor's estate." The trust named Tipp as successor trustee.

Monroe died on December 15, 2001. He was survived by his wife, Tipp, Maynard, and Howard. Monroe and his wife had previously entered into a prenuptial agreement, and she is not making a claim against the estate.

On April 22, 2002, Maynard initiated a proceeding in the county court under Neb. Rev. Stat. § 30-2806 (Reissue 1995). Maynard sought to remove Tipp as the trustee and also raised issues with respect to Tipp's administration of the trust. After a hearing, the county court removed Tipp as trustee on December 31, 2002, replaced her with William L. Reinbrecht, and ordered Reinbrecht to file an accounting within 90 days. Tipp did not appeal from this order.

In the months that followed, several items were filed with the court, as described in greater detail below, culminating with orders entered on May 1, 2003. As relevant to the assignments of error on appeal and cross-appeal, the court (1) did not surcharge Tipp for her management of a duplex, (2) ordered Tipp to return $10,000 to the trust stemming from a payment Monroe made to his wife, and (3) ordered Tipp to return to the trust the following assets owned by Monroe prior to his death: MetLife insurance policy proceeds, U.S. Bank account proceeds, First Federal Lincoln account proceeds, Nebraska State Bank account proceeds, Omaha Public Power District (OPPD) bonds, and U.S. Treasury notes. The court also ordered that trust funds be used to pay Tipp's attorney fees and costs as well as Reinbrecht's fees

and costs. Tipp filed her appeals to these orders on May 13 and 28, 2003.

ASSIGNMENTS OF ERROR

Tipp assigns that the county court erred in (1) removing her as trustee and replacing her with Reinbrecht; (2) ordering her to reimburse the trust $10,000, stemming from a payment made by Monroe to his wife; (3) ordering Tipp to pay to the trust the following assets: MetLife insurance policy proceeds, U.S. Bank account proceeds, First Federal Lincoln account proceeds, Nebraska State Bank account proceeds, OPPD bonds, and U.S. Treasury notes; and (4) approving the statement for services of Reinbrecht in the amount of $11,355.12.

On cross-appeal, Maynard assigns that the court erred in (1) failing to order that his attorney fees be paid from the trust, (2) awarding Tipp attorney fees from the trust, and (3) failing to surcharge Tipp for her management of the duplex.

STANDARD OF REVIEW

[1,2] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002).

ANALYSIS

Removal of Trustee

In her first assignment of error, Tipp argues that the district court erred in removing her as trustee. The court did so by an order entered on December 31, 2002, in which the court also appointed Reinbrecht to be the successor trustee and ordered him to file an accounting within 90 days.

[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. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). Maynard argues

that the court's December 31, 2002, order was a final order and that because Tipp did not file an appeal within 30 days of that order, we do not have jurisdiction over this issue. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2002).

[4] 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. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004); Neb. Rev. Stat. § 25-1902 (Reissue 1995). The district court's December 31, 2002, order did not determine the action and prevent a judgment, nor was it made on summary application in an action after judgment was rendered. Thus, we consider whether it was made during a special proceeding and affected a substantial right.

Nebraska law grants courts jurisdiction over subject matter relating to trusts. Prior to January 1, 2005, the operative date of the Nebraska Uniform Trust Code (NUTC), Neb. Rev. Stat. § 30-3801 et seq. (Cum. Supp. 2004), jurisdiction was granted to courts pursuant to § 30-2806 (repealed by 2003 Neb. Laws, L.B. 130), and expressly included jurisdiction over proceedings to remove a trustee. See § 30-2806(1). However, while this appeal was pending, the NUTC became operative. Now, the county court's jurisdiction over matters relating to trusts is codified at § 30-3814. In addition, the provisions dealing with removal of a trustee are codified at § 30-3862.

Section 30-38,110(a)(3) provides that the NUTC

> applies to judicial proceedings concerning trusts commenced before January 1, 2005, unless the court finds that application of a particular provision of the code would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of the code does not apply and the superseded law applies[.]

Thus, we are required to apply the NUTC in this case, absent "[substantial] interfere[nce] with the effective conduct of the judicial proceedings or prejudice [to] the rights of the parties." As

noted above, jurisdiction over proceedings to remove a trustee has been shifted from § 30-2806 to §§ 30-3814 and 30-3862. We find no prejudice to the parties in applying the NUTC in this case.

[5,6] Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). We have also stated that for purposes of § 25-1902, a special proceeding includes every special statutory remedy which is not in itself an action. *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003).

In *In re Estate of Snover*, 233 Neb. 198, 201-02, 443 N.W.2d 894, 897 (1989), this court stated:

> Any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the code and ending in a final judgment is an action. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding.

Under these rules, we conclude that a proceeding initiated pursuant to §§ 30-3814 and 30-3862 of the NUTC to remove a trustee is a special proceeding within the meaning of § 25-1902.

We also conclude that the removal of a trustee under §§ 30-3814 and 30-3862 affects a substantial right. Maynard analogizes the present case to the removal of a personal representative. We have held that a proceeding under Neb. Rev. Stat. § 30-2454 (Reissue 1995) to remove a personal representative for cause is a special proceeding within the meaning of § 25-1902 and therefore is a final order and is appealable, even though it may not terminate the action or constitute a final disposition of the case. See *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992). In *In re Estate of Snover*, we concluded that "[g]iven the scope of the personal representative's power over the interests of the beneficiaries and other interested parties in an estate, the right conferred by § 30-2454 to petition the county court to remove the personal representative for cause is a substantial right." 233 Neb. at 203, 443 N.W.2d at 898. The same can be said of proceedings to remove a trustee. Therefore, we conclude that the district court's December 31, 2002, order removing Tipp as trustee was a

final order. Tipp's failure to appeal from that order within 30 days precludes us from considering her first assignment of error.

Remaining Assignments of Error

Each of the remaining assignments of error on appeal and cross-appeal arose from the district court's May 1, 2003, orders. A recitation of the events leading up to May 1 is warranted.

After Reinbrecht assumed the duties of trustee, he filed several items with the court. On March 13, 2003, he filed an inventory of assets that Monroe owned at his death. On April 7, Reinbrecht filed a "Petition for Instruction and Application for Review of Fees," in which Reinbrecht requested "guidance" from the court regarding several issues, including whether various assets Tipp acquired at Monroe's death should be returned to the trust pursuant to article VI of the trust agreement. Those assets included: proceeds from a MetLife insurance policy, which named Tipp as the beneficiary; proceeds in a U.S. Bank account, which was held in the names of Monroe, his wife, and Tipp; proceeds from the First Federal Lincoln account and from a Nebraska State Bank account, both of which named Tipp as the payable-on-death beneficiary; OPPD bonds, and U.S. Treasury notes held jointly by Monroe and Tipp. Also on April 7, Reinbrecht filed an application for approval of his own fees and costs in the amount of $11,355.12. Finally, also on April 7, Reinbrecht filed a report in which he made numerous recommendations to the court. Those recommendations addressed many of the issues raised by Reinbrecht in his April 7 "petition for instruction."

Tipp filed a resistance to Reinbrecht's report in which she took exception to Reinbrecht's recommendations. Thereafter, on April 22, 2003, Maynard and Howard filed their own "application for instruction" in which they posed several questions to the court, sought answers, and made arguments. Tipp filed a resistance, arguing against Maynard and Howard's positions.

In light of all the items filed, the parties got together in court on April 28, 2003. No witnesses testified, and only one exhibit was offered and received into evidence: a one-page list, in Monroe's handwriting, of various bank account numbers and life insurance policy numbers. Instead, the parties' attorneys presented brief arguments, and the court announced its findings after

having "reviewed all the filings." Those findings were reduced to the written orders entered on May 1, 2003.

The court's failure to hold a formal evidentiary hearing prior to entering its May 1, 2003, orders is of great concern to us, as it was to us in *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004). In that case, the Douglas County Court entered orders in a conservatorship proceeding after engaging in discussions with the parties, but without receiving any *evidence* on which to base those orders. Such is the situation here. The court and parties assembled for arguments but examined no witnesses and received only one exhibit into evidence. As stated above, in the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002). The district court's May 1, 2003, orders are not supported by competent evidence. We vacate, and remand to the county court with directions to hold an evidentiary hearing.

VACATED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
LORELE LESOING-DITTOE, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V.
DOUG DITTOE, APPELLANT.

693 N.W.2d 261

Filed February 18, 2005. Nos. S-03-1004, S-03-1005.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record.

3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **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.

Appeals from the District Court for Lancaster County, KAREN FLOWERS, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE J. YARDLEY, Judge. Judgments of District Court reversed, and causes remanded with directions.

Mark A. Fahleson and Glen Th. Parks, of Rembolt, Ludtke & Berger, L.L.P., for appellants.

Jon Bruning, Attorney General, Kimberly A. Klein, Gary E. Lacey, Lancaster County Attorney, Alicia B. Henderson, and Jarrod P. Crouse, Senior Certified Law Student, for appellee.

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

WRIGHT, J.

NATURE OF CASE

The Lancaster County Court ordered that a dog owned by Lorele Lesoing-Dittoe and Doug Dittoe (collectively the Dittoes) be destroyed. The Lancaster County District Court affirmed the judgment of the county court, and the Dittoes appeal.

SCOPE OF REVIEW

[1] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Jensen, ante* p. 213, 691 N.W.2d 139 (2005).

[2] Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *Id.*

[3] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Guardianship &*

Conservatorship of Trobough, 267 Neb. 661, 676 N.W.2d 364 (2004).

FACTS

The Dittoes live on an acreage near Lincoln, Nebraska. They own a female malamute-shepherd mix dog named "Murphy." During 1996, Murphy left the Dittoes' yard on four separate occasions and attacked or injured other dogs in the nearby area.

The Dittoes took a number of steps to confine and train Murphy in order to prevent further incidents. Because Murphy was able to jump over a small fence that surrounded the Dittoes' backyard, they installed an invisible fence, but the system did not function properly and Murphy was shocked repeatedly. This system was removed, and in March 1997, the Dittoes installed a 6-foot-high three-rail iron fence at a cost of $20,000. Murphy was not involved in any further incidents until 2001.

On March 17, 2001, Doug inadvertently left a gate open. Murphy and another dog owned by the Dittoes ran at large while the Dittoes were out for the evening, and Murphy attacked a dog owned by John Matejovich. Matejovich stated that he heard yelping after he let his dog out onto the patio. He found Murphy holding his dog by the back of the neck. Matejovich separated the dogs and took his dog into the house. Matejovich's dog had a wound on the side of its neck, and 2 days later, he took the dog to the veterinarian. No stitches were required, and the veterinary bill was $34.06.

On March 19, 2001, the Dittoes were notified by the Lancaster County sheriff's office that Murphy had been declared a potentially dangerous dog pursuant to Neb. Rev. Stat. § 54-617(6) (Reissue 2004). A complaint was filed against Doug on March 22, alleging that Murphy had been allowed to run at large in violation of Neb. Rev. Stat. § 54-608 (Reissue 2004). A complaint was filed against Lorele on March 27, alleging that Murphy and a dog named "Chloe" had "wounded, injured, worried or chased" a domestic animal belonging to John or Beverly Matejovich. See Neb. Rev. Stat. § 54-601 (Reissue 2004). The Dittoes pleaded no contest to the charges.

On April 6, 2001, the State filed a motion for disposition of Murphy pursuant to Neb. Rev. Stat. § 54-611 (Reissue 2004). The

motion alleged that the "reasonable and proper" disposition was the destruction of Murphy. See *id*.

At a proceeding characterized by the State as a "sentencing hearing," Lorele testified that after the March 2001 incident, they added spring-loaded gates and padlocks to the fence and that there had been no further incidents of Murphy's leaving the yard. She stated that the Dittoes had set up fencing systems, taken Murphy to obedience school, and socialized her by visiting dog runs and by inviting other animals to their home. Lorele noted that Murphy was currently being supervised whenever she was in the backyard and that she had never exhibited any threatening behavior toward children or adults in the Dittoe home.

Doug testified that on March 17, 2001, he took Murphy and Chloe for a walk. When he returned, he forgot to close one gate, and the dogs got out while the Dittoes were away for the evening. Doug stated that the Dittoes had taken several steps to ensure that no future incidents would occur, including installing spring-loaded hinges on both fence gates, installing padlocks on the gates, and posting signs instructing that the gates must remain closed at all times. Doug did not believe that Murphy was a dangerous dog or that she needed to be destroyed.

Dr. Valerie Aliano, Murphy's veterinarian since 1995, testified that she had treated at least 10,000 animals over the course of 18 years of practice. Aliano stated that Murphy had never caused any trouble with other dogs while she was at Aliano's clinic. Murphy did not react aggressively even when invasive procedures were performed. Based on her training and experience, it was Aliano's opinion that Murphy was not a threat to other animals and that she should not be destroyed.

Lancaster County Sheriff Terry Wagner testified that he had personally spent time with Murphy and observed the steps that the Dittoes had taken to confine her. Based on his information and experience, Wagner agreed with Aliano's opinion that it would be unreasonable to destroy Murphy.

Six other individuals testified as to Murphy's nature and the steps taken by the Dittoes to contain her within the confines of their property. These witnesses had personally observed and spent time with Murphy, and in some instances, their children and pets had spent time with Murphy as well. Each witness testified based

on personal experience that destruction of Murphy was not reasonable or proper.

The county court found that the 1996 attacks appeared to be unprovoked and that in at least two of the cases, it appeared that Murphy was "stalking" the other dogs. The court opined that if Murphy got loose, she would be a threat to any dog, and that although the Dittoes had spent considerable money to erect and maintain a fence, they could not guarantee that Murphy would not get loose again. The court ordered that Murphy be confiscated by the Lancaster County sheriff's office, which acts as the animal control authority for the county, and that Murphy be destroyed in an expeditious and humane manner within 30 days of the order if no appeal was filed. In addition, Lorele and Doug were each fined $100 plus costs, and they were ordered to pay the Matejoviches' veterinary bill of $34.06.

The Dittoes appealed to the Lancaster County District Court, which ordered that Murphy remain in the custody of the Dittoes during the pendency of the appeal. The district court found no error on the record of the county court. It noted that the question was not whether the district court would have ordered Murphy's destruction, but whether the county court abused its discretion. It found no abuse of discretion, and it affirmed the judgment of the county court. The Dittoes timely appealed from that order.

ASSIGNMENT OF ERROR

The Dittoes make a number of assignments of error. However, we address only one because it is dispositive of this appeal: The district court erred when it found no error in the county court's conclusion that the destruction of Murphy was "reasonable and proper."

ANALYSIS

Section 54-611 provides:

> In counties having a population of eighty thousand or more inhabitants and cities of the first class contained in such counties, if upon final hearing the defendant is adjudged guilty of any violation of sections 54-601 and 54-608 to 54-610, the court may, in addition to the penalty provided in section 54-613, order such disposition of the offending dog as may seem reasonable and proper.

The issue is whether the destruction of Murphy was a reasonable and proper disposition.

In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Jensen, ante* p. 213, 691 N.W.2d 139 (2005). Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *Id*. When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004).

[4] However, because the dispositional order in this case is more akin to a sentence, our review is for abuse of discretion. See *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). 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. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004).

Upon a finding that the Dittoes were guilty of violating §§ 54-601 and 54-608, the county court was allowed to order "such disposition of the offending dog as may seem reasonable and proper." See § 54-611. The provision in § 54-611 that allows the court to order disposition is similar to Neb. Rev. Stat. § 29-2280 (Reissue 1995), which allows a court to order restitution to the victim of a crime. In that situation, restitution is " 'a criminal penalty imposed as punishment for a crime and is part of the criminal sentence imposed by the sentencing court.' " *State v. Holecek*, 260 Neb. 976, 981, 621 N.W.2d 100, 104 (2000). Therefore, we consider whether the county court abused its discretion when it ordered the destruction of Murphy.

In 1996, Murphy was involved in four separate incidents during which she attacked other dogs. No other incidents occurred until March 2001, when Murphy was inadvertently allowed to run at large. The incident resulted in what appears to be a relatively minor injury, in that the owner of the other dog waited 2

days to have the dog seen by a veterinarian and the bill for treatment was $34.06.

At the "sentencing hearing," no evidence was offered that Murphy has ever attacked or harmed a human. One owner of a dog that had been injured by Murphy 5 years earlier stated in an affidavit that Murphy should be destroyed, and two other dog owners testified to holding the same opinion.

Aliano, the veterinarian who had treated Murphy since 1995, testified based on her experience, education, and knowledge of dog behaviors that Murphy was an alpha dog, which is a dog that tries to assert dominance over other animals. If an animal submits, Murphy will not take any other action because "all she is trying to do is say, 'I'm top dog in this situation.' " Aliano said that the injuries inflicted by Murphy were consistent with an alpha dog type of confrontation. Aliano said that an alpha dog could be aggressive toward other dogs and yet pose no threat to humans. She stated that Murphy was not a threat to people. Aliano said Murphy's interaction with other dogs in the waiting room of the veterinary clinic had been appropriate, had been well controlled, and did not show any kind of aggression toward other animals. Aliano said she has never had to have a veterinary technician assist her to control Murphy, to use a muzzle on Murphy, or to have Murphy wait in an examination room rather than the waiting room.

Aliano, who had been a veterinarian for 18 years, opined that the Dittoes had "gone above and beyond what most people would do to correct the situation to make sure" that Murphy did not harm another dog. In her 18 years of practice, Aliano had seen a number of animals that were aggressive, but she had never had a problem with Murphy. She had on occasion recommended euthanasia for certain animals because of behavior problems and was not opposed to euthanasia because there were times that it was necessary. Because of the proper precautions that the Dittoes had taken, she believed that Murphy was not a threat. In Aliano's opinion, Murphy was not a dog that was going to go after any animal because it was prey. Murphy was less dangerous than many of the dogs Aliano treated. When asked for her opinion based upon her training and her personal observations of Murphy, Aliano replied that she "absolutely [did] not believe that [Murphy] needs to be destroyed."

The Lancaster County sheriff's office acts as the animal control authority for the county. Wagner, the Lancaster County sheriff, testified that he was familiar with dangerous dog situations. Wagner stated that he knew Doug from high school and had visited the Dittoe home on social occasions. Wagner was familiar with Murphy's past history, but he had never seen Murphy behave aggressively and did not consider her to be dangerous.

Wagner had observed the fence around the backyard of the Dittoe residence and described it as "[p]retty massive," "real substantial," and "it does a good job of containing the backyard." Wagner said the steps taken by the Dittoes were reasonable to confine a potentially dangerous dog. Based on his training and experience in law enforcement and on his personal observation of Murphy, Wagner did not believe a proper disposition would be to destroy Murphy.

Linda Vavrus, who worked as a gardener for the Dittoes, testified that Murphy and Chloe were very friendly dogs. The dogs greeted Vavrus and her employees at the gate and then watched the gardeners as they worked. Vavrus said none of her crew had ever been bothered by the dogs, and she had never witnessed any violent behavior on the part of either of the dogs. Vavrus said that she did not consider either Murphy or Chloe to be a dangerous dog and that neither should be destroyed.

A number of relatives and friends of the Dittoes testified that Murphy had not posed a threat to their children and other dogs. Cindy Rempe testified that her children have taken care of the Dittoes' dogs and stayed with them when no adult is present, including over weekends. She had never seen Murphy act aggressively toward her children, other humans, or other animals. Rempe said she did not believe Murphy was a dangerous dog and did not believe that she should be destroyed.

Lorele's sister, Jennifer Lesoing-Lucs, had a dog that played with Murphy. Lesoing-Lucs said her dog had never been injured as a result of playing with Murphy. Her opinion was that Murphy should not be destroyed because she was not a threat.

Donna Carlsen, Doug's sister, testified that she visited the Dittoes with her dog. Carlsen said she had never observed any acts of aggression or injury by Murphy or Chloe. Carlsen's children also play with Murphy, and there have been no aggressive

incidents toward her children. Carlsen said she did not believe Murphy should be destroyed.

Becki Seoane, a friend of the Dittoes, testified that her children and their friends have played with Murphy on a regular basis and that she had never observed or had reported to her any act of aggression by Murphy toward a child. Seoane did not consider Murphy to be a dangerous animal or an aggressive dog, and she did not believe Murphy should be destroyed.

Laird Haberlan, a friend of the Dittoes, said his 6-year-old son played with Murphy. Haberlan has no concern for his son's safety around Murphy, and he had never seen Murphy act aggressively toward his son, other people, or other animals. He did not believe Murphy should be destroyed.

Although there were some recommendations for Murphy's destruction from the owners of the dogs that had been attacked, neither Wagner nor Aliano agreed with those recommendations. Thus, the two expert witnesses who had personally observed Murphy's behavior and the location in which she was confined did not believe that it would be proper to destroy her. These individuals had previously dealt with aggressive animal situations during their professional careers and did not believe the dog should be destroyed.

It is apparent from the record that the Dittoes have gone to extraordinary measures to prevent the reoccurrence of the dog's escape. They have constructed a 6-foot-high iron rail fence at a cost of $20,000. The gate which allowed the dog to escape is now spring loaded and locked. It is also significant that Wagner testified that the fence was substantial and did a good job of containing the dogs. Wagner, as a government official responsible for enforcing the statutes governing dogs, opined that Murphy's destruction was not a proper disposition.

Pursuant to § 54-611, the county court may order such disposition of an offending dog as may seem reasonable and proper. Whether such disposition is reasonable is dependent upon the particular circumstances. Under the facts and circumstances of this case, we conclude that the order for the destruction of the dog was not reasonable. The county court therefore abused its discretion in ordering the destruction of the dog.

CONCLUSION

The judgments of the district court, which affirmed the combined judgment of the county court, are reversed, and the causes are remanded with directions that the district court shall enter orders reversing the judgment of the county court that ordered destruction of the dog named "Murphy."

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DONELL KING, APPELLANT.

693 N.W.2d 250

Filed February 18, 2005. No. S-03-1160.

1. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Effectiveness of Counsel: Proof.** Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in order to show ineffective assistance of counsel such that a conviction must be overturned, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
5. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
6. **Trial: Courts: Expert Witnesses.** The trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid, and whether that reasoning or methodology can be applied to the facts in issue.
7. **Trial: Rules of Evidence: Expert Witnesses.** A trial court's evaluation of the admissibility of expert opinion testimony is essentially a four-step process. The court must first determine whether the witness is qualified to testify as an expert. If it is necessary for the court to conduct an analysis under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), then the court must determine whether the reasoning or methodology underlying the expert

testimony is scientifically valid and reliable. Once the reasoning or methodology has been found to be reliable, the court must determine whether the methodology can properly be applied to the facts in issue. Finally, the court determines whether the expert evidence and the opinions related thereto are more probative than prejudicial, as required under Neb. Rev. Stat. § 27-403 (Reissue 1995).

8. **Trial: Expert Witnesses.** A trial court is not required, sua sponte, to make explicit on-the-record rulings regarding the admissibility of expert testimony.
9. ____: ____. A trial court is not always required to hold a hearing prior to qualifying an expert pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
10. **Trial: Evidence.** An objection based upon insufficient foundation is a general objection.
11. **Trial: Expert Witnesses.** A general foundational objection fails to alert the trial court, or opposing counsel, to any issue pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
12. **Trial: Evidence: Appeal and Error.** An objection on the basis of foundation alone fails to preserve for appellate review an issue pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
13. ____: ____: ____. If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose.
14. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
15. **Sentences: Prior Convictions: Records: Right to Counsel: Waiver: Proof.** In a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right.
16. **Habitual Criminals: Prior Convictions: Right to Counsel: Proof.** For purposes of Neb. Rev. Stat. § 29-2221 (Reissue 1995), it is not enough for the State to show the presence of counsel at sentencing alone. The State must also show the presence of counsel at the time of conviction. Absent such proof, the evidence is insufficient to prove that the earlier convictions were counseled.
17. **Habitual Criminals: Proof.** Pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1995), in order to be sentenced as a habitual criminal, a defendant must twice have been convicted of a crime, sentenced, and committed to prison, in this state or any other state.
18. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed in part, and in part sentences vacated and cause remanded with directions.

James J. Regan for appellant.

Jon Bruning, Attorney General, and Jeffrey J. Lux for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Following a jury trial, Donell King was found guilty of first degree sexual assault, kidnapping, and robbery. Thereafter, King was found to be a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1995) and was sentenced to 10 to 25 years' imprisonment for first degree sexual assault, 10 to 25 years' imprisonment for kidnapping, and 10 to 25 years' imprisonment for robbery. The sentences were ordered to run consecutively.

BACKGROUND

The State alleges that on the night of January 30, 2002, H.W. was abducted, sexually assaulted, and robbed by King. As H.W. approached a stop sign after leaving a hospital in Omaha, Nebraska, where she had attended an evening meeting, King entered H.W.'s vehicle through the front passenger door. Pursuant to King's instructions, H.W. continued to drive the vehicle until King ordered her to move to the back seat of the car so he could drive.

The State claimed that during the abduction, King demanded that H.W. give him money. King went through H.W.'s purse and took approximately $140 in cash and her checkbook, credit cards, automated teller machine (ATM) card, and driver's license. He also took her jewelry. King then drove to an ATM and used H.W.'s ATM card to withdraw money from her account. After leaving the ATM, King drove to an unknown location where he demanded that H.W. take off her clothing and then forced her to engage in oral sex and sexual intercourse.

The State further contends that after sexually assaulting H.W., King drove the vehicle to another location, where he parked the

car. King took the vehicle's keys, put them in a glove, and told H.W. to watch where he dropped the glove. He advised H.W. that when she could no longer see him, she could retrieve the keys. The evidence reveals that after retrieving her keys, H.W. returned to the hospital, where she was examined and the police were called. King was subsequently arrested and charged with first degree sexual assault, kidnapping, and robbery.

As part of his defense at trial, King admitted to taking H.W.'s money and property but denied sexually assaulting her. King claimed that on the day in question, H.W. approached him, wanting to purchase crack cocaine, and that with her permission, he got into her vehicle to complete the transaction. King claimed that after H.W. purchased the cocaine, he and H.W. smoked the drug together. King claims that afterward, H.W. wanted to purchase additional cocaine, and that with her permission, he drove her vehicle to a house, where more drugs were acquired. He then drove to an ATM, where he claims that H.W. authorized King to withdraw money for the second purchase. King claimed that he and H.W. then smoked the newly purchased cocaine and thereafter had consensual sexual intercourse in her vehicle. King admitted that after engaging in sexual intercourse with H.W., he stole the items from her purse. However, at trial, King claimed that he did not rob her because he did not take her money or jewelry by force or threats of force.

At trial, counsel for King made a general foundational objection to the testimony of Dr. Raymond Schulte and Omaha police officers Jerry Martinez and John Gasko. The State intended to have these witnesses testify regarding H.W.'s alleged use of crack cocaine on the night of her assault. Over these objections, Schulte, who was H.W.'s gynecologist and who had conducted an examination of H.W. following her sexual assault, testified that H.W. showed no signs of contact with or usage of a controlled substance when examined. Similarly, Martinez and Gasko were allowed to testify that in their opinions, H.W. was not under the influence of crack cocaine that evening. Later that day, after the witnesses had testified, King's attorney met with the prosecutors and the trial judge in chambers to discuss evidence issues which had arisen at trial. During that meeting, King's attorney renewed his general foundational objections. King's attorney also objected

to the testimony of the officers on the ground that they had not been previously identified as officers pursuant to Neb. Rev. Stat. § 29-1912 (Reissue 1995). King's attorney commented that he believed he had also objected on the basis of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), which he thought was basically the same as a foundational objection. Following his conviction, King timely appealed, and we moved this 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).

On appeal, King argues that Schulte, Martinez, and Gasko were improperly allowed to testify. King maintains that these individuals testified as experts and that the trial court failed to conduct a proceeding to determine whether they were qualified to testify under *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra*. Further, King argues that the State failed to provide notice, as required under § 29-1912, that it intended to offer the expert testimony of Martinez and Gasko. It is King's position that the State had a duty to disclose results and reports which documented examinations conducted by the witnesses. King also argues that his trial counsel was ineffective as a result of counsel's failure to anticipate the expert testimony of Schulte, Martinez, and Gasko and counsel's failure to make proper objections to their testimony. Finally, King argues that there was insufficient evidence to find that he was a habitual criminal, as the evidence failed to establish that King was represented by counsel at all critical stages of his prior criminal proceedings, including sentencing.

ASSIGNMENTS OF ERROR

King assigns, restated, that (1) the trial court erred in admitting the testimony of the officers who were not properly qualified as experts, (2) the trial court erred in finding the State had no obligation to notify King of its intent to use expert testimony on the subject of whether H.W. was under the influence of crack cocaine, (3) King had ineffective assistance of counsel stemming from counsel's failure to object to the admission of opinion testimony regarding whether H.W. was under the influence of crack cocaine, and (4) the trial court erred in finding he was a habitual criminal.

STANDARD OF REVIEW

[1-3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Miner*, 265 Neb. 778, 659 N.W.2d 331 (2003). The standard for reviewing the admissibility of expert testimony is abuse of discretion. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Hartman v. Hartman*, 265 Neb. 515, 657 N.W.2d 646 (2003); *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003).

[4] Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in order to show ineffective assistance of counsel such that a conviction must be overturned, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

ANALYSIS

King assigns four errors on appeal. Each will be addressed in the order assigned.

DAUBERT OBJECTION

In his first assignment of error, King argues that the trial court erred in admitting the testimony of Schulte, Martinez, and Gasko with respect to their opinions that H.W. was not under the influence of crack cocaine on the night of her assault. King maintains that the trial court failed to conduct a proceeding to determine whether these witnesses were qualified to testify as experts and that therefore, the witnesses should not have been permitted to testify regarding H.W.'s alleged drug use. During the testimony of Schulte, Martinez, and Gasko, King's trial attorney objected generally on the basis of foundation.

[5,6] An expert's opinion is ordinarily admissible under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to

disclose the basis of that opinion on cross-examination. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004); *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). When the opinion involves scientific or specialized knowledge, this court held in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), that we will apply the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (*Daubert/Schafersman*). Under our recent *Daubert/Schafersman* jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004); *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004).

[7] We recently stated in *State v. Tolliver*, 268 Neb. 920, 927-28, 689 N.W.2d 567, 575 (2004):

> A trial court's evaluation of the admissibility of expert opinion testimony is essentially a four-step process. The court must first determine whether the witness is qualified to testify as an expert. It must examine whether the witness is qualified as an expert by his or her knowledge, skill, experience, training, and education. If it is necessary for the court to conduct a *Daubert* analysis, then the court must determine whether the reasoning or methodology underlying the expert testimony is scientifically valid and reliable. To aid the court in its evaluation, the judge may consider several factors, including but not limited to whether the reasoning or methodology has been tested and has general acceptance within the relevant scientific community. Once the reasoning or methodology has been found to be reliable, the court must determine whether the methodology can properly be applied to the facts in issue. In making this determination, the court may examine the evidence to determine whether the methodology was properly applied and whether the protocols were followed to ensure that the tests were performed properly. Finally, the court determines whether the expert evidence and the opinions related thereto are more probative

than prejudicial, as required under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).

We recently discussed our standard for the admissibility of expert testimony in *Carlson v. Okerstrom*, 267 Neb. 397, 410, 675 N.W.2d 89, 103 (2004): "Under rule 702, it is not enough that a witness is qualified as an expert. The trial court must also act as a gatekeeper to ensure the evidentiary relevance and reliability of the expert's opinion." In *Schafersman v. Agland Coop*, 262 Neb. 215, 232, 631 N.W.2d 862, 876-77 (2001), we stated: "[I]n those limited situations in which a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, pursuant to [rule] 702 whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."

[8,9] A trial court, however, is not required, sua sponte, to make explicit on-the-record rulings regarding the admissibility of expert testimony. *Hoult v. Hoult*, 57 F.3d 1 (1st Cir. 1995). Nor is a trial court required to always hold a hearing prior to qualifying an expert pursuant to *Daubert/Schafersman*. *U.S. v. Solorio-Tafolla*, 324 F.3d 964 (8th Cir. 2003). We conclude that in order to preserve a challenge on appeal to the admissibility of evidence on the basis of *Daubert/Schafersman*, a litigant must object on that basis and the objection should alert the trial judge and opposing counsel as to the reasons for the objections to the evidence.

[10-12] In the present case, King's objections to the opinion testimony of Schulte, Martinez, and Gasko were based on "foundation" and that the State had not complied with § 29-1912(e). An objection on the basis of insufficient foundation is a general objection. *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003); *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). Such an objection fails to alert the trial court, or opposing counsel, to any *Daubert/Schafersman* issue. See *U.S. v. Barker*, 27 F.3d 1287 (7th Cir. 1994). Consequently, an objection on the basis of foundation alone fails to preserve for appellate review a *Daubert/Schafersman* issue.

[13] Because King's foundational objection was not sufficient to preserve a *Daubert/Schafersman* issue for appellate review, we

look to whether the foundational objection was properly overruled. If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose. *State v. Davlin, supra*; *State v. Baker*, 245 Neb. 153, 511 N.W.2d 757 (1994). Neither of those criteria is met in the present case. Thus, King's first assignment of error is without merit.

Failure to Notify Opposing Counsel of Expert Testimony

King next argues that pursuant to § 29-1912(e), once mutual and reciprocal discovery was ordered by the trial court, the State was obligated to disclose to King the nature of the testimony it intended to elicit from Martinez and Gasko. Section 29-1912(e) requires the State to permit the defendant to inspect and copy or photograph the results and reports of physical or mental examinations and the scientific facts or experiments made in connection with the particular case. The testimony of Martinez and Gasko was that based on their experience and training, it was their opinion that H.W. did not appear to be under the influence of drugs or alcohol at the time they interviewed her. The record is devoid of any evidence that there were records of the two officers' observations other than would be contained in the police reports. The police reports in this case, as noted by the prosecutor, had been voluntarily turned over to the defense counsel. The requirements of § 29-1912(e), therefore, had been met by the State, and King's assignment of error in this regard is without merit.

Ineffective Assistance of Counsel

In his third assignment of error, King argues that his trial counsel was ineffective as a result of counsel's failure to anticipate the expert testimony of Martinez and Gasko. King claims counsel should have properly objected to their testimony regarding H.W.'s alleged drug use, i.e., object on the basis of *Daubert/Schafersman*.

[14] King raises his claim of ineffective assistance of counsel for the first time on direct appeal. Such a claim, however, need not be dismissed merely because it is made on direct appeal. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003). The determining factor is whether the record is sufficient to adequately review the

question. *Id*. If the matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id*.

Although we have held that certain elements of what is alleged to be ineffectiveness of counsel in this case have resulted in a waiver, the record is not sufficient for us to determine whether, absent a hearing, there was ineffectiveness of counsel.

Habitual Criminal Enhancement—Representation by Counsel

In his final assignment of error, King argues that the trial court erred in finding him to be a habitual criminal. King claims the two prior convictions relied on by the State did not meet the State's burden of proof for enhancement under § 29-2221 because the State failed to show that he was represented by counsel during all "critical stages" of those criminal proceedings, including conviction and sentencing. Brief for appellant at 23. We conclude that the State failed to meet its burden.

[15,16] In a proceeding for an enhanced penalty, the State has the burden to show that the records of a defendant's prior felony convictions, based on pleas of guilty, affirmatively demonstrate that the defendant was represented by counsel or that the defendant, having been informed of the right to counsel, voluntarily, intelligently, and knowingly waived that right. *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004). *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002), is our latest pronouncement and controls the issue of whether, under § 29-2221, the State has met its burden of showing a prior counseled conviction. See *State v. Hall, supra*. In *Thomas*, we held that it not enough for the State to show the presence of counsel at sentencing alone for purposes of § 29-2221. The State must also show the presence of counsel at the time of conviction. *State v. Thomas, supra.* Absent such proof, the evidence is insufficient to prove that the earlier convictions were counseled for the purposes of § 29-2221. *State v. Thomas, supra*.

Although in *Thomas*, we held that proof of counsel, or an intelligent and knowing waiver of counsel by the defendant, at the time of sentencing is not alone sufficient for purposes of § 29-2221, we have not previously addressed whether evidence of counsel or the waiver of counsel at the time of conviction alone will suffice. We

agree with King that for purposes of habitual criminal sentencing, the State must prove the defendant was represented by counsel at the time of conviction and sentencing, or had knowingly and voluntarily waived representation for those proceedings. See *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967) (stating absence of counsel during sentencing after plea of guilty, coupled with assumptions concerning defendant's criminal record which were materially untrue, deprived defendant of due process), citing *Townsend v. Burke*, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948). See *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999) (where, citing *Mempa v. Rhay, supra*, we held that advisement to criminal which indicates he or she has no constitutional right to counsel at time of sentencing is prejudicial error).

The State claims that exhibits 60, 61, 65, and 66 prove King's 1994 conviction. Exhibit 60 is a document from the office of the state's attorney in Cook County, Illinois. Attached to it is the November 22, 1994, order of sentence and commitment. Exhibit 61 is a certified statement of conviction by the clerk of the circuit court for Cook County, which shows that on November 22, King was sentenced to 12 years' imprisonment. Exhibit 65 is an order of the circuit court for Cook County dated October 25, 1994, which shows the name of King's defense attorney. Exhibit 66 is King's trial proceedings held in the circuit court for Cook County on October 25. Exhibits 60, 61, 65, and 66, however, do not establish that King was represented by counsel or had waived the right to counsel at the time of sentencing for his 1994 conviction. We conclude, therefore, that the trial court erred in using King's 1994 conviction to enhance King's sentences.

[17] In order to be sentenced as a habitual criminal, a defendant must twice have been convicted of a crime, sentenced, and committed to prison, in this state or any other state. § 29-2221. Because King's 1994 sentence could not be utilized for enhancement as a habitual criminal, the State failed to meet its burden of proving two prior convictions, sentences, and incarcerations. Therefore, King should not have been sentenced as a habitual criminal.

[18] Because we have determined that King's 1994 conviction could not be used for enhancement purposes, we need not decide the issues presented with respect to King's 1993 conviction. An appellate court is not obligated to engage in an analysis which is

not needed to adjudicate the case and controversy before it. *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004). We do note, however, that the preferable procedure to prove enhancement is to follow the statute, Neb. Rev. Stat. § 29-2222 (Reissue 1995), and introduce authenticated copies of the former judgment and commitment.

We vacate King's sentences and remand the cause to the trial court with directions for a new enhancement hearing and for resentencing following the hearing.

CONCLUSION

As to assignments of error Nos. 1 through 3, we determine, for the reasons set out above, that these assignments of error are without merit. With regard to assignment of error No. 4, habitual criminal, the State did not meet its burden of showing that King was counseled at all critical stages of his 1994 conviction. The trial court's finding that King was a habitual criminal, therefore, was error. We therefore vacate King's sentences and remand the cause with directions for a new enhancement hearing and for resentencing after said hearing.

AFFIRMED IN PART, AND IN PART SENTENCES VACATED AND CAUSE REMANDED WITH DIRECTIONS.

ROBERT SOTO, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

693 N.W.2d 491

Filed February 18, 2005. No. S-04-569.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed upon appeal unless clearly wrong.

3. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents a question of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Constitutional Law: Immunity: Waiver.** The Constitution of the State of Nebraska permits the State to lay its sovereign immunity aside and consent to be sued on such terms and conditions as the Legislature may prescribe.
5. **Statutes: Immunity.** Statutes authorizing suits against the State are to be strictly construed because such statutes are in derogation of the State's sovereign immunity.
6. **Immunity: Waiver.** A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.
7. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Time.** Neb. Rev. Stat. § 48-125 (Reissue 2004) authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation benefits.
8. **Workers' Compensation: Final Orders: Time.** Waiting-time penalties, as provided in Neb. Rev. Stat. § 48-125 (Reissue 2004), apply to final adjudicated awards.
9. **Statutes.** A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous.
10. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
11. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision.
12. ____. To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
13. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
14. **Constitutional Law: Statutes: Appeal and Error.** It is the duty of the Nebraska Supreme Court to give a statute an interpretation which meets constitutional requirements if it can reasonably be done.
15. **Statutes: Appeal and Error.** In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.
16. **Workers' Compensation: Time: Attorney Fees.** The purpose of the 30-day waiting-time penalty and the provision for attorney fees, as provided in Neb. Rev. Stat. § 48-125 (Reissue 2004), is to encourage prompt payment by making delay costly if the award has been finally established.
17. **Workers' Compensation.** The Nebraska Workers' Compensation Act is intended to provide benefits for employees who are injured on the job, and the terms of the act are to be broadly construed to accomplish the beneficent purposes of the act.
18. **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.

19. **Workers' Compensation: Final Orders: Legislature: Time.** With respect to that portion of a workers' compensation award against the State which exceeds $50,000, the 30-day period specified in Neb. Rev. Stat. § 48-125(1) (Reissue 2004) does not begin until the first day after the judgment becomes final on which the State could request review and appropriation pursuant to Neb. Rev. Stat. § 48-1,102 (Reissue 2004) during a regular session of the Legislature. A waiting-time penalty may be assessed pursuant to § 48-125 if payment is not made within 30 calendar days thereafter.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded with directions.

James J. Paloucek, of Norman, Paloucek & Herman Law Offices, for appellant.

Jon Bruning, Attorney General, and Tom Stine for appellee.

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

STEPHAN, J.

The issue presented in this appeal is whether the State of Nebraska, as an employer, may be assessed a waiting-time penalty and attorney fees when payment of a portion of a workers' compensation award issued against it is delayed for more than 30 days after becoming final because of the State's compliance with the payment procedure specified in Neb. Rev. Stat. § 48-1,102 (Reissue 2004).

BACKGROUND

On January 28, 2000, Robert Soto filed a petition in the Workers' Compensation Court seeking temporary and permanent total disability benefits due to injuries sustained while working for the State of Nebraska as an employee of the Department of Roads. On January 9, 2001, the Workers' Compensation Court entered an award in favor of Soto. On January 17, an order nunc pro tunc was entered to correct a mathematical error in the award. A review panel of the Workers' Compensation Court affirmed and awarded an attorney fee of $2,500. The Nebraska Court of Appeals affirmed the decision of the review panel in an opinion not designated for permanent publication, awarding an additional attorney fee of $3,000. *Soto v. State*, No. A-01-834, 2002 WL 976005 (Neb. App. May 14, 2002) (not designated for permanent publication). The decision of the Court of Appeals was not appealed by either party,

and the mandate was issued on June 27, 2002. As of the date of the Court of Appeals' award, the State owed Soto $71,666.64 for past benefits and attorney fees and was obligated to pay further benefits of $409 per week. On June 7, before the mandate was issued, the State paid Soto $50,000 of the judgment amount but withheld payment of $21,666.64, asserting that § 48-1,102 prevented it from paying that balance until the Nebraska Legislature reviewed the award and made a specific appropriation. The State made the weekly payment of $409 as ordered beginning June 18, 2002.

On November 15, 2002, Soto filed a second petition seeking immediate payment of the $21,666.64 balance, as well as additional payments and/or fees for waiting time pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2004). The State discontinued making weekly payments after January 27, 2003. As of April 21, 2003, the Legislature had not reviewed or made specific appropriation for the payment of the balance of Soto's award.

Following a hearing on May 15, 2003, the compensation court determined that the balance on the award subject to penalty was $16,166.64, and assessed a waiting-time penalty of $8,083.32 for this unpaid compensation. In addition, the court imposed a penalty of $204.50 per week for all weekly benefits unpaid after January 27, 2003, until weekly benefits were no longer delinquent.

The State appealed, and a review panel of the compensation court reversed the penalty award. The review panel reasoned that in enacting § 48-1,102, the Legislature could not have intended to make the State of Nebraska liable for additional compensation in the form of waiting-time penalties when the legislative review and specific appropriation required by the statute entailed a process which inevitably would delay payment "well in excess of thirty days." Soto perfected a timely appeal from this order, and we granted his petition to bypass.

ASSIGNMENT OF ERROR

Soto assigns, combined and restated, that the review panel erred in reversing the award on the basis of its determination that the State was not liable for a waiting-time penalty under § 48-125.

STANDARD OF REVIEW

[1] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1)

the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award. Neb. Rev. Stat. § 48-185 (Reissue 2004).

[2] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed upon appeal unless clearly wrong. See *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004).

[3] When an appeal calls for statutory interpretation or presents a question of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004); *Campbell v. Omaha Police & Fire Ret. Sys.*, 268 Neb. 281, 682 N.W.2d 259 (2004).

ANALYSIS

[4-6] The Constitution of the State of Nebraska permits the State to lay its sovereign immunity aside and consent to be sued on such terms and conditions as the Legislature may prescribe. Neb. Const. art. V, § 22; *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). Statutes authorizing suits against the State are to be strictly construed because such statutes are in derogation of the State's sovereign immunity. *Id*. A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction. *Butler Cty. Sch. Dist. No. 502 v. Meysenburg*, 268 Neb. 347, 683 N.W.2d 367 (2004); *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003).

With respect to workers' compensation claims, the Legislature has stated that "[t]he Nebraska Workers' Compensation Act shall apply to the State of Nebraska [and] to every governmental agency created by it . . . ." Neb. Rev. Stat. § 48-106(1) (Reissue 2004). In part V of the act, codified at Neb. Rev. Stat. §§ 48-192 through

48-1,109 (Reissue 2004), the Legislature set forth "uniform procedures for the bringing of workers' compensation claims against the state" which "shall be used to the exclusion of all others." § 48-192. Two statutes within part V of the act are pertinent to our analysis of this case. Section 48-199 provides:

> In all suits brought under sections 48-192 to 48-1,109, *the state shall be liable in the same manner and to the same extent as a private individual under like circumstances*, except that no writ of execution shall issue against the state or any state agency, and disposition of or offer to settle any claim made under sections 48-192 to 48-1,109 shall not be competent evidence of liability of the state or any employee or amount of damages.

(Emphasis supplied.) Section 48-1,102 provides:

> Any award to a claimant and any judgment in favor of a claimant under sections 48-192 to 48-1,109 shall be certified by the Attorney General to the Director of Administrative Services, who shall promptly issue his or her warrant for payment of such award or judgment out of the Workers' Compensation Claims Revolving Fund, if sufficient money is available in such fund, *except that no portion in excess of fifty thousand dollars of any award or judgment shall be paid until such award or judgment has been reviewed by the Legislature and specific appropriation made therefor.* Delivery of any warrant in satisfaction of an award or judgment shall be made only upon receipt of a written receipt by the claimant in a form provided by the Attorney General.

(Emphasis supplied.)

[7-8] The dispute in this case involves the relationship of these two statutes with § 48-125, which provides in pertinent part that

> all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death, except that fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability or after thirty days from the entry of a final order, award, or judgment of the compensation court.

As construed by this court, this section authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation benefits. *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000); *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999). Waiting-time penalties, as provided in § 48-125, apply to final adjudicated awards. *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998).

[9] Soto argues that because § 48-199 makes the State "liable in the same manner and to the same extent as a private individual under like circumstances," with no stated exception for waiting-time penalties, a penalty should be assessed with respect to that portion of the award which was not paid within 30 days after it became final. The State does not argue that the statutes present any tension with regard to timely payment of ordered weekly benefits. The State does argue, however, that it is not liable for waiting-time penalties for amounts over $50,000 because § 48-1,102 requires it to submit the portion of the award exceeding $50,000 to the Legislature for review and specific appropriation prior to payment, a process which ordinarily requires more than 30 days because the Legislature does not sit in continuous session. The trial judge generally agreed with Soto's reading of the relevant statutes, but the review panel agreed with the State's interpretation. A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous. *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002); *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002). Applying this standard, we conclude that the statutes before us in this case are open for construction.

[10-12] We are guided by familiar principles. In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004); *Mason v. State*, 267 Neb. 44, 672 N.W.2d 28 (2003). Statutes relating to the same subject

matter will be construed so as to maintain a sensible and consistent scheme and so that effect is given to every provision. *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004); *Reiter v. Wimes*, 263 Neb. 277, 640 N.W.2d 19 (2002). To the extent that there is conflict between two statutes on the same subject, the specific statute controls over the general statute. *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004); *Brown v. Harbor Fin. Mortgage Corp.*, 267 Neb. 218, 673 N.W.2d 35 (2004).

In this case, there is a conflict between § 48-199, which makes the State liable for workers' compensation "in the same manner and to the same extent as a private individual under like circumstances," and § 48-1,102, which requires legislative review and appropriation with respect to that portion of a workers' compensation award against the State which is in excess of $50,000, a requirement not imposed upon private employers. The specific requirement of § 48-1,102 controls over the general language of § 48-199, and the State is therefore required by law to obtain legislative review and specific appropriation for the amount of any award exceeding $50,000 before payment of such amount can be made.

[13,14] Soto, however, argues such a requirement is unconstitutional under the principle that " '[t]he separation of powers doctrine prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives.' " Brief for appellant at 12, quoting *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995). In response, the State argues that § 48-1,102 does not envision legislative "review" that would permit substantive alteration of a final workers' compensation judgment, but merely provides for an official examination to verify a lawful basis for appropriation of public moneys, and that thus, the statute does not run afoul of the separation of powers doctrine. The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996). It is the duty of this court to give a

statute an interpretation which meets constitutional requirements if it can reasonably be done. *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999). We conclude that the State's interpretation of § 48-1,102 is reasonable and therefore hold that the statute so construed does not violate the separation of powers doctrine. We likewise find no merit in Soto's argument that the statute deprives him of equal protection of the law or constitutes special legislation.

[15] It is clear that compliance with § 48-1,102 will necessarily result in portions of some final workers' compensation awards against the State remaining unpaid for more than 30 days. The Legislature convenes annually on the "first Wednesday after the first Monday in January" and remains in regular session for up to 90 legislative days in odd-numbered years and 60 legislative days in even-numbered years unless extended by a vote of four-fifths of all members. See Neb. Const. art. III, § 10. Thus, as noted by the review panel, there is no evidence that the Legislature was in session when the judgment in this case became final on June 27, 2002, and the next regular session would not have commenced until January 2003. We further agree with the review panel that it is unlikely that the Legislature intended, by enacting § 48-1,102, to subject the State to waiting-time penalties in cases where compliance within 30 calendar days was impossible. Similarly, we reject Soto's argument that the State is obligated to call the Legislature into special session, if necessary, in order to comply with § 48-1,102 and avoid a waiting-time penalty. In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *In re Estate of Eickmeyer*, 262 Neb. 17, 628 N.W.2d 246 (2001); *State on behalf of Minter v. Jensen*, 259 Neb. 275, 609 N.W.2d 362 (2000).

[16,17] On the other hand, we find nothing in the Nebraska Workers' Compensation Act reflecting a legislative intent to completely absolve the State from liability for waiting-time penalties on portions of awards which are subject to the review and appropriation requirement of § 48-1,102. As the trial judge noted, the purpose of the 30-day waiting-time penalty and the provision for attorney fees, as provided in § 48-125, is to encourage prompt payment by making delay costly if the award has been finally

established. *Gaston v. Appleton Elec. Co.*, 253 Neb. 897, 573 N.W.2d 131 (1998); *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998). The Nebraska Workers' Compensation Act is intended to provide benefits for employees who are injured on the job, and the terms of the act are to be broadly construed to accomplish the beneficent purposes of the act. *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001). Thus, we cannot conclude that in enacting § 48-1,102, the Legislature intended to create a circumstance whereby the State could indefinitely delay payment of a portion of a workers' compensation judgment without penalty by not promptly pursuing legislative review and appropriation as required by § 48-1,102.

[18,19] 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. *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002); *Ottaco, Inc. v. McHugh*, 263 Neb. 489, 640 N.W.2d 662 (2002). In order to harmonize §§ 48-199, 48-1,102, and 48-125 in the context of waiting-time penalties in a manner which is consistent with the overall purpose of the act, we hold that with respect to that portion of a workers' compensation award against the State which exceeds $50,000, the 30-day period specified in § 48-125(1) does not begin until the first day after the judgment becomes final on which the State could request review and appropriation pursuant to § 48-1,102 during a regular session of the Legislature. A waiting-time penalty may be assessed pursuant to § 48-125 if payment is not made within 30 calendar days thereafter.

In this case, Soto's award became final on June 27, 2002, when the mandate of the Court of Appeals issued. The Legislature next convened in regular session on January 8, 2003. 1 Leg. J. 98th Leg., 1st Sess. 1 (January 8, 2003). The parties stipulated that as of April 21, 2003, the Legislature had not reviewed or made specific appropriation for payment of the award. However, because the record does not specifically reflect the first date on which the State could have requested legislative review and appropriation pursuant to § 48-1,102, or whether the balance of the award was paid within 30 days of such date, we cannot determine whether a

waiting-time penalty should be assessed. Accordingly, we reverse the judgment of the review panel of the Workers' Compensation Court and remand the cause with directions to further remand to the trial judge for further proceedings consistent with this opinion to determine whether a waiting-time penalty and attorney fee should be assessed pursuant to § 48-125.

REVERSED AND REMANDED WITH DIRECTIONS.

JERRY STEVENS AND CYNTHIA STEVENS, APPELLANTS,
v. DOWNING, ALEXANDER, WOOD & ILG,
A PARTNERSHIP, ET AL., APPELLEES.

693 N.W.2d 532

Filed February 25, 2005. No. S-03-782.

1. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to determine the matter independently of the trial court.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
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. **Actions: Parties.** Pursuant to Neb. Rev. Stat. § 25-301 (Cum. Supp. 2004), every action shall be prosecuted in the name of the real party in interest.
5. **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.
6. **Actions: Parties.** The purpose of the inquiry as to whether a party is a real party in interest is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
7. **Actions: Parties: Standing.** The question of whether a party who commences an action has standing and is therefore the real party in interest is jurisdictional.
8. **Jurisdiction: Standing.** The requirement of standing is fundamental to a court's exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding.
9. **Bankruptcy.** Federal law determines the scope of a debtor's bankruptcy estate.
10. **Actions: Bankruptcy.** State law determines only whether a cause of action accrued to the debtor as of the commencement of the bankruptcy case; once that determination has been made, federal law controls whether the trustee can maintain a cause of action on behalf of the bankruptcy estate.

11. **Actions: Bankruptcy: Malpractice: Attorney and Client.** Federal law provides that when a legal malpractice cause of action has accrued to the debtor as of the commencement of the bankruptcy case, it becomes part of the bankruptcy estate.
12. **Pleadings: Bankruptcy.** Under title 11 of the U.S. Code, when a debtor files a voluntary petition in the bankruptcy court, the debtor is divested of all his or her assets and the assets are transferred to the bankruptcy estate.
13. **Actions: Bankruptcy.** Legal or equitable interests, as referenced in 11 U.S.C. § 541(a)(1) (2000), include any causes of action belonging to the debtor at the time the bankruptcy case is commenced.
14. **Bankruptcy: Property.** In a chapter 12 bankruptcy proceeding, property of the bankruptcy estate includes all legal or equitable interests the debtor acquires before and after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first.
15. **Actions: Bankruptcy: Property: Abandonment.** Once a cause of action becomes the property of the bankruptcy estate, it remains so unless abandoned by the estate.
16. **Bankruptcy: Abandonment: Words and Phrases.** Abandonment is the divestiture of the bankruptcy estate's interest in the property, and once abandoned, a debtor's rights to the property are treated as if no bankruptcy petition was filed.
17. **Bankruptcy: Property: Abandonment: Notice.** In order for property of the bankruptcy estate to be abandoned, notice of the proposed abandonment must be given and a hearing held on any timely objections to the abandonment.
18. **Bankruptcy: Property: Abandonment.** Where property has not been scheduled by a debtor or disclosed to creditors, there can be no abandonment of the property.
19. **Bankruptcy.** A debtor seeking protection under the bankruptcy laws must disclose to the bankruptcy court all assets, or potential assets. This duty is a continuing one that does not end once the forms are submitted to the court.

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

Arlan G. Wine for appellant.

Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

MCCORMACK, J.

NATURE OF CASE

The district court for Sarpy County granted summary judgment in favor of the appellees, Downing, Alexander, Wood & Ilg; Nebraska Law Offices, P.C.; Shawn M. Ilg; and Ilg, P.C., L.L.O., and dismissed the legal malpractice claim of the appellants, Jerry Stevens and Cynthia Stevens, after determining the appellants

were not the real parties in interest. The appellants perfected this appeal, which we removed to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). We affirm.

BACKGROUND

From October 1997 until April 2000, the appellants were represented by Ilg. Ilg initially represented the appellants with respect to a loan payment default and an upcoming balloon payment. He later represented them with respect to the filing and prosecution of a chapter 12 bankruptcy case, which offers reorganization protection for farmers. See 11 U.S.C. § 1201 et seq. (2000 & Supp. II 2002). During most of the appellants' representation by Ilg, Ilg was associated with the law firm of Downing, Alexander, Wood & Ilg. However, in December 1999, Ilg left that firm and is currently an attorney with the defendant law firm Ilg, P.C., L.L.O. Since January 2000, the firm of Downing, Alexander, Wood & Ilg has been known as Downing, Alexander & Wood.

In February 1998, the appellants filed for chapter 12 bankruptcy protection, and in February 1999, the appellants' third amended bankruptcy plan was confirmed. According to the appellees, the appellants' bankruptcy is still ongoing. In April 2000, Ilg withdrew as the appellants' attorney and the appellants retained new counsel. In 2002, the appellants filed on their own behalf the present legal malpractice action. In their petition, and the amended petition that followed, the appellants alleged that the appellees were negligent in their representation of the appellants prior to the filing of the bankruptcy petition by advising the appellants to cease making payments on their home mortgage because the debt would be restructured under the bankruptcy and that the attorneys delayed the filing of the bankruptcy petition for over 3 months. The petition also alleges the appellees were negligent following the filing of the petition in a number of respects relating to the prosecution of the bankruptcy proceeding. In their answer, the appellees asserted as affirmative defenses that the appellants were not the real parties in interest and that the amended petition failed to state a cause of action against the appellees.

Thereafter, the appellees filed a motion for summary judgment claiming the appellants "are not the real parties in interest and

not vested with the purported causes of action set forth in their Amended Petition." The district court agreed and granted summary judgment in favor of the appellees. Relying on *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992), the district court concluded that the malpractice action belonged to the bankruptcy estate and that, therefore, the appellants were not the proper parties in interest to bring the claim.

ASSIGNMENTS OF ERROR

The appellants allege that the district court erred in (1) holding that the appellants had no standing to bring forth the lawsuit in their own names and (2) sustaining the appellees' motion for summary judgment and dismissing the case.

STANDARD OF REVIEW

[1] The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to determine the matter independently of the trial court. *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., ante* p. 222, 691 N.W.2d 147 (2005).

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Id.*

[3] 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. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004); *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

ANALYSIS

On appeal, the appellants argue that the district court erred in (1) holding that the appellants had no standing to bring forth the lawsuit in their own names and (2) sustaining the appellees' motion for summary judgment and dismissing the case. The appellants argue that after the confirmation of their bankruptcy plan, the property of the bankruptcy estate, including any causes of action, revested in them. The appellants claim that as a result of the revesting of property, they are the real parties in interest to bring the malpractice action. The appellants concede, however,

that any damages recovered would be subject to claims of their creditors. The appellees argue that the appellants' "revesting" argument is without merit because the appellants did not disclose the cause of action as an asset to the bankruptcy court.

[4-6] The appellants contend that the district court erred in dismissing their malpractice action on the basis that they are not the proper parties in interest. Neb. Rev. Stat. § 25-301 (Cum. Supp. 2004) provides that subject to an exception not involved in this case, "[e]very action shall be prosecuted in the name of the real party in interest . . . ." See, also, *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002). We have 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.' "

Id. at 931, 652 N.W.2d at 870. " 'The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.' " *Eli's, Inc. v. Lemen*, 256 Neb. 515, 527, 591 N.W.2d 543, 552 (1999).

[7,8] The question of whether a party who commences an action has standing and is therefore the real party in interest is jurisdictional. *Id.* The requirement of standing is fundamental to a court's exercise of jurisdiction, and either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. *Governor's Policy Research Office v. KN Energy, supra*.

The appellants claim that upon the confirmation of their chapter 12 bankruptcy plan, the property of the bankruptcy estate, including any causes of action, revested in them. As a result of the revesting of the property, the appellants claim they are parties in interest with respect to the present malpractice suit. We disagree.

[9-11] Federal law determines the scope of a debtor's bankruptcy estate. *In re Segerstrom*, 247 F.3d 218 (5th Cir. 2001). State law determines only whether a cause of action accrued to the debtor as of the commencement of the bankruptcy case; once that determination has been made, federal law controls whether the

trustee can maintain a cause of action on behalf of the bankruptcy estate. *Id*. Federal law provides that when a legal malpractice cause of action has accrued to the debtor as of the commencement of the bankruptcy case, it becomes part of the bankruptcy estate. *Id*.

[12-14] Under title 11 of the U.S. Code, when a debtor files a voluntary petition in the bankruptcy court, the debtor is divested of all his or her assets and the assets are transferred to the bankruptcy estate. 11 U.S.C. § 541(a) (2000). As stated in § 541(a)(1), the bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." The reference in § 541(a)(1) to "legal or equitable interests" includes any causes of action belonging to the debtor at the time the bankruptcy case is commenced. See, *In re Segerstrom, supra*; *In re Alvarez*, 224 F.3d 1273 (11th Cir. 2000); *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992). Additionally, with respect to chapter 12 bankruptcy, the property of the estate also includes "all property of the kind specified in [§ 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first." 11 U.S.C. § 1207(a)(1). Thus, under a chapter 12 bankruptcy proceeding, when a cause of action accrued to a debtor is immaterial to the determination of whether the claim is part of the bankruptcy estate, so long as the case has not been closed, dismissed, or converted to a chapter 7 bankruptcy. There is no evidence in the record of this case that the appellants' bankruptcy case has been closed, dismissed, or converted. Consequently, we conclude that the present malpractice claim is the property of the bankruptcy estate.

Having determined that the appellants' malpractice claim is the property of the bankruptcy estate, we must determine whether the appellants can bring the cause of action in their own names. We have previously addressed whether a debtor has standing to bring a cause of action in his or her own name when the cause of action accrues before the bankruptcy petition was filed. In *Pappas v. Sommer, supra*, we held that the debtors did not have standing to bring their legal malpractice claim which accrued prior to the filing of their bankruptcy petition because the cause of action was the property of the bankruptcy estate and that thus, the trustee, not the debtor, was the proper party to litigate the claim. We similarly

conclude that under the circumstances of this case, the appellants do not have standing to bring this cause of action and, therefore, are not the real parties in interest.

[15-18] Once a cause of action becomes the property of the bankruptcy estate, it remains so unless abandoned by the estate. 11 U.S.C. § 554(d) (2000). Abandonment is the divestiture of the bankruptcy estate's interest in the property, and once abandoned, a debtor's rights to the property are treated as if no bankruptcy petition was filed. 5 Collier on Bankruptcy § 554.02[3] (15th ed. 2004). In order for property of the bankruptcy estate to be abandoned, notice of the proposed abandonment must be given and a hearing held on any timely objections to the abandonment. 11 U.S.C. § 554(a); Fed. R. Bankr. P. & Off. Bankr. Forms 6007. Alternatively, property may be abandoned where it has been scheduled under 11 U.S.C. § 521(1) (2000) and has not been administered when the bankruptcy case is closed. 11 U.S.C. § 554(c). "Abandonment presupposes knowledge." 5 Collier on Bankruptcy, *supra*, § 554.03 at 554-13. Where property has not been scheduled by a debtor or disclosed to creditors, there can be no abandonment of the property. See, *Vreugdenhill v. Navistar Intern. Transp. Corp.*, 950 F.2d 524 (8th Cir. 1991); 5 Collier on Bankruptcy, *supra*, § 554.03. In *Vreugdenhill*, the court held that under the federal Bankruptcy Code, the debtor must formerly schedule the property before the close of the case for the property to be abandoned by operation of law.

In the present case, there was no abandonment of the appellants' malpractice claim pursuant to § 554(a). There was also no abandonment under § 554(d), since the appellants' bankruptcy case remains open; nor could there have been an abandonment, because the appellants failed to schedule the claim as an asset. We conclude, therefore, that the cause of action belongs to the bankruptcy estate and that the appellants have no standing to bring the lawsuit.

[19] In reaching this conclusion, we reject the appellants' argument that upon confirmation of their bankruptcy plan, the present cause of action revested in them, making them the proper parties to bring the claim. A debtor seeking protection under the bankruptcy laws must disclose to the bankruptcy court all assets or potential assets. See 11 U.S.C. §§ 521(1) and 541(a)(7). This duty

is a continuing one that does not end once the forms are submitted to the court. See *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002). Here, the appellants did not disclose the malpractice claim as an asset to the bankruptcy court and therefore the claim could not revest in them. See *Valley Federal Sav. Bank v. Anderson*, 612 N.E.2d 1099 (Ind. App. 1993).

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

AFFIRMED.

DENNY WIEKHORST EQUIPMENT, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. TRI-STATE OUTDOOR MEDIA GROUP, INC., APPELLEE AND CROSS-APPELLANT.

693 N.W.2d 506

Filed February 25, 2005. No. S-03-1114.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Collateral Estoppel.** Four conditions must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
3. **Landlord and Tenant: Leases: Appurtenances.** In the absence of an agreement, the right of a tenant to remove a fixture from real property must be exercised during the term of the lease.
4. ____: ____: ____. Where a lessee is given the right to remove fixtures, he must exercise that right within a reasonable time. When the lessee fails to remove the fixtures within a reasonable time, he loses his right thereto.
5. **Real Estate: Appurtenances.** Whether articles constructed upon realty owned by another become annexed to and part of the realty depends to a great extent upon the facts and circumstances of the particular case.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded with directions.

William E. Gast, of William E. Gast, P.C., L.L.O., and Gene M. Eckel for appellant.

Richard A. Drews, of Taylor, Peters & Drews, for appellee.

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

WRIGHT, J.

NATURE OF CASE

The Douglas County District Court enjoined Tri-State Outdoor Media Group, Inc. (Tri-State), from removing an advertising structure (billboard) on land owned by Denny Wiekhorst Equipment, Inc. (Wiekhorst), until on or after July 2007. The court also ordered Tri-State to pay annual rent in a sum equaling 25 percent of the annual gross rent it received for advertising fees. Wiekhorst timely appealed, and Tri-State has filed a cross-appeal.

SCOPE OF REVIEW

[1] An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

FACTS

In 1985, Western Outdoor Advertising Company (Western) erected a billboard on property owned by Roy A. Smith, who operated H.P. Smith Motors. The billboard measures 14 by 48 feet and has two faces. It is attached to a 36-inch diameter, single-pole all-steel structure. The property on which the billboard is located overlooks Interstate 80 in Omaha, Nebraska.

The lease agreement between Western and Smith, dated July 1, 1985, provided for an initial 5-year term, renewable for "an additional" 5-year period, in the event that Western gave written notice of its intention to exercise the option to renew at least 10 days "prior to the expiration of the initial five-year period of this lease." The lease stated that Western was to pay rent of $1 per year, in return for which Smith received a discounted rate on advertising his business on the billboard. The lease was renewed once for a 5-year term beginning on November 11, 1991. The record does not indicate that any party attempted to renew the lease after this first renewal.

The record is unclear as to the precise date, but in 1997 or 1998, Tri-State purchased Western, allegedly acquiring its property, equipment, structures, and display and lease contracts. There is no evidence in the record concerning this transaction, and we are unable to determine what Tri-State actually purchased. Tri-State had no communication with Smith concerning its acquisition of Western's leases. Tri-State continued to renew permits to operate the billboard and to collect advertising fees without rendering payment of rent or other consideration to Smith. Nor did Tri-State account to Smith for advertising fees received. Smith sold his automobile dealership in 1997, and he had apparently forgotten about the lease until he was contacted by Wiekhorst about purchasing the property on which the billboard stands.

On or about April 25, 2002, Tri-State filed for bankruptcy protection under chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Middle District of Georgia, Columbus Division.

In July 2002, Wiekhorst purchased the real estate upon which the billboard is located from Smith for $500 in cash and a $7,000 donation to a charity of Smith's choice. The warranty deed was recorded on July 31. The property is approximately 5 feet wide at one end and 28 feet wide on the other, and approximately 60 feet long. One of the co-owners of Wiekhorst stated that the property is of little use for any purpose other than a billboard.

Wiekhorst sought relief from the automatic stay of the bankruptcy court and asked for a determination that the lease agreement concerning the billboard was terminated or had expired. In Tri-State's proposed chapter 11 plan, it sought to assume the alleged executory contract or unexpired lease at issue. Wiekhorst objected. The bankruptcy court found that the lease between Smith and Western had terminated or expired prior to the filing of the bankruptcy action, so there was no executory contract or valid unexpired lease for Tri-State to assume or reject. For this reason, the bankruptcy court granted Wiekhorst relief from the stay and sustained its objection to Tri-State's proposed assumption of the alleged lease. The bankruptcy court directed Tri-State to pay Wiekhorst an administrative fee of $3,600, based on $600 per month for 6 months.

Wiekhorst subsequently learned that Tri-State intended to remove the billboard from the property. Wiekhorst agreed, but insisted that removal could be accomplished only by compliance with certain conditions. The parties were unable to agree on the proper method of removal.

On February 28, 2003, Tri-State sent crews to Omaha to simply cut off the billboard pole at the ground and leave the foundation buried in the ground. Tri-State was prevented by Wiekhorst from entering the property to remove the billboard and subsequently claimed that it was damaged in the amount of $2,550 for expenses incurred, including labor and travel for the crews sent to remove the billboard.

On April 8, 2003, Wiekhorst filed an amended petition in Douglas County District Court, in which it stated that Tri-State claimed some ownership rights in the billboard through a lease agreement entered into on or before July 1, 1985, by and between Smith and Western. Wiekhorst alleged that Tri-State and/or Western had been in breach of the obligations stated in the lease agreement and that no consideration had been paid under the lease agreement since at least July 1997. Wiekhorst alleged that the lease agreement specifically provided that the billboard at issue was a part of the demised premises which reverted to the owner of the property upon expiration or breach of the lease. Wiekhorst asserted that it was the owner of the billboard and that Tri-State had no right to remove it.

The trial court found that the value of the property was totally dependent upon its use as a site for advertising and that if the billboard were removed 18 years after its construction and after changes to the Omaha Municipal Code, the property would become worthless. It found that Wiekhorst, as the owner of the property, would suffer irreparable injury if Tri-State were allowed to remove the billboard.

The trial court found that the billboard had not been removed during the term of the lease or any extension thereof and that there had not been any attempt to remove the billboard within a reasonable time after the expiration of the lease. It also found that Tri-State continued to collect fees for billboard advertisements without paying rent to the owner of the property.

The trial court concluded that Tri-State had conducted business after expiration of the lease as if it had a "de facto lease" with the landowner, first Smith and then Wiekhorst. It therefore enjoined Tri-State from removing the billboard from Wiekhorst's property until on or after July 2007, the completion of the fifth year of the parties' de facto lease. Tri-State was ordered to pay annual rent to Wiekhorst in a sum equaling 25 percent of the annual gross rent received by Tri-State for advertising fees.

As to Tri-State's counterclaim, the trial court found that Tri-State should not have dispatched sign removal crews to Omaha until a mutual agreement concerning removal had been reached. Since the parties had not agreed as to the method of removal, Tri-State was on notice that Wiekhorst would not consent to Tri-State's planned method of removal. The court dismissed Tri-State's counterclaim with prejudice.

Wiekhorst appeals from the order, and Tri-State has filed a cross-appeal.

ASSIGNMENTS OF ERROR

Wiekhorst asserts that the trial court erred (1) in finding that a 5-year de facto lease existed between the parties, notwithstanding the fact that on February 19, 2003, the U.S. Bankruptcy Court for the Middle District of Georgia found that there was no valid unexpired lease from and after the April 2003 filing of Tri-State's bankruptcy petition; (2) in ruling that Tri-State owned the billboard at the time of trial, notwithstanding the fact that Tri-State failed to remove it within a reasonable time following the July 2000 expiration of the lease between the parties' predecessors in interest; and (3) in ruling, in effect, that Tri-State could remove the billboard at the termination of a de facto lease in July 2007.

On cross-appeal, Tri-State asserts that the trial court erred (1) in finding that a 5-year de facto lease existed between Tri-State and Wiekhorst from and after July 2002, after it was determined on February 19, 2003, by the bankruptcy court that there was no valid unexpired lease between the parties; (2) in finding that Tri-State failed to remove the billboard within a reasonable time after expiration of the lease, without determining that Tri-State had ever abandoned the billboard; (3) in finding that Wiekhorst would suffer irreparable harm without an adequate remedy at law,

which would justify injunctive relief preventing Tri-State from removing the billboard until July 2007; and (4) in denying Tri-State recovery of expenses incurred in sending crews to Omaha to remove its billboard, when the crews were prevented from doing so by a temporary restraining order obtained by Wiekhorst in violation of the automatic stay in Tri-State's bankruptcy case.

ANALYSIS

Wiekhorst commenced this action in Douglas County District Court seeking an injunction and other equitable relief. An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

We first consider the trial court's determination that a 5-year de facto lease existed between the parties. Each party claims this finding was erroneous because the bankruptcy court had previously found that there was no valid unexpired lease. Each party asserts that the doctrine of collateral estoppel prevented relitigation of the issue of whether a lease existed between them.

Tri-State filed its bankruptcy petition on April 25, 2002, in the U.S. Bankruptcy Court for the Middle District of Georgia. An order of relief was entered the following day. The bankruptcy court then entered an order authorizing the filing of certain lists, including a list of billboard leases, under seal.

On December 12, 2002, Wiekhorst filed an objection to Tri-State's assumption of the lease between Smith and Western. Wiekhorst alleged that the lease was dated July 1, 1985, expired on July 1, 1990, and was not extended and that Western and/or Tri-State were holdover tenants and at some point ceased paying rent. Wiekhorst alleged that it had attempted to collect rent from Tri-State after Wiekhorst purchased the property, but its requests for payment were ignored by Tri-State. An amended plan of reorganization provided that Tri-State would assume all executory contracts not identified for rejection, and because the expired lease was not identified, Wiekhorst inferred that the lease would be assumed. Wiekhorst stated it was filing an objection because

it believed that there was no lease to assume and that an order of confirmation would promote the holdover tenancy.

Wiekhorst sought relief from the automatic stay of the bankruptcy court and asked for a determination that the lease agreement for the billboard was terminated or had expired. The bankruptcy court entered an order on February 19, 2003, granting Wiekhorst relief from the automatic stay. The court found that there was no valid unexpired lease or executory contract between Western (Tri-State's predecessor) and Smith, because the lease between them had terminated or expired prior to the filing of the bankruptcy petition. Thus, the bankruptcy court made a finding that there was no valid unexpired lease or executory contract for Tri-State to assume or reject.

This court must give full faith and credit to judgments rendered by federal courts. See *Hayes v. Payne Investment Corporation*, 127 Neb. 24, 254 N.W. 684 (1934). See, also, *First Fed. Sav. & Loan Assn. v. Wyant*, 238 Neb. 741, 472 N.W.2d 386 (1991); *State Bank of Towner v. Edwards*, 484 N.W.2d 281 (N.D. 1992) (state court has no power to review decisions of federal court and is bound by related bankruptcy proceedings).

[2] In addition, the finding that no lease existed between Tri-State and Wiekhorst cannot be relitigated under the doctrine of collateral estoppel. Four conditions must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). In the case at bar, these conditions are satisfied.

First, the trial court determined that a de facto lease existed between the parties. However, the identical issue was previously determined by the bankruptcy court, which found that there was no valid unexpired lease between these parties.

Second, the bankruptcy court's finding as to the nonexistence of a lease was a final adjudication on the merits. This determination was included in an "Order Granting Relief From Automatic Stay" and in an "Order Sustaining Objection to Assumption of Alleged

Executory Contract." No further action was needed concerning whether there was a lease between the parties.

Tri-State and Wiekhorst were both parties in the bankruptcy court, which satisfies the third element of collateral estoppel. The fourth element requires that there was an opportunity to fully and fairly litigate the issue in the prior action. Wiekhorst and Tri-State were both represented before the bankruptcy court.

The determination of whether a lease existed between Tri-State and Wiekhorst had previously been decided, and that issue could not be relitigated in this action. See *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002). We conclude that the trial court erred in determining that a de facto lease existed between the parties.

Since there was no valid unexpired lease for Tri-State to assume and no lease existed between Wiekhorst and Tri-State, we examine what rights Tri-State has in the billboard.

Tri-State's rights are based upon the rights of its predecessor, Western. The lease between Western and Smith provided that Western would pay $1 per year to Smith to rent space on the property for the billboard. The lease was entered into in 1985 for a 5-year term, and it was renewed in 1991 for an additional 5-year term. The record does not support a finding that the lease was renewed at the end of the second 5-year period. Thus, when Western sold its assets to Tri-State in 1997 or 1998, no lease existed between Western and Smith.

The bankruptcy court determined that there existed no valid unexpired lease between Western and Smith and that, therefore, there was no valid unexpired lease for Tri-State to assume. The lease provided that Western could remove the billboard "at any time during the term of this lease or any extension thereof, or within a reasonable time after the expiration of this lease or any extension thereof." Western did not remove the billboard during the lease or within a reasonable time after its expiration.

The trial court noted that Tri-State obviously kept the billboard in place after the lease expired because it was collecting advertising fees without having to pay rent to the landowner. Until Wiekhorst purchased the property in July 2002 and attempted to buy the billboard, Tri-State was content to collect advertising fees without making any rental payments. As the trial court stated,

"After having feasted on the collection of advertising fees on a rent free basis between 1998 and July 2002, it seems manifestly unfair and unreasonable to now allow the defendant to invoke a right of removal clause . . . ."

[3] In the absence of an agreement, the right of a tenant to remove a fixture from real property must be exercised during the term of the lease. *Free v. Stuart*, 39 Neb. 220, 57 N.W. 991 (1894). If the tenant leaves the premises without removing the fixtures and the landlord takes possession, the fixtures become the property of the landlord. *Id*. See, also, *Stevens v. Burnham*, 62 Neb. 672, 87 N.W. 546 (1901) (right of tenant, or of those claiming through or under him, to remove trade or agricultural fixture from leased premises, expires with tenancy); *Friedlander v. Ryder*, 30 Neb. 783, 47 N.W. 83 (1890).

[4] Other courts have held similarly. In *Smith v. United States*, 113 F.2d 191, 193 (10th Cir. 1940), the court held that "[w]here a lessee is given the right to remove fixtures, he must exercise that right within a reasonable time. When the lessee fails to remove the fixtures within a reasonable time he loses his right thereto." See, also, *Wilson v. Davis*, 202 Ark. 827, 153 S.W.2d 171 (1941); *Wadman v. Burke*, 147 Cal. 351, 81 P. 1012 (1905); *Mullins v. Sturgill*, 192 Va. 653, 66 S.E.2d 483 (1951); *Bernard v. Crosby*, 121 Wash. 257, 209 P. 524 (1922).

In the case at bar, ownership of the billboard is determined by the lease agreement. The lease provided:

> [A]ll signs . . . placed on the demised premises by Lessee shall at all times be and remain the personal property of Lessee, subject to removal by the Lessee at any time during the term of this lease or any extension thereof, or within a reasonable time after the expiration of this lease or any extension thereof.

Thus, the lease granted Western the right to remove the billboard at the expiration of the lease or within a reasonable time thereafter. This right did not transfer to Tri-State when it purchased Western's assets, because there was no valid unexpired lease.

Wiekhorst cites as authority *Adams Outdoor Adv. Ltd. Part. v. Long*, 253 Va. 206, 483 S.E.2d 224 (1997). In that case, a billboard was erected more than 65 years earlier by Consolvo & Cheshire, an advertising agency. The lease provided that all billboards were

the property of the lessee and that the lessee could remove the billboards upon termination of the lease. Subsequent leases between successor landowners and different lessees stated that " 'signs, structures and equipment' " erected by the lessee were the property of the lessee and could be removed by the lessee. *Id.* at 208, 483 S.E.2d at 226.

In 1993, the landowner, Robert E. Long, notified Adams Outdoor Advertising Limited Partnership (Adams) that the lease for a billboard was being terminated. Adams accepted the cancellation and notified Long that it would schedule demolition of the billboard. Long filed an action to enjoin Adams from demolishing the billboard because Long wanted to use the billboard to advertise his own business. The trial court held that Long, as the landowner, owned the billboard, and the Virginia Supreme Court affirmed that holding.

Because the billboard was permanently affixed to the land, the appellate court held that the billboard's character was determined by the agreement between the parties, if one existed. "Whether such a structure remains personalty, owned by the person who erected the structure, or becomes part of the realty, and thus owned by the landowner, is determined . . . by an agreement establishing the nature and ownership of the structure . . . ." *Id.*

The court stated:

> When tenants retain ownership of structures they erect on property and are allowed to remove the structures, the removal generally must occur within a reasonable period after the end of the tenancy. If the structure is not removed, it becomes the property of the landlord because it is affixed to the land. 1 Raleigh C. Minor, *The Law of Real Property* § 37 (Frederick D.G. Ribble ed., 1928).

253 Va. at 209, 483 S.E.2d at 226.

Consolvo & Cheshire had constructed the billboard and did not remove it at the conclusion of its tenancy or within a reasonable time thereafter. "Consequently, the billboard, which was permanently affixed to the land, became part of the realty and the property of the landowner. When Long acquired the land, he acquired the billboard as part of the land purchased." *Id.* at 209, 483 S.E.2d at 227. The court stated that the entry of a former tenant onto the land to remove the structure would itself constitute

a trespass, citing 2 Thompson on Real Property § 13.05(c) (David A. Thomas 2d ed. 1994).

In the case at bar, Western entered into a lease agreement with Smith in 1985, and Western leased the property from Smith until 1996. Western did not remove the billboard within a reasonable time after termination of the lease. The billboard then became part of the realty and belonged to Smith, who subsequently sold the property and the billboard to Wiekhorst.

When Tri-State purchased Western's assets, including certain leases, it did not acquire a lease for the billboard because Western had no interest in the billboard after the expiration of its lease with Smith. Thus, Tri-State had no interest in the billboard. Tri-State did not attempt to renew the lease with Smith. Instead, Tri-State elected to continue collecting advertising fees without compensating or accounting to the landowner. It did not operate as if it had a de facto lease with Wiekhorst because it paid nothing to Wiekhorst, even though it was collecting advertising fees. Tri-State subsequently refused to compensate Wiekhorst for use of the property.

[5] We further note that this court has held, "Whether articles constructed upon realty owned by another become annexed to and part of the realty depends to a great extent upon the facts and circumstances of the particular case." *Fuel Exploration, Inc. v. Novotny*, 221 Neb. 17, 23, 374 N.W.2d 838, 842 (1985). In the case at bar, Smith testified that he believed he was selling the property and the billboard to Wiekhorst because Smith owned the property and he believed Tri-State had abandoned the billboard by discontinuing rent payments. The billboard became a part of the realty upon termination of the lease and the failure of Western to remove the billboard within a reasonable time thereafter. It became the property of Smith, who subsequently sold it to Wiekhorst.

If a court of equity has properly acquired jurisdiction of a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. *State ex rel. Cherry v. Burns*, 258 Neb. 216, 602 N.W.2d 477 (1999). We agree with the trial court's finding that the billboard had not been removed within a reasonable time after expiration of the lease. However, the court erred in holding that a de

facto lease existed and that the billboard belonged to Tri-State. The court also erred in directing that Tri-State retain use of the billboard for advertising purposes until 2007.

Upon remand, we direct the trial court to order Tri-State to account to Wiekhorst for the net profits from advertising fees received by Tri-State from the date Wiekhorst purchased the real estate to the present, less any administrative fee paid to Wiekhorst as ordered by the bankruptcy court.

CONCLUSION

The judgment of the district court is reversed, and the cause is remanded with directions to enter judgment consistent with this opinion. There is no merit to the remaining issues in Tri-State's cross-appeal, and it is dismissed.

REVERSED AND REMANDED WITH DIRECTIONS.

McCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DARYL B. ANDERSON, APPELLANT.

693 N.W.2d 267

Filed February 25, 2005. No. S-03-1118.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
4. **Jury Instructions.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.
5. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
6. **Trial: Waiver: Appeal and Error.** The failure to make a timely objection waives the right to assert prejudicial error on appeal.

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

Christopher J. Lathrop for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Daryl B. Anderson appeals from his conviction for causing serious bodily injury while driving under the influence of alcohol during a September 25, 2002, motor vehicle accident with Jaime Hillman. Anderson raises issues related to the jury instructions given at his trial, the sufficiency of the evidence to support his conviction, and the voir dire of prospective jurors.

II. BACKGROUND

Anderson was charged with causing serious bodily injury while driving under the influence of alcohol in violation of Neb. Rev. Stat. § 60-6,198 (Reissue 2004) (count I); operating a motor vehicle without an operator's license in violation of Neb. Rev. Stat. § 60-484 (Cum. Supp. 2002) (count II); operating a motor vehicle without proof of financial responsibility in violation of Neb. Rev. Stat. § 60-321 (Reissue 2004) (count III); and operating an unregistered motor vehicle in violation of Neb. Rev. Stat. § 60-302 (Supp. 2001) (count IV). Counts II, III, and IV are not subjects of this appeal.

Jury selection for Anderson's trial began on July 9, 2003. That morning, 37 individuals reported for jury duty and 24 of them initially constituted the jury panel. During the court's questioning of the 24 prospective jurors, 1 prospective juror was excused for cause by the court and was immediately replaced on the panel. Shortly thereafter, the court passed the panel for cause and the State began its voir dire. During the State's questioning of the panel, another prospective juror was excused for cause. After the court excused that prospective juror, Anderson asked the court whether the excused prospective juror needed to be replaced on the panel. The court answered, "No, not until the time that we get

down to 12 jurors that you don't have a strike for." The State continued its questioning of the panel, and five more prospective jurors were excused for cause. Anderson did not request that these five prospective jurors be replaced on the panel, and they were not replaced. Upon conclusion of its voir dire, the State passed the panel for cause. The panel then consisted of 18 prospective jurors.

After Anderson passed the panel, the district court stated the following:

> At this time counsel may exercise [their] peremptory challenges.
>
> I would tell the prospective jurors and members of the panel that each side has a right to six peremptory challenges. If they exercise those to the point where there's only 12 of you remaining, then I will call more to be examined for cause.
>
> So, counsel, bearing that in mind, you may exercise those. I would tell the parties they don't have to exercise any of them, it's up to them.

The parties then exercised their peremptory challenges, striking a total of 6 prospective jurors from the panel, 3 by each party, leaving 12 prospective jurors on the panel. The court then called six prospective jurors forward to the panel to be questioned. As the court questioned those six prospective jurors, one was excused for cause and immediately replaced. The district court passed the panel for cause, and during the State's voir dire, two prospective jurors were excused for cause and both were immediately replaced. After the State and then Anderson passed the panel for cause, the court instructed both parties that they could exercise their three remaining peremptory challenges against any of the 18 remaining prospective jurors. Each party did so, leaving the 12 individuals who were sworn in as jurors.

The State's first witness at trial was Stephanie Sorgenfrei, a friend of Hillman. On the day of the accident, Sorgenfrei and Hillman had lunch together at a restaurant in Papillion. After lunch, the two traveled east on Cornhusker Road in separate vehicles, with Sorgenfrei following behind Hillman. As Hillman and Sorgenfrei crested a hill approaching the intersection of Cornhusker Road and Eagle Hills Drive, Sorgenfrei testified that she saw a Chevrolet Suburban, driven by Anderson, at that

intersection, sitting across both eastbound lanes of Cornhusker Road and facing north. Sorgenfrei testified that Hillman attempted to evade the Suburban by maneuvering her car into the turning lane for westbound traffic when Anderson's Suburban lunged forward —"like a tiger attacking his prey"—and struck Hillman's vehicle. The parties stipulated that Hillman suffered serious bodily injury as a result of the collision.

Deputy Brian Jarrett of the Sarpy County sheriff's office responded to the accident. Jarrett testified that upon making contact with Anderson at the scene, he could smell a very strong odor of alcohol on Anderson and noticed that Anderson's eyes were watery and bloodshot and that his speech was slurred. Jarrett further testified that after Anderson was transported to the hospital, Anderson told Jarrett that he had had "a few VO Canadian Whiskey drinks" upon waking that morning and then had more drinks later that morning. While at the hospital, a blood sample was drawn from Anderson. A chemical test performed on that sample indicated a blood alcohol content of .272 grams of alcohol per 100 milliliters of blood. Anderson also submitted to a breath test after being transported from the hospital to the county jail. The breath test indicated a breath alcohol content of .260 grams of alcohol per 210 liters of breath.

At the close of all the evidence, the jury received the following instruction on the elements of causing serious bodily injury while driving under the influence of alcohol:

INSTRUCTION NO. 3

> Under **Count I** of the Information in this case, depending on the evidence, you may find the Defendant:
>
> (1) Guilty of Driving under the influence of alcohol causing serious bodily injury; or
>
> (2) Guilty of driving under the influence of alcohol; or
>
> (3) Not guilty.
>
> **A. ELEMENTS**
>
> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the Defendant of the crime of driving under the influence of alcohol causing serious bodily injury are:
>
> (1) The Defendant operated a motor vehicle;

> (2) The Defendant operated a motor vehicle in violation of Nebraska Revised Statute Section 60-6,196;
>
> (3) *The Defendant's act of driving proximately resulted in serious bodily injury to Jaime Hillman*;
>
> (4) The act took place on or about September 25, 2002;
>
> (5) The act took place in Sarpy County, Nebraska.
>
> Section 60-6,196 states in part as follows:
>
> (1) It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
>
> (a) While under the influence of alcoholic liquor *or of any drug*;
>
> (b) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or
>
> (c) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.
>
> . . . .
>
> The Defendant's operation of a motor vehicle while under the influence of alcohol caused serious bodily injury to Jaime Hillman if Jaime Hillman's serious bodily injury occurred in a natural and continuous sequence, and without the Defendant's act the serious bodily injury would not have occurred. *If, on the other hand, you find that the acts or omissions of Jaime Hillman were the sole cause of her serious bodily injury, you must find Defendant not guilty.*

(Emphasis supplied.)

Anderson made three objections to this instruction. First, he argued that subparagraph A(3) above should have stated: "The Defendant's act of driving *in violation of § 60-6,196* proximately resulted in serious bodily injury to Jaime Hillman." He also argued that the words "or of any drug" should not have been included in the instruction when there was no evidence offered that he was under the influence of any drug. Finally, he argued that the last sentence quoted above should have read: "If, on the other hand, you find that the acts or omissions of Jaime Hillman were the sole *proximate* cause of her serious bodily injury, you must find the Defendant not guilty." The court overruled each objection.

The jury found Anderson guilty on counts I, II, and IV. He was sentenced to probation for a period of 18 months. Anderson filed a timely notice of appeal, and we granted the State's petition to bypass the Nebraska Court of Appeals.

III. ASSIGNMENTS OF ERROR

Anderson assigns, rephrased and consolidated, that the district court erred in (1) overruling each of his three objections to the jury instructions, (2) finding there was sufficient evidence to convict him of causing serious bodily injury while driving under the influence of alcohol, (3) overruling his objection to testimony regarding the blood alcohol test results, and (4) not replacing the prospective jurors excused for cause on the jury panel before the parties began exercising their peremptory challenges.

IV. STANDARD OF REVIEW

[1] Whether jury instructions given by a trial court are correct is a question of law. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[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. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004).

V. ANALYSIS

1. Jury Instructions

Anderson unsuccessfully objected to jury instruction No. 3 on three grounds, which now become his first three arguments on appeal.

(a) Implication of Drug Use

Anderson argues that the district court erred in including the words "or of any drug" in the jury instruction when no evidence was offered at trial that Anderson was under the influence of any drugs. Anderson relies on *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997). There, a jury received an instruction stating, " 'This is a criminal case in which the State of Nebraska has

charged [the defendant] with causing serious bodily injury by driving under the influence of alcoholic liquor or *drugs*.' " (Emphasis in original.) *Id.* at 467, 558 N.W.2d at 302. Another instruction stated, " 'The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of *causing* serious bodily injury while driving under the influence of alcoholic liquor *or drugs* are as follows . . . .' " (Emphasis in original.) *Id.* at 465, 558 N.W.2d at 301. We concluded that including the word "drugs" in the instructions was plain error because it implied that the defendant was a drug user and because there was no evidence in the record regarding drug use by the defendant.

[3,4] Upon careful consideration of our decision in *State v. Adams, supra*, we decline to apply it here to reverse Anderson's conviction. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). Furthermore, jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *Id.*

Viewed as a whole, we conclude that the jury instructions do not make the same implication as that made in *State v. Adams, supra*. In *Adams*, the implication that the defendant may have been a drug user was created by including the word "drugs" in statements about what the defendant had been charged with and could be convicted of. The same cannot be said of the instructions in this case. In jury instruction No. 2, the jury was told that count I of the information charged Anderson with "operat[ing] a motor vehicle under the influence of alcohol and caus[ing] serious bodily harm." The word "drugs" does not appear in this instruction. In jury instruction No. 3, the jury was told it could find Anderson guilty of driving under the influence of alcohol causing serious bodily injury, driving under the influence of alcohol, or not guilty. The instruction said nothing relating to Anderson's driving under the influence of any drug. The instruction did use the word "drug" but only when the instruction quoted Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2002). Read as a whole, the instructions conveyed to the jury that Anderson was charged with operating a motor

vehicle while under the influence of alcohol, but not drugs. Anderson's argument is without merit.

(b) Proximate Cause Instruction

Anderson argues that the district court erred in instructing that "[t]he Defendant's act of driving proximately resulted in serious bodily injury to Jaime Hillman." Anderson contends that it was error to instruct the jury that the mere act of driving need proximately cause Hillman's serious bodily injury.

Anderson relies on *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997), in which the defendant was convicted of causing serious bodily injury while driving under the influence of alcohol. The jury in *Adams* was instructed that the material elements of the crime included " '[t]hat while so operating a motor vehicle [the defendant] did proximately cause serious bodily injury to [the victim].' " 251 Neb. at 465, 558 N.W.2d at 301. The defendant appealed to the Court of Appeals, which reversed the judgment and remanded the cause for a new trial. It concluded that the instructions failed to properly instruct the jury that the act of driving while under the influence must proximately cause serious bodily injury. *State v. Adams*, No. A-95-669, 1996 WL 219671 (Neb. App. Apr. 30, 1996) (not designated for permanent publication). The State petitioned for further review to this court, and we affirmed the decision of the Court of Appeals.

State v. Bartlett, 3 Neb. App. 218, 525 N.W.2d 237 (1994), provides a more detailed explanation of the proximate cause element of causing serious bodily injury while driving under the influence. The Court of Appeals found plain error when a jury was instructed that the material elements of the crime were in part as follows:

> "1. [the defendant] was operating a motor vehicle; and,
>
> "2. when he did so, he caused serious bodily injury to [the victim]; and,
>
> "3. when he did so, he had a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his blood . . . ."

Id. at 223, 525 N.W.2d at 241. The *Bartlett* court interpreted Neb. Rev. Stat. § 39-669.39 (Cum. Supp. 1992) (now codified at § 60-6,198) to require that the defendant's act of driving while intoxicated must proximately cause serious bodily injury:

> To interpret the statute otherwise, that is, to find that the statute criminalizes any bodily injury which the defendant proximately causes if the defendant happens to be driving while intoxicated, would result in an absurdity. If we were to interpret the statute in such a way, it would impose strict liability upon a defendant for an act such as assaulting his passenger, if it caused serious bodily injury, so long as the defendant happened to be driving and happened to be intoxicated in violation of § 39-669.07 [now codified at § 60-6,196]. Rather, the conduct which the statute seeks to criminalize is some *act* of the defendant which proximately causes serious bodily injury. The only act mentioned in the statute is the act of driving while intoxicated. Therefore, we believe the act of driving while intoxicated must proximately cause the injury.

(Emphasis in original.) *State v. Bartlett*, 3 Neb. App. at 224, 525 N.W.2d at 241.

In the case at bar, instruction No. 3 required proof beyond a reasonable doubt of a nexus between the defendant's *act of driving* and the serious bodily injury, rather than merely requiring proof that the injury occurred *while* the defendant was driving. It logically follows that Anderson's "act of driving" occurred while Anderson was under the influence. Therefore, read as a whole, the jury instructions fairly presented the law so that the jury could not be misled.

(c) "Sole Cause" Instruction

Anderson argues that the statement made in jury instruction No. 3, "If . . . you find that the acts or omissions of Jaime Hillman were the sole cause of her serious bodily injury, you must find Defendant not guilty" should have instead been written as "sole proximate cause."

In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004). Anderson has failed to demonstrate any prejudice as a result of this omission. As the Court of Appeals described in *Bartlett*, "[the victim's] actions were not a defense to this charge so long as [the defendant's] conduct was a contributing factor, i.e.,

also a proximate cause." *State v. Bartlett*, 3 Neb. App. 218, 229, 525 N.W.2d 237, 244 (1994). While flawed, the instruction in this case was not prejudicial.

2. Sufficiency of Evidence

Anderson argues that there was insufficient evidence to convict him of causing serious bodily injury while driving under the influence of alcohol. He contends that the State failed to offer any evidence that his alcohol use was the proximate cause of Hillman's injuries.

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. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004). Anderson recognizes that "[t]aking the facts most favorable to the State, the State showed that . . . Anderson was under the influence of alcohol, a collision occurred between his vehicle and Jaime Hillman's vehicle, and . . . Hillman was seriously injured." Brief for appellant at 15. In addition, Sorgenfrei testified that Hillman attempted to avoid Anderson's vehicle on the road but was struck when Anderson's vehicle lunged into Hillman's vehicle. This is sufficient evidence to find that Anderson's act of operating a motor vehicle in violation of § 60-6,196 proximately caused serious bodily injury to another.

3. Blood Alcohol Test

[5] Anderson also assigns that the district court erred in overruling his objections to testimony regarding the blood alcohol test, a test he contends was not performed in accordance with the standards and procedures required by law. Assuming, for the sake of argument, that the court did err, we conclude that such error was harmless. Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact. *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003).

In addition to the results of the blood alcohol test, the record also contains evidence that a chemical breath test was performed on Anderson, revealing a breath alcohol content in excess of the

legal limit. Anderson has not taken exception to the chemical breath test results. That evidence supports the finding by the jury that Anderson was in violation of § 60-6,196 at the time of the accident, rendering this assignment of error meritless.

4. Voir Dire

Finally, Anderson argues that the district court committed prejudicial error when it excused six prospective jurors for cause but did not replace them on the jury panel prior to the parties' first use of peremptory challenges.

The record reveals the inconsistent actions of the district court in replacing some excused prospective jurors but not others, as recounted in detail above. The court, on its own motion, initially excused one prospective juror for cause and immediately replaced her on the panel. Subsequently, during the State's voir dire of the panel, six prospective jurors were excused for cause but were not replaced. After the parties' first round of peremptory challenges were exercised, additional individuals were called to the panel. Those that were thereafter excused for cause were immediately replaced on the panel.

After the first prospective juror had been excused but not replaced, Anderson inquired, "Judge, do we need to replace [this juror]?" The court answered, "No, not until the time that we get down to 12 jurors that you don't have a strike for." Anderson did not make an objection, and the court excused five more jurors for cause and did not replace them on the panel.

[6] We question the court's management of the jury pool in this case, but Anderson did not object to the district court's actions. Instead he inquired about the procedure. The failure to make a timely objection waives the right to assert prejudicial error on appeal. *In re Interest of Phyllisa B.*, 265 Neb. 53, 654 N.W.2d 738 (2002). That rule has equal application here. Anderson's failure to object to the district court's actions is a waiver of his right to assert this argument on appeal.

VI. CONCLUSION

The judgment of the district court is affirmed.

Affirmed.

IN RE TRUST CREATED BY HAROLD INMAN, DECEASED. ROBERT H. BRACKETT, TRUSTEE OF THE HAROLD INMAN REVOCABLE TRUST, APPELLANT, V. MARYANN TREMAINE ET AL., APPELLEES.

693 N.W.2d 514

Filed February 25, 2005. No. S-03-1183.

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.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Evidence: Words and Phrases.** Competent evidence is evidence which is admissible and tends to establish a fact in issue.

Appeal from the County Court for Douglas County: JOSEPH P. CANIGLIA, Judge. Affirmed.

Kenneth W. Pickens and Luke H. Paladino, Senior Certified Law Student, of Pickens, Green & Gleason, L.L.P., for appellant.

Monte Taylor, of Taylor, Peters & Drews, for appellees.

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

STEPHAN, J.

Robert H. Brackett, as trustee of a revocable trust created by his grandfather, Harold Inman, now deceased, petitioned the county court for Douglas County for authority to sell certain real property held by the trust to himself. After an evidentiary hearing at which several beneficiaries of the trust appeared in opposition to the proposed sale, the court denied Brackett's petition. He 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).

FACTS

Inman, as settlor, executed a revocable trust agreement dated March 9, 1994, naming himself as the initial trustee. The beneficiaries of the trust included Inman's two daughters and seven

grandchildren, including Brackett, who was also named as successor trustee. Brackett became the trustee upon Inman's death and had served in that capacity for approximately 7 years as of the hearing held in this matter in August 2003.

The trust instrument directed that certain assets be distributed from the trust to various beneficiaries upon Inman's death. Those assets are not involved in this appeal. The trust assets also included approximately 189 acres of farmland located in Washington County, Nebraska. The trust instrument directed that Elizabeth Peters, one of Inman's surviving daughters, was to receive rental income from 55 acres of this land during her lifetime and that upon her death, Brackett was to receive the income during his lifetime. The trust instrument further provided that Brackett was to receive income from the remainder of the farmland and that upon his death, it was to be divided among the other beneficiaries or their issue.

Brackett executed a real estate purchase agreement dated September 30, 2002, whereby he agreed to purchase from "Robert Brackett as Trustee of the Inman Living Trust" a portion of the Washington County land held by the trust, consisting of 42 acres, of which 30 were tillable. On April 14, 2003, Brackett registered the trust in the county court for Douglas County and petitioned the court to approve the proposed sale of the 42-acre tract. All nine beneficiaries of the trust, including Brackett, were listed in the petition as interested parties. Brackett alleged in his verified petition that he had purchased a home and moved it "onto the real property he proposes to sale [sic] to himself." He further alleged that if the court approved the sale at a price of $84,000, a reasonable rate of return on the proceeds would exceed the income being generated by the subject property. Five of the beneficiaries thereafter filed a written objection to the proposed sale on grounds that it "serves no one's interest but the Trustee's, reduces the value of the residuary estate and amounts to a calloused disregard of the Trustee's fiduciary obligation to protect the interests of the trust beneficiaries."

An evidentiary hearing on the proposed sale was held on August 15, 2003. Brackett testified that the only assets held by the trust at that time were the 189 acres of Washington County farmland, which included the 42 acres he proposed to sell, and $300 in

cash. The 30-acre tillable portion of the 42-acre parcel was rented on a cash basis and generated income of $64 per acre, totaling $1,920. Bracket testified that the proposed purchase price of $84,000 was based upon an appraised value of $2,000 per acre. Frederick Wohlenhaus, a licensed real estate appraiser, testified that he appraised the 189-acre tract in the fall of 1999, in March 2002, and in early August 2003. He also examined the 42-acre parcel which was the subject of the proposed sale. Wohlenhaus concluded that the highest and best use of the land was agricultural and that the fair market value of the 42-acre parcel was $2,000 per acre.

Brackett testified that he purchased an old farmhouse at auction and moved it onto the 42-acre parcel in June 2002, prior to seeking court approval of the sale. He further acknowledged that as a condition of the proposed sale, he would grant a permanent easement for ingress and egress to the remaining property which is located generally northeast and southwest of the 42 acres. Brackett believed, but was not certain, that the rate of return on the farmland was approximately 2⅓ percent, based upon its appraised value. Although he professed no experience in investing, he believed that the proceeds from the sale of the land could be invested to earn a greater return. He testified that if the sale were authorized, he would employ a broker to invest the proceeds, but indicated that further research would be necessary to determine the specific investments to be made. Brackett testified that he had previously attempted to sell the entire parcel of land held by the trust but received no offers.

Dr. David Volkman testified on behalf of Brackett as an expert in economics and finance. Volkman reviewed the trust instrument, the assets held and income earned by the trust, the Nebraska Uniform Prudent Investor Act, information from the National Council of Real Estate Investment Fiduciaries, equity returns from a database, and the appraisals prepared by Wohlenhaus. Based upon this information, Volkman opined that because the assets of the trust were not diversified, the standards of the Nebraska Uniform Prudent Investor Act were not met. Volkman analyzed the diversification of the trust in relation to the return and risk of the investments and compared the rate of return on farmland as opposed to other types of investments. Asked to evaluate the risk associated with the trust assets as then held, Volkman stated:

> The greatest risk is that it's not diversified. It's invested all in one asset. And when you invest in one asset, you significantly increase the probability of not receiving the return that you would like to it. It would be similar if you went out and bought one stock and put all of your savings in one stock. There's a high probability you may not get the return that you want from that one stock.

Volkman further testified that farmland has a lower rate of return and higher risk for rate of return compared to the Dow Jones index, a higher rate of return and higher risk than treasury notes, and a significantly lower rate of return but also less risk than the NASDAQ Composite Index. He testified that the overall risk to the beneficiaries could be reduced by having a portion of the corpus invested in farmland and other portions in investments which would yield a higher rate of return.

Maryann Tremaine, Inman's other surviving daughter, testified as a spokesperson for the five beneficiaries who filed a written objection to the sale. She opposed the sale because of her belief that Inman intended the farmland to remain in trust for all of the beneficiaries and that it would increase in value over time. Another beneficiary who joined in the written objection testified that she opposed the sale for generally the same reasons. Two beneficiaries who did not file written objections also testified in opposition to the sale. Peters opposed the sale because she believed the property should remain "in the family" and was satisfied with the current income. One of Inman's granddaughters who is a beneficiary of the trust testified that she opposed the sale because "I truly believe my grandfather left the property for everybody to enjoy. It has sentimental value to the whole family, not just one person."

In its order denying Brackett authority to execute the proposed sale, the county court found that "seven of the nine trust beneficiaries oppose the sale; that there is no persuasive evidence that the proposed sale would enhance or protect the interests of the beneficiaries and that there is a likelihood that the sale would lessen the value of those interests."

ASSIGNMENTS OF ERROR

Brackett assigns, combined and restated, that by denying him authority to sell the trust property to himself, the probate court (1)

failed to allow him to diversify the assets of the trust in compliance with the Nebraska Uniform Prudent Investor Act and (2) erroneously allowed principles against self-dealing to trump statutory law and trust provisions that authorized the requested sale.

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 Conservatorship of Hanson*, 268 Neb. 200, 682 N.W.2d 207 (2004); *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Conservatorship of Hanson, supra*; *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002). Competent evidence is evidence which is admissible and tends to establish a fact in issue. *Mathes v. City of Omaha*, 254 Neb. 269, 576 N.W.2d 181 (1998).

ANALYSIS

The Nebraska Uniform Trust Code (NUTC) was enacted in 2003 and became operative on January 1, 2005, during the pendency of this judicial proceeding. See Neb. Rev. Stat. §§ 30-3801 to 30-38,110 (Cum. Supp. 2004). Although not briefed or argued by the parties, this operative date has significance in this case because the NUTC applies to certain preexisting trust relationships. § 30-38,110. See, generally, John M. Gradwohl and William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 Neb. L. Rev. 312 (2003). Specifically, § 30-38,110 provides in pertinent part:

> (a) Except as otherwise provided in the Nebraska Uniform Trust Code, on January 1, 2005:
>
> (1) the code applies to all trusts created before, on, or after January 1, 2005;
>
> (2) the code applies to all judicial proceedings concerning trusts commenced on or after January 1, 2005;

> (3) the code applies to judicial proceedings concerning trusts commenced before January 1, 2005, unless the court finds that application of a particular provision of the code would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of the code does not apply and the superseded law applies; and
>
> (4) an act done before January 1, 2005, is not affected by the code.

Under § 30-38,110(a)(1), the NUTC is generally applicable to all trusts in existence on January 1, 2005, subject to certain statutory and perhaps constitutional exceptions. See Gradwohl & Lyons, *supra*. Because this judicial proceeding was commenced prior to the operative date of the NUTC, § 30-38,110(3) requires us to apply the NUTC except in those instances where we determine that such application would "substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties," in which instance, we must apply prior law which has been superseded by the NUTC.

In his brief, Brackett argues that this action is governed by Neb. Rev. Stat. § 30-2822(2) (Reissue 1995), which provided in pertinent part: "Any sale or encumbrance to the trustee . . . is voidable by any trust beneficiary except one who has consented after fair disclosure, unless (a) the trust instrument provides otherwise; or (b) the transaction is approved by the court after notice to interested persons." This statute was repealed by the NUTC. 2003 Neb. Laws, L.B. 130 (operative date January 1, 2005). Under the corresponding provision of the NUTC, a transaction involving trust property entered into by the trustee for the trustee's own personal account

> is voidable by a beneficiary affected by the transaction unless:
>
> (1) the transaction was authorized by the terms of the trust;
>
> (2) the transaction was approved by the court;
>
> (3) the beneficiary did not commence a judicial proceeding within the time allowed by section 30-3894;

> (4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 30-3898; or
>
> (5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

§ 30-3867(b). Both statutes authorize a transfer of trust assets by a trustee to the trustee's own account with court approval, and the only issue presented in this appeal is whether the county court erred in not approving Brackett's proposed sale of trust assets to himself. Because we perceive no prejudice to any party in analyzing this issue under the NUTC, we do so pursuant to § 30-38,110(a)(3).

Resolution of the issue prescribed by this appeal requires an examination of the relationship between two separate legal duties owed by a trustee to the beneficiaries of the trust. The first is the duty of loyalty, which is substantially the same under the NUTC and prior law. Under the NUTC, "[a] trustee shall administer the trust solely in the interests of the beneficiaries." § 30-3867(a). Likewise, under the former law, "[a] trustee shall invest and manage the trust assets solely in the interest of the beneficiaries." Neb. Rev. Stat. § 8-2206 (Reissue 1997). Similar substantive provisions of the Nebraska Uniform Prudent Investor Act, formerly codified at Neb. Rev. Stat. §§ 8-2202 to 8-2205 (Reissue 1997), are also now included in the NUTC at §§ 30-3883 to 30-3886. Accordingly, pursuant to § 30-38,110(a)(3), we shall refer to the provisions of the NUTC in discussing the trustee's duties of loyalty and compliance with the prudent investor rule.

The record reflects that Brackett has purely personal reasons for seeking to acquire the 42-acre parcel from the trust. Brackett, who described himself as one who invests, remodels, and sells real estate, testified that he moved the farmhouse which he had purchased at auction to the trust property because he had "nowhere else to put it." He further acknowledged that he sought more land than was necessary for a home site because "I wanted my kids to have a good sized piece of land. I've always worked the land when I was a kid there and played up there. And it has some sentimental value, and I wanted more of a farmstead for my kids to grow up on." Brackett argues, however, that the county

court should nevertheless have approved the sale because investment of the proceeds in something other than agricultural real estate would provide diversification of trust assets in a manner consistent with the prudent investor rule, thereby benefiting all the beneficiaries.

The prudent investor rule applicable to trustees is now codified at §§ 30-3883 to 30-3889. Included in that rule is the principle that a "trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." § 30-3885. On the record before us, we conclude that there was no absolute duty to diversify the trust assets which would compel court approval of the proposed sale. The prudent investor rule is a "default rule" which "may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust." § 30-3883(b). It is true, as Brackett argues, that the trust instrument in this case gave the trustee broad powers in dealing with trust assets, including the power "[t]o receive, hold, manage and care for the property held in trust," and "[t]o sell publicly or privately for cash or on time, property, real or personal, held in trust . . . ." However, the trust instrument also conferred upon the trustee the power

> [t]o retain any property, whether consisting of stocks, bonds, other securities, participations in common trust funds, or of any other type of personal property or of real property, taken over by it as a portion of the trust, *without regard to the proportion such property or property of a similar character so held may bear to the entire amount of the trust*, whether or not such property is of the class in which trustees generally are authorized to invest by law or rule of court; *intending thereby to authorize the Trustee to act in such manner as will be for the best interest of the trust beneficiaries*, giving due consideration to the preservation of principal and the amount and regularity of the income to be derived therefrom.

(Emphasis supplied.) With respect to assets originally placed in trust, this provision modifies the general duty to diversify by authorizing the trustee to retain nondiversified assets if retention would be in the best interests of the beneficiaries.

Furthermore, the trustee's statutory duty to diversify trust assets is subject to the general "prudent investor" standard of care which requires a trustee to consider various circumstances relevant to the trust or its beneficiaries in investing and managing trust assets. § 30-3884(c). These circumstances include "[a]n asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries." § 30-3884(c)(8). We agree with a commentator who has noted that a similar provision in the Nebraska Uniform Prudent Investor Act could be utilized as a basis for justifying "non-diversification" of a family farm or ranch held in trust in favor of retaining the asset "for future generations of the family." Ronald R. Volkmer, *The Latest Look in Nebraska Trust Law*, 31 Creighton L. Rev. 221, 246 (1997). Brackett's professed "sentimental" attachment to the farmland which has been in his family for many years is clearly shared by the other family members who are beneficiaries of the trust. Those who filed an objection or testified in opposition to the proposed sale expressed the view that excising a 42-acre parcel from the 189-acre farm would have a detrimental effect upon their special relationship with the asset without achieving any appreciable benefit.

Brackett does not argue that his duty to diversify is absolute, but relies upon *Love v. Fauquet*, 184 Neb. 250, 166 N.W.2d 742 (1969), to support his argument that because the power to sell is clearly vested in his discretion, the sale should be allowed unless there is a clear abuse of discretion by him and the remainder beneficiaries should not be allowed to abdicate or control the sale. In *Fauquet*, the settlor devised an 80-acre farm in trust for the support and maintenance of a life beneficiary. The trust permitted invasion of the corpus in order to accomplish its objective. After liquid assets of the trust became depleted, the trustee sold the farm at a fair price. The remainder beneficiaries sought to set aside the sale in order to preserve the trust corpus and restrict the life beneficiary and the trustee to the income from the land. This court affirmed the dismissal of the action, determining that there was no conflict of interest on the part of the trustee with respect to the sale and that under the terms of the trust, the risk of invasion of the trust principal to provide liquid assets for support of the life beneficiary fell on the remainder beneficiaries. The instant case is clearly distinguishable from *Fauquet*, in that none of

the beneficiaries are dependent upon the trust for support. Peters, the only income beneficiary other than Brackett, testified that she considered the income from the farm held in trust to be sufficient. Moreover, *Fauquet* involved a sale to a disinterested third party with the express consent of the income beneficiary.

Historically, the law has looked with disfavor upon a trustee selling trust assets to himself. See, e.g., *Lancaster County Bank v. Marshel*, 130 Neb. 141, 264 N.W. 470 (1936). While such transactions are not absolutely prohibited under current law, they are voidable by a beneficiary unless specifically authorized by the trust instrument, approved by a court, or consented to or ratified by the beneficiary. See § 30-3867(c). It logically follows that a court should not approve such a transaction over the objection of a beneficiary unless it can be clearly demonstrated that the transaction is consistent with the trustee's duty to administer the trust solely in the interests of the beneficiaries. See Restatement (Third) of Trusts § 170, comment *f.* at 196 (1992) (noting that "court will permit a trustee to purchase trust property only if in its opinion such purchase is for the best interest of the beneficiary"). We agree with the county court that the evidence in this case does not meet this test. Brackett presented no specific plan for investment of the proceeds from the proposed sale, and thus, any potential benefit to the beneficiaries in the nature of increased income without a corresponding increase in risk to the principal is speculative. There is no evidence that additional income is needed in order to carry out any specific purpose of the trust, and the beneficiaries have articulated a legitimate interest in maintaining the geographic integrity of the farm that has been in their family for many years.

We conclude that the judgment of the county court conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Finding no error appearing on the record, we affirm.

AFFIRMED.

ANNE DWORAK, APPELLANT, V. FARMERS INSURANCE EXCHANGE, APPELLEE.

693 N.W.2d 522

Filed February 25, 2005. No. S-03-1428.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in 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. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Insurance: Motor Vehicles: Contracts: Tort-feasors.** Underinsured motorist coverage is a contract which indemnifies an insured when a tort-feasor's insurance coverage is inadequate.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

James E. Harris, Britany S. Shotkoski, and Michaela E. Welniak, of Harris Kuhn Law Firm, L.L.P., for appellant.

Daniel P. Chesire, of Lamson, Dugan & Murray, L.L.P., and Raymond E. Walden, of Walden Law Office, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Anne Dworak sued her insurer, Farmers Insurance Exchange (Farmers Insurance), seeking underinsured motorist benefits and other relief pursuant to the Unfair Insurance Claims Settlement Practices Act, Neb. Rev. Stat. §§ 44-1536 to 44-1544 (Reissue 1998). Farmers Insurance moved for summary judgment, asserting that the suit was barred under Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004) because the statute of limitations applicable to Dworak's suit against the driver of the other vehicle had expired prior to Dworak's commencement of the current action against

Farmers Insurance. The Douglas County District Court entered judgment in favor of Farmers Insurance.

SCOPE OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

[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. *Id.*

[3] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

FACTS

At all times relevant to this appeal, Farmers Insurance provided automobile insurance coverage to Dworak, including underinsured motorist liability protection. On September 17, 1997, Dworak was involved in an automobile accident in Omaha. The driver of the other vehicle was Tammi Smith. As a result of the accident, Dworak incurred a number of physical injuries, some necessitating surgery.

On August 13, 2001, Smith's insurer, American Family Insurance, offered to settle with Dworak for its policy limits of $50,000. Dworak then wrote to Farmers Insurance to notify the company of the settlement offer in accordance with Neb. Rev. Stat. § 44-6412(2) (Reissue 2004).

On September 7, 2001, Dworak filed suit against Smith and an entity referred to in the petition as "Farmers' Insurance Company." Dworak claimed damages caused by Smith's negligence and sought a declaration of Dworak's rights under the underinsured motorist provisions of her insurance contract with Farmers Insurance. On the same day, Farmers Insurance wrote to notify Dworak that it would "exercise its 44-6412 opportunity" to substitute payment for the settlement proposed by Smith's insurer, American Family Insurance, pursuant to § 44-6412(2).

The district court dismissed Dworak's petition without prejudice on July 11, 2002, pursuant to the court's case progression standards. No summons was ever served upon the defendants.

Dworak filed the current action against Farmers Insurance on October 15, 2002. She sought a declaration of her "rights, status and other legal obligations and entitlements" pursuant to the underinsured motorist provisions of her insurance policy issued by Farmers Insurance. Farmers Insurance moved for summary judgment, claiming that because Dworak's cause of action against Smith was barred by the applicable statute of limitations, Dworak's suit against Farmers Insurance was also barred, pursuant to § 44-6413(1)(e).

The district court granted summary judgment in favor of Farmers Insurance. The court found that Dworak's claim against Smith had expired on September 17, 2001, and certainly no later than March 7, 2002 (the end of the 6 months allowed for service of summons with respect to the suit filed on September 7, 2001), both of which were several months before the filing of the present action. Accordingly, the court held that the present action was barred pursuant to § 44-6413(1)(e). Dworak perfected an appeal to this court.

ASSIGNMENTS OF ERROR

Dworak's assignments of error can be summarized as follows: The district court erred in finding that her present lawsuit against Farmers Insurance was barred pursuant to § 44-6413(1)(e).

ANALYSIS

The issue is whether § 44-6413(1)(e) applies to the case at bar. In its order sustaining summary judgment for Farmers Insurance, the district court relied upon § 44-6413(1)(e), which states:

> (1) The uninsured and underinsured motorist coverages provided in the Uninsured and Underinsured Motorist Insurance Coverage Act shall not apply to:
>
> . . . .
>
> (e) Bodily injury, sickness, disease, or death of the insured with respect to which the applicable statute of limitations has expired on the insured's claim against the uninsured or underinsured motorist.

Dworak asserts that the district court erred in applying § 44-6413(1)(e). She concedes that service of summons in the original suit against Smith was not timely, but contends that the subsequent dismissal of that suit had no effect on the present action against Farmers Insurance. She claims that because the original action was dismissed without prejudice, she could refile suit against Farmers Insurance when her cause of action for underinsured motorist benefits accrued. According to Dworak, the district court erred in failing to consider the issue of when such a cause of action would accrue for underinsured motorist benefits.

Dworak claims that her cause of action is controlled by Neb. Rev. Stat. § 25-205 (Reissue 1995), which provides that an action on a written contract must be commenced within 5 years. At trial, Dworak asserted that Farmers Insurance breached its obligations under its policy of insurance sometime after September 14, 2001. Therefore, she claimed the 5-year limitation for actions on written contracts permitted her to commence her action against Farmers Insurance within 5 years of September 14.

[4] Underinsured motorist coverage is a contract which indemnifies an insured when a tort-feasor's insurance coverage is inadequate. *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000). Because of the derivative nature of underinsured motorist coverage, two statutory limitations periods are arguably applicable to an insured's action against the underinsured motorist carrier. *Id.* The first is found in § 44-6413(1)(e), which provides that underinsured motorist coverage shall not apply to an action for "[b]odily injury . . . of the insured with respect to which the applicable statute of limitations has expired on the insured's claim against the . . . underinsured motorist." The second is found in § 25-205, which provides for a 5-year statute of limitations on written contracts.

Whether § 44-6413(1)(e) applies to the case at bar presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve questions independently of the conclusion reached by the trial court. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

Dworak's claim against Farmers Insurance was filed more than 4 years after the accident involving Smith. Section 44-6413(1)(e) serves to bar certain claims for uninsured and underinsured

motorist coverage. We first addressed § 44-6413(1)(e) in *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999), where the plaintiff sued his insurer in order to recover uninsured motorist benefits after incurring injuries in an automobile accident. He did not file suit against the tort-feasor, and the suit against his insurer was filed after the expiration of the 4-year statute of limitations applicable to his action against the tort-feasor.

We held that § 44-6413(1)(e) operated as a bar to an action for uninsured motorist benefits where the insured claimant did not commence an action against the tort-feasor within the applicable limitations period. See *Kratochvil v. Motor Club Ins. Assn., supra*. We concluded that § 44-6413(1)(e) controlled the insured's claim and that the district court did not err in finding the claim was precluded because the applicable statute of limitations against the tort-feasor had expired prior to the filing of his action against his insurer.

Farmers Insurance argues that this appeal presents a factual situation that is analogous to that found in *Kratochvil*. Specifically, it claims that the 4-year statute of limitations applicable to Dworak's cause of action against Smith had expired prior to Dworak's filing of the present suit against Farmers Insurance. It contends that the filing of the original action against Smith, which was within the applicable statute of limitations, had no effect because it was subsequently dismissed. As such, it argues that § 44-6413(1)(e) serves as a bar to the present action.

Dworak relies upon *Schrader v. Farmers Mut. Ins. Co.*, 259 Neb. 87, 608 N.W.2d 194 (2000), and *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000), in arguing that § 44-6413(1)(e) does not apply to the case at bar. Dworak's reliance is misplaced because *Schrader* and *Snyder* are factually distinguishable. In *Schrader*, prior to the filing of the action against his insurer, but less than 4 years after the accident, Michael Schrader filed suit against the tort-feasor. More than 4 years after the accident occurred, Schrader accepted a settlement offer from the tort-feasor's insurer. Schrader then sought underinsured motorist benefits from his insurer.

Schrader's insurer moved for summary judgment, arguing that Schrader's suit against it was barred pursuant to § 44-6413(1)(e)

because it had been filed more than 4 years after the accident. The district court granted summary judgment.

We reversed and held that § 44-6413(1)(e) was not applicable. We distinguished *Kratochvil* by stating:

> In *Kratochvil*, § 44-6413(1)(e) applied because the statute of limitations on the insured's underlying claim against the uninsured motorist had expired since the insured had not timely filed suit against the uninsured motorist. In the instant case, however, the statute of limitations never expired on Schrader's claim against [the tort-feasor] because Schrader timely filed suit against her.

Schrader v. Farmers Mut. Ins. Co., 259 Neb. at 93, 608 N.W.2d at 199. We held that in such a situation, the proper statute of limitations to apply was the 5-year limit for actions for written contracts pursuant to § 25-205.

In *Snyder*, the insured, Carol Snyder, was injured in an automobile accident and sued the tort-feasor within the 4-year statute of limitations. She then settled her claim against the tort-feasor and made a demand upon her insurer for underinsured motorist benefits provided by her policy. In a letter dated more than 5 years after the accident with the tort-feasor, Snyder's insurer denied the claim. The district court entered judgment in favor of Snyder, and her insurer appealed.

We concluded that § 44-6413(1)(e) did not apply because it was clear that Snyder had commenced her action against the tort-feasor within the 4-year limitations period governing tort actions. As in *Schrader*, we held that the proper statute of limitations was the 5-year limit for written contracts. Addressing the issue of when a cause of action accrues for underinsured motorist benefits, we stated the following:

> [W]e hold that an insured's cause of action on an insurance policy to recover underinsured motorist benefits accrues at the time of the insurer's breach or failure to do that which is required under the terms of the policy. . . .
>
> . . . Snyder's cause of action against [the insurer] did not accrue until [the insurer's] claims supervisor denied liability for underinsured motorist benefits . . . .

Snyder v. EMCASCO Ins. Co., 259 Neb. at 629, 611 N.W.2d at 416.

Dworak argues that § 44-6413(1)(e) does not apply to the present case because her original action against Smith was dismissed without prejudice. She claims this would permit the refiling of her suit against Farmers Insurance if and when it breached or failed to perform under its policy. Dworak contends that the appropriate statute of limitations is the 5-year limit applicable to actions on written contracts and that, therefore, the current action was filed in a timely manner. This argument has no merit.

As previously stated, in *Schrader v. Farmers Mut. Ins. Co.*, 259 Neb. 87, 608 N.W.2d 194 (2000), and *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000), the insured filed suit against the tort-feasor within the 4-year statute of limitations for actions in tort, therefore complying with § 44-6413(1)(e). For this reason, we held in each case that the limits imposed by § 44-6413(1)(e) did not apply, and we analyzed the suits against the insurers for underinsured motorist benefits under the auspices of the 5-year statute of limitations for actions upon written contracts.

Conversely, in the present case, although Dworak filed suit against Smith within the applicable 4-year statute of limitations, this suit was eventually dismissed for failure to serve summons upon Smith. Neb. Rev. Stat. § 25-217 (Reissue 1995) requires that all actions shall be dismissed without prejudice as to any defendant not served within 6 months from the date the petition was filed. Dworak's original lawsuit was dismissed in accordance with the case progression standards of the district court. However, the effect of a dismissal without prejudice is the same as if the case had been dismissed pursuant to § 25-217.

In *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000), we discussed the effect of dismissing an unserved petition without prejudice pursuant to § 25-217. We stated:

> The inference from the entire expression "shall stand dismissed without prejudice" is twofold: (1) that the dismissal of the action is mandatory and automatic in nature and (2) that notwithstanding the dismissed status of the action, the character of the dismissal is "without prejudice" and *the action may therefore be refiled if not otherwise barred, such as by the statute of limitations.*

(Emphasis supplied.) *Vopalka v. Abraham*, 260 Neb. at 745, 619 N.W.2d at 600. As such, a dismissal without prejudice means that another petition may be filed against the same parties upon the same facts as long as it is filed within the applicable statute of limitations. Dworak's filing of the suit against Smith and its subsequent dismissal without prejudice did not toll the underlying 4-year statute of limitations. Unlike *Schrader* and *Snyder*, Dworak did not prevent the expiration of the 4-year statute of limitations. Therefore, § 44-6413(1)(e) is applicable to the case at bar.

Dworak's arguments fail to take into account the purpose of § 44-6413(1)(e) and the reason for its enactment. The statute serves as a prerequisite to an insured's suit against the insurer for uninsured or underinsured motorist coverage. The purpose underlying § 44-6413(1)(e) is the protection of the insurer under circumstances where it may have to pay uninsured or underinsured motorist benefits. The statute makes it the responsibility of the insured to preserve the cause of action against the tort-feasor in order to protect the insurer's rights against the tort-feasor. Because the statute of limitations on Dworak's cause of action against Smith expired prior to filing the suit against Dworak's insurer, she failed to comply with § 44-6413(1)(e).

Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). 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*.

Even when viewing the evidence in a light most favorable to Dworak, we conclude that the district court properly sustained Farmers Insurance's motion for summary judgment. Section 44-6413(1)(e) applies to this case and bars Dworak's claim pursuant to the Uninsured and Underinsured Motorist Insurance Coverage Act. The district court properly concluded that this case presents no genuine issue as to any material fact and that Farmers Insurance is entitled to judgment as a matter of law.

Dworak argues that the decision of the district court leaves open the possibility for an insured to be placed in a "legal trap and dilemma." See brief for appellant at 18. However, any potential "trap" or "dilemma" may be avoided through compliance with § 44-6413(1)(e). If Dworak had complied with § 44-6413(1)(e) by timely filing her initial suit and serving summons upon Smith, she would have preserved her cause of action against Farmers Insurance for underinsured motorist benefits.

CONCLUSION

For the reasons stated above, the order of the district court granting summary judgment in favor of Farmers Insurance is affirmed.

AFFIRMED.

MARK J. PARKERT, APPELLANT, V.
ERIC H. LINDQUIST, APPELLEE.

693 N.W.2d 529

Filed February 25, 2005. No. S-04-089.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief.
3. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.
4. **Attorney Fees.** Attorney fees may be recovered only when provided by statute, or where the uniform course of procedure has been to allow recovery.
5. **Contracts: Attorney Fees: Public Policy.** A contract provision requiring that in the event of litigation the prevailing party will be entitled to attorney fees is contrary to public policy and void.
6. **Contracts: Public Policy.** It is not the province of the courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands.
7. **Contracts: Attorney Fees: Public Policy.** In a nonjudicial proceeding, a contract provision requiring payment of a reasonable attorney fee is not against public policy.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Afffirmed.

Monte Taylor and Paul E. Peters, of Taylor, Peters & Drews, for appellant.

Steven J. Riekes and Harold M. Zabin, of Marks, Clare & Richards, L.L.C., for appellee.

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

CONNOLLY, J.

Mark J. Parkert appeals the district court's order dismissing his complaint seeking damages for conversion against the appellee, Eric H. Lindquist. Parkert, a trustor under a trust deed, alleged that he was coerced into paying an attorney fee to Lindquist because of a provision in the trust deed and that the provision violated public policy. We determine that in a nonjudicial setting, a contract provision requiring payment of a reasonable attorney fee does not violate public policy. Accordingly, we affirm.

BACKGROUND

Parkert's complaint alleged the following facts: Lindquist is an attorney who represents a number of mortgage lenders in pursuing remedies against delinquent borrowers. Parkert formerly owned a residence in Omaha that was financed by a loan from Wells Fargo Home Mortgage, Inc. (Wells Fargo), and was secured by a deed of trust. In May 2003, he entered into an agreement to sell his home, and before closing, he became delinquent in his payments on the mortgage. One day before closing, a notice of default and an instrument appointing Lindquist the successor trustee under the deed of trust was filed with the register of deeds. At closing, Lindquist, acting as the attorney for Wells Fargo, faxed a payoff letter to the escrow agent stating the payoff amount of the loan to Wells Fargo and directing an additional payment to Lindquist of $775.

After Parkert consulted with an attorney, he refused to pay the fee and made further inquiries. The closing proceeded in Parkert's absence, and he was sent a check for the net proceeds of the sale after deducting settlement charges, including the $775 attorney

fee. In a letter, Lindquist responded to Parkert's inquiries, citing language in the trust deed. Lindquist also sent his itemized invoice to Wells Fargo for $575.67 and a check for $199.33 which represented the difference between the amount withheld at closing and the amount Lindquist charged.

Parkert alleged that Lindquist, by taking his fee from the closing costs when he did the work for Wells Fargo, converted Parkert's money. Parkert also alleged a violation of the Consumer Protection Act and alleged that he was bringing the action as a class action. He sought restitution for himself and members of the class, prejudgment interest, and fees.

Lindquist moved to dismiss under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003). Lindquist alleged that Parkert defaulted and that the loan had been accelerated. He alleged that the fees were charged by Eric H. Lindquist, P.C., L.L.O., to Wells Fargo for services performed to pursue its remedies when Parkert defaulted on the loan. He further alleged that the trust deed with Wells Fargo provided that if payments were in default and the loan accelerated, Parkert would be obligated to pay reasonable attorney fees. A copy of the deed of trust with the language regarding attorney fees was attached to the motion.

The district court sustained the rule 12(b)(6) motion and dismissed the complaint. Parkert appealed, and we granted his motion to bypass.

ASSIGNMENT OF ERROR

Parkert assigns, rephrased, that the district court erred by dismissing his complaint.

STANDARD OF REVIEW

[1,2] A district court's grant of a motion to dismiss is reviewed de novo. *Spear T Ranch v. Knaub, ante* p. 177, 691 N.W.2d 116 (2005). Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief. *Id.*

[3] As a practical matter, dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes

allegations that show on the face of the complaint that there is some insuperable bar to relief. *Id.*

ANALYSIS

Parkert contends that a provision in the trust deed requiring the payment of a lender's attorney fees as part of the costs of collection is against public policy. Relying on cases where we disallowed provisions requiring fees to be paid to the opposing party in litigation, he argues that the rule should also extend to nonjudicial proceedings. We disagree.

[4,5] We have stated that the general rule in this jurisdiction is that attorney fees may be recovered only when provided by statute, or where the uniform course of procedure has been to allow recovery. *Quinn v. Godfather's Investments*, 217 Neb. 441, 348 N.W.2d 893 (1984). We have additionally held that a contract provision requiring that in the event of litigation the prevailing party will be entitled to attorney fees is contrary to public policy and void. *Id.* See *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984). This rule is derived from what is often referred to as the "American rule." The American rule focuses on contractual provisions allowing attorney fees in judicial proceedings. *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983).

Although we have applied the American rule to invalidate contracts providing for fees to prevailing parties in judicial proceedings, we have never applied the rule to nonjudicial proceedings.

[6,7] In determining whether to apply the American rule to nonjudicial proceedings, we recognize a strong policy favoring the parties' freedom to contract. See *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985). " 'It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands.' " *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. 469, 480, 293 N.W.2d 843, 849 (1980). Here no such demand exists. Thus, in the light of a strong policy allowing parties the freedom to contract, we decline to extend the rule to nonjudicial proceedings. Accordingly, we hold that in a nonjudicial proceeding, a contract provision requiring payment of a reasonable attorney fee is not against public policy.

Here, Parkert did not allege that the fee provision is ambiguous, nor has he alleged that the fee was unreasonable. Because the fee was not collected in a judicial proceeding, the contract provision was valid. Thus, Parkert could not state a claim for conversion or violation of the Consumer Protection Act and the district court correctly dismissed. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. RONALD J. PALAGI, RESPONDENT.

693 N.W.2d 276

Filed February 25, 2005. No. S-04-1182.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

Respondent, Ronald J. Palagi, was admitted to the practice of law in the State of Nebraska on January 28, 1975, and at all times relevant hereto was engaged in the private practice of law in Omaha, Nebraska. On October 21, 2004, formal charges were filed against respondent. The formal charges set forth three counts that collectively included charges that the respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); Canon 2, DR 2-106(A) (charging excessive fee); Canon 5, DR 5-103(B) (improperly advancing or guaranteeing financial assistance to client); and Canon 9, DR 9-102(B)(4) (failing to return property of client), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). On January 20, 2005, respondent filed a conditional admission under Neb. Ct. R. of Discipline 13 (rev. 2002), in which he knowingly admitted the truth of the allegations that he violated DR 1-102(A)(1), DR 2-106(A), DR 5-103(B), and DR 9-102(B)(4), as well as his oath of office as an attorney, and

waived all proceedings against him in connection therewith in exchange for a stated form of consent judgment of a public reprimand. Upon due consideration, the court approves the conditional admission and orders that respondent be publicly reprimanded.

FACTS

In summary, the formal charges allege that respondent undertook the representation of Larry and Nancy Humphrey in a wrongful death case and that during the course of that representation, respondent charged the Humphreys separately for a "cost" that should have been treated and included in the agreed fee and, thus excessively charged the Humphreys. More specifically, the conditional admission states that

> respondent included the payment of $2,493.75 made to Ex-Parte Legal Services for research and drafting services provided to respondent in the Humphrey case [as an] out of pocket [cost]. However, since the contract [for services] with the Humphreys did not make this clear, [r]espondent should have resolved any question regarding the charging of costs in favor of the client and treated them as part of the legal services his law firm had agreed to provide for a contingency fee.

The formal charges further allege that respondent failed to deliver to Herbert Tibbs and Robert Brodax, former clients of respondent, their client files after Tibbs and Brodax had each requested the same. Finally, the formal charges allege that respondent advanced certain living expenses to Brodax.

ANALYSIS

Rule 13 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written

> statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to rule 13, we find that respondent knowingly admits the essential relevant facts outlined in the formal charges and knowingly admits that he violated DR 1-102(A)(1), DR 2-106(A), DR 5-103(B), and DR 9-102(B)(4), as well as his oath of office as an attorney. We further find that respondent waives all proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1), DR 2-106(A), DR 5-103(B), and DR 9-102(B)(4), as well as his oath of office as an attorney, and that respondent should be and hereby is publicly reprimanded. Respondent 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 10(P) (rev. 2003) and 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

HENDRY, C.J., not participating.

NEBRASKA LIQUOR DISTRIBUTORS, INC., APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

693 N.W.2d 539

Filed March 4, 2005. No. S-02-616.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is 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. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
6. **Judicial Notice: Evidence: Appeal and Error.** Judicial notice of a sufficiency of the evidence finding in a previous case cannot stand for a de novo finding in a subsequent case.
7. **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.
8. ____: ____: ____. It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
9. **Words and Phrases.** Under the "ejusdem generis" canon of construction, when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.
10. ____. Under the "ejusdem generis" rule, specific words or terms modify and restrict the interpretation of general words or terms where both are used in sequence.
11. **Liquor Licenses: Words and Phrases.** The interest forbidden by Neb. Rev. Stat. § 53-169.01 (Reissue 2004) is a financial or business interest.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed and remanded with directions.

Michael J. Lehan, of Kelley & Lehan, P.C., for appellant.

Jon Bruning, Attorney General, and Milissa D. Johnson-Wiles, and, on brief, Don Stenberg, former Attorney General, and Hobert B. Rupe for appellee.

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

GERRARD, J.

The question presented in this case is what type of "interested relationship" between an alcoholic liquor wholesaler and a manufacturer of alcoholic liquor is prohibited by state law. Neb. Rev. Stat. § 53-169.01 (Reissue 2004) states, in relevant part:

> No manufacturer of alcoholic liquor holding a manufacturer's license . . . and no manufacturer of alcoholic liquor outside this state manufacturing alcoholic liquor, except beer, for distribution and sale within this state shall, directly or indirectly, as owner or part owner, or through a subsidiary or affiliate, or by any officer, director, or employee thereof, or by stock ownership, interlocking directors, trusteeship, loan, mortgage, or lien on any personal or real property, or as guarantor, endorser, or surety, be interested in the ownership, conduct, operation, or management of any alcoholic liquor wholesaler holding an alcoholic liquor wholesale license, except beer, under section 53-123.02.

Nebraska Liquor Distributors, Inc. (NLD), filed an application for a wholesale liquor license with the Nebraska Liquor Control Commission (Commission). The Commission denied the application after it found that Mitchell Johnson (Mitchell), the sole shareholder of NLD, had a business interest in a manufacturer of alcoholic liquor. NLD petitioned the district court for judicial review of the Commission's decision, asserting that there was not a statutorily prohibited relationship between the wholesaler and the manufacturer of alcoholic liquor in the instant case. Upon a hearing, the district court affirmed the Commission's decision. NLD appeals the judgment of the district court. For the reasons that follow, we reverse, and remand with directions to the court.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are largely undisputed. On September 6, 2001, NLD applied to the Commission for a class X wholesale liquor license.

Competing liquor wholesalers sent the Commission letters requesting a hearing on NLD's application, alleging that NLD was not eligible for the license under § 53-169.01. The Commission held a hearing, and the State offered NLD's application file into evidence. Over hearsay objections to the competitors' letters contained in the file, the file was received in evidence.

Mitchell testified at the hearing as the sole shareholder for NLD. He testified to certain connections he had with Johnson Brothers Liquor Company (Johnson Brothers), a wholesale liquor company incorporated in Minnesota and doing business in eight states. The Commission received these facts, not because Johnson Brothers is itself a manufacturer of alcohol, alone triggering § 53-169.01, but because Johnson Brothers allegedly has its own business interest in a liquor manufacturer, United States Distilled Products Company (USDP). Mitchell testified that he was formerly the president of Johnson Brothers. In 1995, Mitchell sold all his interest in Johnson Brothers, but at the time of the hearing was still receiving his stock payoff. He resigned as president of Johnson Brothers in January 1997. Mitchell's brother is the present chairman of the board of Johnson Brothers. Mitchell is also a minority stockholder with his brother in another liquor distributing company, Indiana Liquor Distributing Company.

To connect Mitchell's relationship with Johnson Brothers to a business interest in the liquor manufacturer, USDP, the Commission looked to an unpublished Nebraska Court of Appeals decision, *Johnson Bros. Liquor Co. v. Nebraska Liquor Control Comm.*, No. A-99-1182, 2000 WL 1725059 (Neb. App. Nov. 21, 2000) (not designated for permanent publication). *Johnson Bros. Liquor Co.* reversed a district court's reversal of a Commission decision. The Commission had rejected a wholesale liquor license application filed by Johnson Brothers. The Commission did so on the basis that Johnson Brothers had a business interest in the liquor manufacturer, USDP. The Court of Appeals reinstated the Commission's decision, finding that the district court had applied the incorrect standard of review and that there was sufficient evidence to support the Commission's decision. See *id*.

In addition to the asserted connection through Johnson Brothers, Mitchell has other indirect or remote ties to USDP. Mitchell's nephew is the owner, stockholder, and president of USDP. Mitchell himself owned stock in USDP but sold all his interest in that company more than 15 years ago.

In an order issued in the instant case, the Commission denied NLD's application. The Commission found that NLD had a business interest in Johnson Brothers and that Johnson Brothers had a business interest in USDP. The Commission concluded that NLD therefore had a business interest in USDP. As in *Johnson Bros. Liquor Co.*, this business interest in a liquor manufacturer disqualified the wholesaler, NLD, from acquiring a class X wholesale liquor license in Nebraska pursuant to § 53-169.01.

NLD appealed the Commission's order. Before the district court on appeal, NLD submitted as exhibits the transcript and the bill of exceptions from the Commission hearing. The district court affirmed the decision. After its de novo review, the district court found that Mitchell had a direct interest in Johnson Brothers and an indirect interest in USDP. The court based the finding of a direct interest in Johnson Brothers on Mitchell's familial relationship to a director of Johnson Brothers, on his former dealings with Johnson Brothers, and on the timing of Mitchell's application, coming as it did less than a year after Johnson Brothers' similar application was rejected. To find the indirect interest in USDP, the court relied on the conclusions contained in *Johnson Bros. Liquor Co.*, taking judicial notice of this unpublished Court of Appeals opinion due to its factual connection to the matters in the instant case.

NLD timely appealed the district court's affirmance of the Commission's decision.

ASSIGNMENTS OF ERROR

NLD assigns, renumbered and restated, that the district court erred by (1) considering the letters from competitors over a hearsay objection, (2) not reversing or remanding the case due to the Commission's failure to make specific findings of fact consistent with the findings in the record, and (3) finding any relationship between NLD and USDP which rendered NLD ineligible for the wholesale liquor license.

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. *Lein v. Nesbitt, ante* p. 109, 690 N.W.2d 799 (2005).

[2] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*.

[3] 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. *DLH, Inc. v. Nebraska Liquor Control Comm.*, 266 Neb. 361, 665 N.W.2d 629 (2003).

[4] 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. *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004).

ANALYSIS

Before we determine whether a relationship exists between NLD and USDP which would render NLD ineligible for a wholesale liquor license, it is necessary to briefly consider the evidentiary and procedural issues raised by NLD.

HEARSAY OBJECTION

[5] NLD first assigns that the district court erred by considering letters from competitors over a hearsay objection. The hearsay objection was made at the hearing before the Commission but only indirectly presented to the district court on appeal. More to the point, the alleged error of the district court's considering the letters was assigned but not argued in any way in the brief before this court. NLD only argued that, even including the content of the letters, the evidence was insufficient to deny the application. Errors that are assigned but not argued will not be addressed by

an appellate court. *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

Sufficiency of Commission's Findings of Fact

NLD cites Neb. Rev. Stat. § 84-915 (Reissue 1999) for the proposition that the Commission's decision must be "in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law." NLD alleges that the statement in the record at the Commission hearing falls short of this standard.

However, the Commission's written decision clearly meets the standard set forth in § 84-915, whether or not the statement in the record does. In fact, NLD does not allege that the decision in writing lacks the required elements, but, rather, alleges only that it is inconsistent with the statement in the record. Whether or not such an inconsistency exists is immaterial; the written findings of fact and conclusions of law made by the Commission are valid and binding. Section 84-915 requires merely that the writing *or* the statement in the record contain the findings of fact and conclusions of law. Indeed, the written decision does, and thus, this assignment of error is without merit.

Disqualifying Interest

The disposition of this appeal hinges on the interpretation and application of § 53-169.01. As previously noted, no manufacturer of alcoholic liquor (except beer) outside the State of Nebraska shall, either directly or indirectly, be interested in the ownership, conduct, operation, or management of any alcoholic liquor wholesaler holding an alcoholic liquor wholesale license (except beer). See *id*.

We note that while the forbidden interest in § 53-169.01 is worded as that of the manufacturer in the wholesaler and not the interest of the wholesaler in the manufacturer, the obvious intent of the Legislature is to forbid both types of interests. The undue favorable relationship likely to result from the interest is the ill addressed by the statute; it is logically impossible for one company to have a financial interest in another without that interest being reciprocal. USDP is the only liquor manufacturer in which NLD is alleged to have a disqualifying interest. Therefore, the district court's affirmance will be upheld only if a sufficient interest

is established by the record between Mitchell (or his wholly owned NLD) and USDP.

There are three sources of this alleged connection. First, the owner and president of USDP is Mitchell's nephew. Second, Mitchell owned stock in USDP, but he sold all his interest in USDP over 15 years ago. Third, both Mitchell and USDP had connections to Johnson Brothers—a fact which led both the Commission and the district court to conclude that Mitchell and USDP were indirectly interested in each other to a disqualifying degree. To properly analyze this third source, we must consider each of the two connections in turn.

Mitchell's connections to Johnson Brothers are many. The chairman of the board of Johnson Brothers is both Mitchell's brother and a joint shareholder with Mitchell of another liquor distributing company. Mitchell was president of Johnson Brothers until his retirement in January 1997. Mitchell also had stock in Johnson Brothers but sold all of his shares to Johnson Brothers in 1995. Yet, at the time of the Commission hearing, Johnson Brothers was still paying Mitchell the predetermined sum for his shares of stock. Finally, the district court found the timing of Mitchell's application suspicious, coming as it did on the heels of the denial of Johnson Brothers' similar application. We assume without deciding that Mitchell is interested in Johnson Brothers.

The Commission's conclusion regarding Johnson Brothers' connections to USDP appears to be based in large part on the findings in the unpublished Court of Appeals case, *Johnson Bros. Liquor Co. v. Nebraska Liquor Control Comm.*, No. A-99-1182, 2000 WL 1725059 (Neb. App. Nov. 21, 2000) (not designated for permanent publication), which upheld a previous finding of the Commission that Johnson Brothers had a business interest in USDP which disqualified it for a wholesale liquor license. The district court relied heavily on *Johnson Bros. Liquor Co.* to establish the connection between Johnson Brothers and USDP in its affirmance. We must decide whether reliance on that case conforms to the law.

[6] It is provided by statute that judicial notice may be taken of any fact not subject to reasonable dispute, when such fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Neb. Rev.

Stat. § 27-201(2)(b) (Reissue 1995). The *Johnson Bros. Liquor Co.* opinion is a source of which the accuracy cannot reasonably be questioned. See *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001). However, the ultimate factual finding of *Johnson Bros. Liquor Co.*—that there was sufficient evidence to support the Commission's decision—is not helpful because the applicable standard of review for the district court in the instant case was de novo, not mere sufficiency of the evidence. *Johnson Bros. Liquor Co.* does not stand for a judicial de novo finding that Johnson Brothers had a disqualifying interest in USDP.

It is critical to note the distinction between the standard of review applicable in *Johnson Bros. Liquor Co.* and the case at bar. In *Johnson Bros. Liquor Co.*, the district court was to review the Commission's decision for jurisdiction and sufficiency of the evidence. See, generally, *City of Lincoln v. Nebraska Liquor Control Comm.*, 261 Neb. 783, 626 N.W.2d 518 (2001) (describing change in appellate procedure from Commission). After *Johnson Bros. Liquor Co.*, the standard of review changed. The district court in the instant case must review the Commission's decision under the now-applicable Administrative Procedure Act. See *City of Lincoln v. Nebraska Liquor Control Comm., supra*. Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004). See Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1999).

This is an important difference. In a review for sufficiency of the evidence, an appellate court does not make its own factual findings, but in a true "de novo" review, the court uses assignments of error as a guide to the factual issues in dispute, but makes independent factual determinations based on the record. See, generally, *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995) (explaining differences in standards of review).

Therefore, the ultimate finding of *Johnson Bros. Liquor Co. v. Nebraska Liquor Control Comm.*, No. A-99-1182, 2000 WL 1725059 (Neb. App. Nov. 21, 2000) (not designated for permanent publication), that the district court should have found that the

evidence was (merely) sufficient to support the Commission's finding, cannot stand for a judicial de novo finding that the record actually supports that finding. As a matter of fact, the Court of Appeals in *Johnson Bros. Liquor Co.* reversed the district court decision which, while erroneously applying a de novo standard to the determination of the Commission, found that Johnson Brothers' interest in USDP *did not* disqualify it for the license. Simply stated, since the Court of Appeals did not perform a de novo review of the record in *Johnson Bros. Liquor Co.*, the Court of Appeals' decision in that case does not contain findings of fact that are judicially noticeable.

Many of the other alleged facts in *Johnson Bros. Liquor Co.* are unavailable for judicial notice under § 27-201(2)(b). The Court of Appeals indicated that "[t]he evidence was contradictory and hotly contested," *Johnson Bros. Liquor Co.*, 2000 WL 1725059 at *7, and did not make any findings favoring one version over another. The remaining facts which were not subject to reasonable dispute are unhelpful. Thus, to establish the connection between Johnson Brothers and USDP, the district court was limited to the fact that the USDP president and sole shareholder is the son of Johnson Brothers' chairman of the board—Mitchell's nephew and brother, respectively.

[7,8] We must now apply § 53-169.01 to these facts, determining whether the court's decision that NLD was "interested in the ownership, conduct, operation, or management of" USDP conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. 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. *City of Gordon v. Ruse*, 268 Neb. 686, 687 N.W.2d 182 (2004). It is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. See *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 662 N.W.2d 599 (2003).

[9-11] The scope of the interest forbidden is wide, prohibiting interests "directly or indirectly" held, and interests established in various indirect ways, for example, "through a subsidiary or affiliate." The list of ways a manufacturer can hold a forbidden

interest in a distributor is substantial, but each one listed indicates an interest of a financial or business nature. Under the "ejusdem generis" canon of construction, when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed. *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000). Thus, under the "ejusdem generis" rule, specific words or terms modify and restrict the interpretation of general words or terms where both are used in sequence. *Id*. Therefore, we hold that the interest forbidden by § 53-169.01 is a financial or business interest.

The interest between Mitchell, or his wholly owned NLD, and USDP, as established by the record, is largely familial. The three connections established by the record are as follows: (1) Mitchell owned USDP stock but sold it 15 years ago, (2) Mitchell is the uncle to the owner and president of USDP, and (3) Mitchell may have a business interest in Johnson Brothers, which has as its chairman of the board the father of USDP's owner and president. While Mitchell may indeed have some generalized familial interest in seeing USDP succeed, the record falls short of establishing that the interest is a financial or business one. We determine that the interest Mitchell and NLD have in USDP, as established by the record, is not indicative of the type of relationship which § 53-169.01 would forbid if NLD were licensed. The judgment of the district court affirming the Commission's order does not conform to the law and is not supported by competent evidence.

CONCLUSION

The record fails to establish that NLD was sufficiently interested in the ownership, conduct, operation, or management of USDP to trigger the prohibition of § 53-169.01. The district court erred in relying on the Court of Appeals' decision in *Johnson Bros. Liquor Co. v. Nebraska Liquor Control Comm.*, No. A-99-1182, 2000 WL 1725059 (Neb. App. Nov. 21, 2000) (not designated for permanent publication), and by affirming the Commission's denial of NLD's application for a wholesale liquor license on the above basis. Because the district court had determined that NLD was ineligible for a wholesale liquor license pursuant to § 53-169.01, it did not review and consider all the

evidence from the Commission hearing in its de novo review. Therefore, it will be necessary to remand the cause to the district court for it to complete its de novo review of the record.

We therefore reverse the judgment of the district court and remand the cause with directions to complete its de novo review of the record prior to entering final judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

H & R BLOCK TAX SERVICES, INC., A MISSOURI CORPORATION, APPELLANT, V. CIRCLE A ENTERPRISES, INC., A NEBRASKA CORPORATION, AND T. JOAN KELSEY, APPELLEES.

693 N.W.2d 548

Filed March 4, 2005. No. S-03-750.

1. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
2. **Restrictive Covenants: Courts: Reformation.** It is not the function of the courts to reform a covenant not to compete in order to make it enforceable.
3. **Restrictive Covenants: Employer and Employee.** A partial restraint of trade such as a covenant not to compete must meet three general requirements to be valid. First, the restriction must be reasonable in the sense that it is not injurious to the public. Second, the restriction must be reasonable in the sense that it is no greater than reasonably necessary to protect the employer in some legitimate business interest. Third, the restriction must be reasonable in the sense that it is not unduly harsh and oppressive on the party against whom it is asserted.
4. **Restrictive Covenants.** A covenant not to compete ancillary to the sale of a business must be reasonable in both space and time so that it will be no greater than necessary to achieve its legitimate purpose. Whether such a covenant not to compete is reasonable with respect to its duration and scope is dependent upon the facts of each particular case.
5. **Restrictive Covenants: Employer and Employee: Goodwill.** In the employment context, the validity of a covenant not to compete aimed at preventing a former employee from unfairly appropriating customer goodwill is no greater than reasonably necessary only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and had personal contact.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Reversed and remanded for further proceedings.

Larry R. Baumann and Neleigh N. Smith, of Kelley, Scritsmier & Byrne, P.C., for appellant.

George M. Zeilinger for appellees.

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

STEPHAN, J.

This is an appeal from a determination by the district court for Lincoln County that a covenant not to compete included in a franchise agreement between H & R Block Tax Services, Inc. (H & R Block), and Circle A Enterprises, Inc., was unenforceable as a matter of law.

BACKGROUND

On April 2, 1985, T. Joan Kelsey and H & R Block entered into a satellite franchise agreement authorizing Kelsey to operate an H & R Block tax preparation business in Ogallala, Nebraska. On May 19, 1986, Kelsey assigned the agreement to Circle A Enterprises, a corporation of which she was the president. On the same date, Kelsey gave written notice of the assignment to H & R Block, expressly acknowledging that she remained personally liable for the performance of all terms of the franchise agreement.

The franchise agreement provided in relevant part:

> **12. Limitations on Competition and Disclosure.**
>
> (a) Franchisee covenants that: (i) during the term hereof he will not compete, directly or indirectly whether as an owner, stockholder, partner, officer, director or employee, with Block or Block franchisees in the business of preparing tax returns or performing Related Services in or within 45 miles of the Franchise Territory; in the franchise territory granted to any other Block franchisee; or within 45 miles of any office operated by Block; (ii) for a period of one year after the termination of this Agreement or the Transfer or other disposition of this franchise, he will not directly or indirectly, whether as an owner, stockholder, partner, officer, director or employee, solicit by mail, phone or in person, or divert from Block or Block franchisees any person for whom Franchisee prepared a tax return or performed Related Services or Additional Services at any time during

> the term of this Agreement for the purpose of rendering of services in connection with the preparation of tax returns or performance of Related Services or Additional Services; and (iii) for a period of one year after the termination of this Agreement or the transfer or other disposition of this franchise, he will not compete directly or indirectly, whether as an owner, stockholder, partner, officer, director or employee, with Block or Block franchisees in the business of preparing tax returns or performing Related Services or Additional Services in or within 45 miles of the Franchise Territory.
>
> (b) Franchisee further covenants that Franchisee will never (i) divulge to or use for the benefit of any person, association or corporation outside of the H&R Block organization, any information or knowledge concerning customers, the methods, promotion advertising or any other systems or methods of operation of Block's business or that of Block's franchisees which Franchisee may have acquired by virtue of his operations under this Agreement; (ii) use any materials regarding Additional Services without payment of the applicable royalty therefor and execution of an addendum regarding such Additional Services; or (iii) do any deliberate act prejudicial or injurious to the goodwill or name of Block. Information furnished to employees shall be reasonably limited to that which directly relates to such employee's duties and assists in the proper performance of such duties.
>
> . . . .
>
> (g) Franchisee will cause each individual employed to prepare tax returns or to supervise the preparation of tax returns to execute an agreement, in the form prescribed by Block, containing substantially the same covenants against competition and disclosure as are set forth in subparagraphs (a) and (b)(i).

The franchise was terminated in the fall of 1999, and Kelsey relocated to North Platte, Nebraska, which is more than 45 miles distant from Ogallala. Kelsey subsequently operated a tax preparation business in North Platte, and in the year 2000, prepared tax returns for a number of clients for whom she had prepared returns while operating the H & R Block franchise. Kelsey testified that she did not solicit these former clients but that if they initiated

contact with her, she prepared their returns. Her records indicate that over 85 percent of her receipts generated in 2000 came from former H & R Block clients.

On January 25, 2001, H & R Block filed this action in which it alleged that Circle A Enterprises and Kelsey breached the terms of the franchise agreement and prayed for damages and an accounting. In their joint answer and counterclaim, Circle A Enterprises and Kelsey alleged that the covenant not to compete set forth in the franchise agreement was "overbroad and unenforceable pursuant to the laws of the State of Nebraska." They denied any breach of the franchise agreement on their part and claimed damages for alleged breaches of the franchise agreement by H & R Block.

Following a bench trial, the district court issued a memorandum opinion and judgment on June 3, 2003. In its order, the court construed subparagraphs 12(a)(ii) and (iii) of the franchise agreement as one integrated covenant not to compete. Relying on *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987), the court concluded that the portion of the covenant that restricted Kelsey from preparing tax returns for any client within a 45-mile radius of Ogallala was unreasonable and unenforceable as a matter of law because it was not limited to former H & R Block clients with whom Kelsey actually did business and had personal contact. The district court concluded that although the portion of the covenant that restricted Kelsey from soliciting former H & R Block customers for a period of 1 year was reasonable, the invalid portion of the covenant rendered the entire covenant not to compete invalid and unenforceable. Based upon this determination, the court found that Kelsey could not have violated the provision in subparagraph 12(g) of the franchise agreement requiring her to have all employees sign noncompetition agreements. The court further determined that H & R Block failed to prove an alleged breach of subparagraph 12(b) of the franchise agreement. The court found, however, that H & R Block did prove that Circle A Enterprises and Kelsey breached the agreement by failing to turn over certain documents upon termination of the franchise agreement. However, the court held that H & R Block failed to prove any damages caused by this breach. Finally, the court found against Circle A Enterprises and Kelsey on the counterclaim.

H & R Block filed this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

H & R Block assigns that the district court erred in (1) finding that the covenant not to compete was totally invalid and void and not severable into parts, (2) finding that the covenant not to compete could not extend to 45 miles in the tax preparation field for 1 year, and (3) determining that it was not a breach of the franchise agreement to fail to have employees sign a noncompetition agreement.

STANDARD OF REVIEW

[1] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004); *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001).

ANALYSIS

SEVERABILITY

In its first assignment of error, H & R Block asserts that the district court erred in failing to sever any unenforceable covenant not to compete from the remaining enforceable covenants. The district court expressly held that the covenant which prohibited Kelsey from soliciting or diverting H & R Block clients was valid and enforceable for a period of 1 year after termination of the franchise. The court reasoned, however, that because the covenant prohibiting Kelsey from preparing tax returns within 45 miles of Ogallala for a period of 1 year was unenforceable, the valid covenant was rendered invalid as a matter of law.

[2] This court has long held that it is not the function of the courts to reform a covenant not to compete in order to make it enforceable. *CAE Vanguard, Inc. v. Newman*, 246 Neb. 334, 518 N.W.2d 652 (1994); *Brockley v. Lozier Corp.*, 241 Neb. 449, 488 N.W.2d 556 (1992); *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990); *Philip G. Johnson & Co. v. Salmen*,

211 Neb. 123, 317 N.W.2d 900 (1982). For example, in *CAE Vanguard, Inc. v. Newman*, 246 Neb. at 336, 518 N.W.2d at 654, the terms of a noncompetition agreement signed in conjunction with the sale of stock provided:

> "[Defendant] agrees and covenants that he will not, for a period of five (5) years after the date of this Covenant, and anywhere in the United States, the continent of North America, or anywhere else on earth, or such lesser period of time or geographical area restriction as a court of law might later determine to be the limits of enforceability of this covenant, (a) directly or indirectly solicit electrochemical metalizing business regarding railroad axles and/or mounted wheel sets . . . ."

The district court reformed the agreement by employing the "blue-pencil" rule and striking the words " 'or anywhere else on earth, or such lesser period of time or geographical area restriction as a court of law might later determine to be the limits of enforceability of this covenant.' " *Id.* at 337, 518 N.W.2d 654. On appeal, we held that the covenant was not subject to reformation in this manner and that "we must either enforce it as written or not enforce it at all." *Id.* at 339, 518 N.W.2d at 656. We reached such conclusion even though the agreement provided that a court could reform the covenant, noting that "[p]rivate parties may not confer upon the court powers which it does not possess." *Id.*

In *Vlasin v. Len Johnson & Co.*, 235 Neb. at 451-52, 455 N.W.2d at 774, the covenant at issue restricted an employee from entering " 'into the insurance business within a fifty (50) mile radius of the City of Ogallala, Keith County, Nebraska, for a period of three (3) years from and after the date of the termination of this agreement.' " We found the covenant to be unreasonable and refused to reform it, noting that it is not the function of the courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable. See, also, *Philip G. Johnson & Co. v. Salmen, supra* (refusing to reform covenant restricting former partner for period of 3 years from soliciting or accepting work from any client or former client of partnership).

Our jurisprudence thus reflects a consistent refusal to strike or alter the language of an integrated covenant not to compete in order to make it enforceable. Although the covenant at issue in the

instant case is set forth in separate subparagraphs, we nevertheless agree with the district court that subparagraphs 12(a)(ii) and (iii) of the franchise agreement contain only one covenant not to compete, as both subparagraphs impose restrictions on the franchisee's posttermination competition. See *H & R Block Eastern Tax Services, Inc. v. Vorpahl*, 255 F. Supp. 2d 930 (E.D. Wis. 2003). Thus, if any portion of the covenant contained in subparagraphs 12(a)(ii) and (iii) is invalid, the remainder of the covenant is likewise invalid and unenforceable. See, *CAE Vanguard, Inc. v. Newman, supra*; *Brockley v. Lozier Corp., supra*; *Vlasin v. Len Johnson & Co., supra*; *Philip G. Johnson & Co. v. Salmen, supra*.

Nature of Transaction

In order to determine whether the covenant contained in subparagraphs 12(a)(ii) and (iii) is valid and enforceable, we must decide the primary issue in this appeal: Whether a covenant not to compete in a franchise agreement is more akin to a covenant not to compete in a sale of a business agreement or whether it is more akin to a covenant contained in an employment contract. This is an issue of first impression in this jurisdiction.

[3] Regardless of the context, a partial restraint of trade such as a covenant not to compete must meet three general requirements to be valid. First, the restriction must be reasonable in the sense that it is not injurious to the public. *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987). See *Presto-X-Company v. Beller*, 253 Neb. 55, 568 N.W.2d 235 (1997). Second, the restriction must be reasonable in the sense that it is no greater than reasonably necessary to protect the employer in some legitimate business interest. *Polly v. Ray D. Hilderman & Co., supra.* Third, the restriction must be reasonable in the sense that it is not unduly harsh and oppressive on the party against whom it is asserted. *Id.* The only requirement at issue in the instant case is whether the restriction is no greater than reasonably necessary to protect H & R Block's legitimate business interest.

Nebraska courts are generally more willing to uphold promises to refrain from competition made in the context of the sale of goodwill as a business asset than those made in connection with contracts of employment. *Presto-X-Company v. Beller, supra*. The

rationale behind the differential treatment is that in a sale of a business, "[i]t is almost intolerable that a person should be permitted to obtain money from another upon solemn agreement not to compete for a reasonable period within a restricted area, and then use the funds thus obtained to do the very thing the contract prohibits." *Swingle & Co. v. Reynolds*, 140 Neb. 693, 695, 1 N.W.2d 307, 309 (1941).

[4] In the context of the sale of a business,

> " '[T]he restraint of trade that is permissible . . . is no greater than is necessary to attain the desired purpose—the purpose of making good will a transferable asset. It is lawful for the seller to restrict his own freedom of trade only so far as is necessary to protect the buyer in the enjoyment of the good will for which he pays. The restraint on his own freedom must be reasonable in character and in extent of space and time.' "

Presto-X-Company v. Beller, 253 Neb. at 62, 568 N.W.2d at 239, quoting *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991), and 6A Arthur Linton Corbin, Corbin on Contracts § 1385 (1962). Thus, a covenant not to compete ancillary to the sale of a business must be reasonable in both space and time so that it will be no greater than necessary to achieve its legitimate purpose. *Presto-X-Company v. Beller, supra*. Whether such a covenant not to compete is reasonable with respect to its duration and scope is dependent upon the facts of each particular case. *Id.*

[5] In the employment context, the validity of a covenant not to compete aimed at preventing a former employee from unfairly appropriating customer goodwill is no greater than reasonably necessary "only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and ha[d] personal contact." *Polly v. Ray D. Hilderman & Co.*, 225 Neb. at 668, 407 N.W.2d at 756. We have applied this test strictly. See *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004).

H & R Block urges us either to treat the franchise agreement as a sale of a business and apply the law applicable in that context or to create a new rule regarding the enforceability of covenants not to compete in franchise agreements. Circle A Enterprises and

Kelsey, however, urge us to analogize the franchise agreement to an employment contract and apply that body of law.

Decisions from other jurisdictions provide some guidance on this point. In *Jiffy Lube Intern., Inc. v. Weiss Bros., Inc.*, 834 F. Supp. 683 (D.N.J. 1993), the court held that covenants not to compete in a vehicle service franchise were more analogous to agreements ancillary to the sale of a business than to an employment agreement. The court reasoned that a franchisor and a franchisee are in a more equitable bargaining situation than would be found in a typical employer-employee relationship. In addition, it emphasized that the primary characteristic of a franchise is the license given to the franchisee "to trade upon and exploit the franchisor's good will." *Id.* at 691. The court reasoned that when the franchise is terminated, the goodwill is in some sense returned to the franchisor and that thus, a "reasonably crafted" restrictive covenant is necessary to protect the goodwill after its return. *Id.*

In *McCart v. H & R Block, Inc.*, 470 N.E.2d 756 (Ind. App. 1984), the court held that a tax preparation service franchise very similar to that at issue in the instant case was akin to the sale of a business for purposes of determining whether the franchisor had a protectible interest which justified the use of a covenant not to compete. The court compared the customer affiliation associated with H & R Block's service mark to the goodwill inherent in the sale of a business. The court noted that the franchisee paid for the value of the mark in order to draw upon H & R Block's reputation and attract customers. Because the bargain for use of the mark was a bargain for customers who would be attracted to it, the court found that it was analogous to the goodwill involved in a sale of a business. Based on this analysis, the court concluded that a covenant restricting the franchisee from competition for 2 years within a 50-mile radius was reasonable and enforceable.

A different rationale was applied by the Supreme Court of Kansas in *H & R Block, Inc. v. Lovelace*, 208 Kan. 538, 493 P.2d 205 (1972), another case involving an H & R Block franchise. In *Lovelace*, the court reasoned:

> The agreement before us is neither a contract of employment nor one for sale of a business, but rather that which in the modern business world has now come to be known as a franchise. . . .

> . . . Suffice it to say under the contract here defendant operated under plaintiff's name in providing a service in which enterprise plaintiff retained a considerable amount of operational control including the prescribing of office hours, fees to be charged, methods and forms to be used, accounting periods, advertising and promotion and training of personnel, and upon breach of the contract by defendant, title to and possession of books, records, files and client lists vested in plaintiff.
>
> Under these narrow facts we are inclined to the view the contract is more akin to one of employment than to a contract for sale or disposition of a business and sufficiently of that character to make strict construction against the promisee appropriate.

208 Kan. at 545-46, 493 P.2d at 211-12. The court thereafter held that a covenant prohibiting competition anywhere for a period of 5 years was unenforceable because of its unreasonable territorial extent.

A Wisconsin federal court recently addressed the enforceability of a covenant not to compete identical to the one before us now. In *H & R Block Eastern Tax Services, Inc. v. Vorpahl*, 255 F. Supp. 2d 930 (E.D. Wis. 2003), the court did not expressly decide whether the franchise agreement was more analogous to a sale of a business or an employment agreement. Nevertheless, after examining the time, space, purpose, and scope of the restrictions, it determined that the posttermination restrictions on competitive activity were reasonable. This approach is similar to the analysis which this court employs in determining the validity of a restrictive covenant in the context of the sale of a business.

In the instant case, there is evidence that H & R Block provides various goods and services to its franchisees, including training, national and local advertising, copiers, paper, and tax forms. H & R Block's training program generally begins around Labor Day and runs through the beginning of December, with classes held twice a week for 3 hours at a time. In addition, H & R Block offers upper-level tax courses, including training which enables individuals to receive Internal Revenue Service certification. H & R Block provides an annual update on tax changes and material to all franchisees for use in training their employees. Upon

franchise termination, the franchisee is required to return all items provided by H & R Block and copies of all customer tax returns and customer lists.

Although the record indicates that H & R Block retained significant control over its franchisees, it is equally clear that the main purpose of obtaining a franchise from H & R Block is to trade on the reputation and goodwill of its service mark and thereby acquire customers. Based on the evidence and our interpretation of the applicable law, we conclude that the franchise agreement in this case is analogous to a sale of a business for purposes of determining the enforceability of the posttermination covenant not to compete. We therefore apply the analysis outlined in *Presto-X-Company v. Beller*, 253 Neb. 55, 568 N.W.2d 235 (1997), to determine whether the covenant is enforceable.

ENFORCEABILITY

There is no claim or evidence in this case that the covenant is injurious to the public interest. See, *Presto-X-Company v. Beller, supra*; *Swingle & Co. v. Reynolds*, 140 Neb. 693, 1 N.W.2d 307 (1941). We therefore focus on the issue of whether the covenant is reasonable in both space and time so that the restraint imposed will be no greater than necessary to achieve its legitimate purpose. See, *Presto-X-Company v. Beller, supra*; *D. W. Trowbridge Ford, Inc. v. Galyen*, 200 Neb. 103, 262 N.W.2d 442 (1978).

The district court determined from the evidence at trial that "the duration of the covenant not to compete and the geographic limitation of 45 miles from Ogallala, Nebraska are reasonable." We agree. The franchise district manager for H & R Block testified that the 45-mile scope of the covenant was reasonably necessary to protect the integrity of H & R Block's service mark and its customer relationships. While there is evidence of other tax return preparers located within a 45-mile radius of Ogallala, there is no showing that any of them had prior access to the mark and materials incident to an H & R Block franchise. Generally, income tax returns are prepared annually, and thus the 1-year restraint simply limits the former franchisee from soliciting former H & R Block clients within the restricted area for one tax season. The record establishes that a 1-year restriction is reasonably necessary to protect the franchisor's goodwill in its tax

preparation business. See, also, *H & R Block Eastern Tax Services, Inc. v. Vorpahl*, 255 F. Supp. 2d 930 (E.D. Wis. 2003) (determining that 1-year/45-mile scope of covenant not to compete in franchise agreement was reasonable).

Relying on *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987), and *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986), the district court reasoned that the covenant not to compete in subparagraph 12(a)(iii) was unenforceable because it was not "customer specific" and instead prohibited any competitive activity within 45 miles of Ogallala for 1 year after termination of the franchise. *Polly* and *Boisen* involved covenants not to compete set forth in employment contracts. Because we conclude that this franchise agreement is akin to a sale of a business, the "customer specific" rule articulated in those cases is not applicable. Instead, in the case of a covenant not to compete ancillary to the sale of a business, a restraint is enforceable if it is reasonable in both time and scope. See *Presto-X-Company v. Beller, supra.* Applying that rule to this case and for the reasons set forth above, we conclude that the covenant not to compete set forth in subparagraphs 12(a)(ii) and (iii) of the franchise agreement is reasonable and enforceable.

CONCLUSION

For the foregoing reasons, we conclude that the district court erred in finding the covenant not to compete contained in subparagraphs 12(a)(ii) and (iii) of the franchise agreement to be unenforceable as a matter of law. Although the district court conducted a full evidentiary hearing, its final judgment was based entirely on its determination of unenforceability. It therefore made no factual findings as to whether the covenant was violated based on the evidence presented. In view of our independent determination that the covenant is enforceable, it becomes necessary to determine whether Kelsey's actions violated the covenant and, if so, the consequences of the violation. Also, it must be determined whether Kelsey violated subparagraph 12(g) of the franchise agreement by failing to obtain noncompete agreements from her employees. These factual determinations should be made by the district court, and we therefore reverse the

judgment and remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., dissenting.

I respectfully dissent from the majority opinion which concludes that the covenant not to compete should be treated as if it were part of a contract for the sale of a business and that the district court erred in finding the covenant to be unenforceable.

We have previously addressed covenants not to compete in both contracts for the sale of a business and employment contracts. Nebraska courts are generally more willing to uphold promises to refrain from competition made in the context of the sale of goodwill as a business asset than they are to honor those promises made in contracts of employment. See *Presto-X-Company v. Beller*, 253 Neb. 55, 568 N.W.2d 235 (1997). The rationale is that a seller who obtains money from a buyer as consideration for a covenant not to compete should not be permitted to use that money to compete with the buyer. However, a covenant not to compete ancillary to the sale of a business must be reasonable in both space and time so that it will be no greater than reasonably necessary to achieve its legitimate purpose. *Id.* The purpose of the restriction is to protect the buyer in the enjoyment of the goodwill which he has purchased in the sale of the business.

In the case of an employer-employee relationship, a covenant not to compete will be enforced only if it restricts a former employee from working for or soliciting the former employer's clients or accounts with whom the employee actually did business and had personal contact. See *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987).

Here, the covenant not to compete was contained within a franchise agreement. Neb. Rev. Stat. § 87-402(1)(a) (Reissue 1999) of the Franchise Practices Act defines a franchise as

> a written arrangement for a definite or indefinite period, in which a person grants to another person for a franchise fee a license to use a trade name, trademark, service mark, or related characteristics and in which there is a community of

interest in the marketing of goods or services at wholesale or retail or by lease, agreement, or otherwise.

The franchise agreement at issue authorized Kelsey to offer tax preparation services under H & R Block's trade name. H & R Block, however, retained considerable control, including the right to determine office hours and fees and the right to dictate which forms would be used. Upon termination of the agreement, Kelsey was required to return all client lists and copies of client tax returns to H & R Block. Kelsey paid H & R Block for the use of its trade name, but such payment did not carry with it any expectation of ownership that would accompany the sale of a business. See, *McDonald's Corp. v. Markim, Inc.*, 209 Neb. 49, 306 N.W.2d 158 (1981); *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 197 N.W.2d 646 (1972).

The district court determined that the covenant not to compete which prohibited Kelsey from preparing tax returns within a 45-mile radius of Ogallala, Nebraska, was unreasonable, ineffective, unenforceable, and therefore void. The rationale for the court's determination was that a covenant not to compete must not be greater than is reasonably necessary to protect an employer against a former employee's improper and unfair competition, and cannot restrict the former employee from engaging in ordinary competition with his previous employer. See, *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990); *Polly v. Ray D. Hilderman & Co., supra.* The evidence established that there were a significant number of bookkeepers and tax return preparers in competition with H & R Block within a 45-mile radius of Ogallala. Under these circumstances, the court concluded that enforcing the covenant would result in restricting Kelsey from engaging in ordinary competition with H & R Block.

The question presented is whether the covenant not to compete in the franchise agreement between Kelsey and H & R Block is more similar to a covenant not to compete concerning the sale of a business or one entered into in the context of an employer-employee relationship.

When a business is sold, the sales agreement may contain a covenant not to compete if goodwill is a business asset purchased by the buyer. In that situation, the seller agrees not to compete with the buyer and the restraint of trade can be no greater than is

reasonably necessary to obtain the desired result of making goodwill a transferable asset. The restriction upon the seller is only that which is reasonably necessary to protect the buyer's enjoyment of the goodwill purchased. See *Presto-X-Company v. Beller*, 253 Neb. 55, 568 N.W.2d 235 (1997).

When a covenant not to compete is part of a franchise agreement, the situation is quite different. The franchisor may require the franchisee to pay for use of a trade name, and the franchisor may retain considerable control over operation of the business. Upon termination of the franchise, the franchisee is in most instances left with nothing while the franchisor retains the goodwill, the name of the business, and all records and client lists.

A case which illustrates the difference is *H & R Block, Inc. v. Lovelace*, 208 Kan. 538, 493 P.2d 205 (1972). H & R Block sought to restrain the defendant from violating a covenant not to compete upon the termination of a franchise agreement. The court made a distinction between covenants contained in employer-employee contracts and covenants relating to the sale of a business. It pointed out that the agreement at issue was neither a contract of employment nor one for the sale of a business, but, instead, was what has now come to be known as a franchise. The court concluded that under the facts presented, the contract was more like an employment agreement than a contract for the sale of a business.

In concluding that the franchise agreement at issue should be considered analogous to the sale of a business for the purpose of determining enforceability of the covenant not to compete, the majority relies upon *Jiffy Lube Intern., Inc. v. Weiss Bros., Inc.*, 834 F. Supp. 683 (D.N.J. 1993), and *McCart v. H & R Block, Inc.*, 470 N.E.2d 756 (Ind. App. 1984). In *Jiffy Lube Intern., Inc.*, the court reasoned that upon termination of the franchise, the goodwill was in some sense returned to the franchisor and that, therefore, a reasonably crafted restrictive covenant was necessary to protect the goodwill after its return. I agree that the goodwill is returned, but that does not permit a covenant which will restrict ordinary competition or one that is greater than reasonably necessary. In *McCart*, the court compared customer affiliation associated with H & R Block's service mark to the goodwill inherent in the sale of a business. H & R Block's protectable interest

was the customer recognition of its service mark and the year-to-year affiliation those customers developed with a particular H & R Block office. The court concluded that H & R Block had a protectable interest in its customer affiliation but that it had no right to restrict competition beyond the limits of its protectable interest.

In my opinion, a franchise agreement is akin to an employment contract. The franchisor retains the goodwill and the name of the business. At the end of the agreement, the franchisee, like the employee in an employer-employee relationship, has nothing remaining. Unlike the seller of a business, the franchisor is not paid for a covenant not to compete. The franchisor exercises control and dictates business policies, which is like the role of an employer in an employer-employee relationship. In such an arrangement, a covenant aimed at preventing the unfair appropriation of customer goodwill can be no greater than reasonably necessary to protect the franchisor. It can restrict the franchisee only from working for or soliciting the franchisor's customers or accounts with whom the franchisee actually did business and had personal contact.

Here, the covenant prohibits Kelsey from engaging in ordinary competition with H & R Block within 45 miles of its Ogallala office for a period of 1 year. In my opinion, the district court correctly determined that the covenant was unenforceable as a matter of law because it was not limited to former H & R Block clients with whom Kelsey actually did business and had personal contact.

For these reasons, I would affirm the district court's judgment finding that the covenant not to compete was overly broad and therefore unenforceable.

CONNOLLY, J., joins in this dissent.

DESTINY 98 TD, APPELLEE AND CROSS-APPELLEE, AND BEL FURY INVESTMENTS GROUP, L.L.C., APPELLANT AND CROSS-APPELLEE, V. JOHN J. MIODOWSKI ET AL., APPELLEES, AND EMPIRE TITLE OF NEBRASKA, INC., INTERVENOR-APPELLEE AND CROSS-APPELLANT.

693 N.W.2d 278

Filed March 11, 2005. No. S-03-1393.

1. **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.
2. **Motions to Vacate: Proof: Appeal and Error.** An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion.
3. **Foreclosure: Tax Sale: Liens: Homesteads: Notice.** The provisions of Neb. Rev. Stat. § 25-1531 (Reissue 1995) requiring notice of homestead exemption rights do not apply to foreclosure of a tax lien represented by a tax sale certificate.
4. **Attorney Fees.** As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
5. **Courts: Jurisdiction.** In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered.
6. **Motions to Vacate: Appeal and Error.** An appellate court reviews a ruling on a motion to vacate for abuse of discretion.
7. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause of action is to be tried, and the issues in a given case will be limited to those which are pled.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed in part, and in part reversed and remanded with directions.

Michael F. Kivett, James J. Bemis, Jr., and Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Jay A. Ferguson for intervenor-appellee Empire Title of Nebraska, Inc.

James H. Monahan, of Monahan & Monahan, for appellees John J. Miodowski and Naomi Miodowski.

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

STEPHAN, J.

This appeal presents the issue of whether a party seeking confirmation of a judicial sale in a tax sale certificate foreclosure proceeding is required to give notice of statutory homestead exemption procedures pursuant to Neb. Rev. Stat. § 25-1531 (Reissue 1995). We conclude that there is no such requirement.

BACKGROUND

On March 1, 1999, Destiny 98 TD (Destiny 98) purchased Douglas County treasurer's certificate of tax sale No. 99-01220, representing a tax lien on Lot 7, Block 4, Burlington Place Addition, in Douglas County, Nebraska. On September 11, 2002, Destiny 98 filed an amended petition to foreclose liens represented by various tax sale certificates. John J. Miodowski and "____ Miodowski" were alleged to be the owners of the property and were named as defendants in the third cause of action, which pertained to the real property and tax sale certificate described above. On February 21, 2003, Destiny 98 filed a motion for judgment by default with respect to the third cause of action, alleging that the Miodowskis had been properly served with summons but had failed to respond with a timely responsive pleading. On March 7, the district court entered a default judgment and decree ordering a sheriff's sale of the property. Notice of the sale was published in The Daily Record, a legal newspaper in Douglas County, on June 27 and July 4, 11, and 18, 2003. At the sheriff's sale held on July 29, Bel Fury Investments Group, L.L.C. (Bel Fury), purchased the property for $6,360. On August 21, the district court confirmed the sale of the property and ordered that a sheriff's deed be delivered to Bel Fury. Subsequent to execution and delivery of a sheriff's deed dated September 3, 2003, Bel Fury filed a praecipe for writ of assistance.

Several days thereafter, Empire Title of Nebraska, Inc. (Empire Title), filed an ex parte application seeking to intervene in the proceeding and for other relief. In its application, Empire Title represented that it had served as trustee and closing agent in a refinancing of the Miodowski property in August 2003 and that it believed it had distributed funds to satisfy the tax liens represented by the tax sale certificates in foreclosure, but that through "error, omission or misunderstanding," this may not have occurred. The district court quashed the writ of assistance as it

related to the property in question and scheduled an evidentiary hearing for October 1, 2003. On September 23, the Miodowskis filed an application to set aside the confirmation of the sale and the sheriff's deed based on Destiny 98's failure to provide them with a notice of homestead exemption pursuant to § 25-1531. Upon being granted leave to intervene during the hearing on October 1, Empire Title filed a motion to vacate confirmation of the sale on grounds that "the property was not sold in conformity to the provisions of Chapter 25 [of the Nebraska Revised Statutes] for fair value under the circumstances and conditions of the sale, and subsequent sale would realize a greater amount."

In an order entered on October 8, 2003, the district court ruled that § 25-1531 did not apply to proceedings to foreclose tax sale certificates pursuant to Neb. Rev. Stat. § 77-1902 (Reissue 2003) and denied the relief sought by the Miodowskis and Empire Title. However, after conducting a hearing on October 10, the court changed its ruling and concluded in an order entered on November 10 that § 25-1531 was applicable. The district court therefore vacated its prior order confirming the sale because the Miodowskis had not been given notice of the homestead exemption procedures in accordance with § 25-1531. A notice of redemption prior to confirmation accompanied by the payment of $7,198.86 to the clerk of the district court was then filed on behalf of the Miodowskis. In a separate order entered on November 26, the court denied Bel Fury's oral motion for attorney fees, stating that there was no statutory authority or recognized custom whereupon attorney fees would be allowable. Bel Fury then 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

Bel Fury assigns that the district court erred in (1) determining that § 25-1531 and Neb. Rev. Stat. § 40-103 (Reissue 2004) are applicable to the sale of real estate pursuant to the foreclosure of a tax sale certificate under Neb. Rev. Stat. § 77-1901 et seq. (Reissue 2003) and (2) determining that Bel Fury is not entitled to attorney fees.

On cross-appeal, Empire Title assigns that the court committed plain error by failing to find that (1) Destiny 98 did not personally serve the necessary parties with notice of publication of the sheriff's sale as statutorily required and (2) there was a shocking discrepancy in the sale price of the property.

STANDARD OF REVIEW

[1] 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. *KLH Retirement Planning v. Okwumuo*, 263 Neb. 760, 642 N.W.2d 801 (2002).

[2] An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion. *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995).

ANALYSIS

Notice of Homestead Exemption

It is undisputed that the Miodowskis were not given notice of homestead exemption procedures prior to the district court's original order confirming the sheriff's sale. Thus, we are presented with the narrow legal question of whether such notice was required by the applicable statutes. Under § 77-1902, the holder of a tax sale certificate may foreclose the lien for taxes represented by the certificate. The statute provides generally that the foreclosure proceeding shall be "in the same manner and with like effect as in the foreclosure of a real estate mortgage, except as otherwise specifically provided by sections 77-1903 to 77-1917." Section 77-1912 provides, with respect to a tax foreclosure, that the "sheriff shall sell the real property in the same manner provided by law for a sale on execution." Section 25-1531, which applies to real estate mortgage foreclosures, provides in pertinent part that

> [p]rior to the confirmation of sale pursuant to this section, the party seeking confirmation of sale shall, except in the circumstances described in section 40-103, provide notice to the debtor informing him or her of the homestead exemption procedure available pursuant to Chapter 40, article 1. The notice shall be given by certified mailing at least ten days prior to any hearing on confirmation of sale.

Section 25-1531 further provides that

> [u]pon application to the court by the judgment debtor within sixty days of the confirmation of any sale confirmed pursuant to this section, such sale shall be set aside if the court finds that the party seeking confirmation of sale failed to provide notice to the judgment debtor regarding homestead exemption procedures at least ten days prior to the confirmation of sale as required by this section.

In a tax sale certificate foreclosure proceeding, "final confirmation of sale may be had immediately after the sheriff's sale." § 77-1903(2). Section 77-1913 provides that upon a timely motion to confirm a sheriff's sale in a tax sale foreclosure proceeding, "[t]he court shall . . . examine the proceedings and, if they are found to be correct . . . make and enter an order of confirmation of the sale" and "direct the disposition of the proceeds of the sale and order the sheriff to make and deliver to the purchasers, without further cost to them, a sheriff's deed for any real estate not redeemed," subject to certain conditions not relevant here. Section 77-1917, which confers the right to redeem real property which is subject to a tax foreclosure "at any time after the decree of foreclosure and before the final confirmation of the sale," includes no reference to a homestead exemption.

Bel Fury argues that because the tax foreclosure statutes codified at chapter 77 of the Nebraska Revised Statutes do not require notice of a homestead exemption, there is no such requirement in a proceeding to foreclose a tax sale certificate. On the other hand, the Miodowskis and Empire Title argue that because § 77-1902 directs that a tax sale certificate foreclosure is to be conducted "in the same manner and with like effect as in the foreclosure of a real estate mortgage," except where §§ 77-1903 to 77-1917 specifically provide otherwise, the homestead exemption notice requirement set forth in § 25-1531 is applicable.

Bel Fury's argument that statutory procedures for the foreclosure of a tax sale certificate are "separate and distinct" from those governing mortgage foreclosures and execution sales ignores the plain language of §§ 77-1902 and 77-1912, which language establishes a partial linkage between tax foreclosure and mortgage foreclosure procedures. For example, in *KLH Retirement Planning v. Okwumuo*, 263 Neb. 760, 642 N.W.2d 801 (2002),

which was commenced as a tax foreclosure proceeding, we construed § 77-1912 as incorporating the procedure for execution sales set forth in Neb. Rev. Stat. § 25-1501 et seq. (Reissue 1995 & Cum. Supp. 2000). We similarly noted the linkage between the tax foreclosure statutes and those governing mortgage foreclosures in *County of Scotts Bluff v. Bristol*, 159 Neb. 634, 68 N.W.2d 197 (1955), and *Madison County v. Crippen*, 143 Neb. 474, 10 N.W.2d 260 (1943).

Thus, in order to resolve the question of whether notification of homestead exemption rights must be shown before a court can confirm a sheriff's sale in a tax sale certificate foreclosure, it is necessary to consider when such notice is required in a mortgage foreclosure. A "homestead," as defined by Neb. Rev. Stat. § 40-101 (Reissue 2004), is "exempt from judgment liens and from execution or forced sale, except as provided in sections 40-101 to 40-116." Section 40-103 provides: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained . . . (2) on debts secured by mortgages or trust deeds upon the premises executed and acknowledged by both husband and wife, or an unmarried claimant." Section 25-1531, pertaining to mortgage foreclosures, requires that the debtor be notified of homestead exemption procedures prior to confirmation of a sheriff's sale "except in the circumstances described in section 40-103." Thus, a notice of homestead exemption rights is required prior to confirmation of sale only in those mortgage foreclosure proceedings where such rights exist.

The tax sale certificate which is the subject of this foreclosure action reflects delinquent city and county taxes against property situated within the city of Omaha. Such taxes are a "first lien on the property taxed until paid or extinguished as provided by law," taking priority over a mortgage or any other liens. Neb. Rev. Stat. § 77-203 (Reissue 2003). Accord, *Alliance RR. Comm. Credit Union v. County of Box Butte*, 243 Neb. 840, 503 N.W.2d 191 (1993); *Licking v. Hays Lumber Co.*, 146 Neb. 240, 19 N.W.2d 148 (1945); *Coffin v. Old Line Life Ins. Co.*, 138 Neb. 857, 295 N.W. 884 (1941); *Eddy v. Kimerer*, 61 Neb. 498, 85 N.W. 540 (1901).

[3] Neither the Miodowskis nor Empire Title have provided us with any argument or authority supporting the existence of any homestead exemption right which would affect the confirmation

of a sheriff's sale in a proceeding to foreclose the lien for taxes represented by a tax sale certificate. We conclude that the tax lien is superior to any homestead interest which could be claimed by the Miodowskis, and therefore hold that the provisions of § 25-1531 requiring notice of homestead exemption rights do not apply to foreclosure of a tax lien represented by a tax sale certificate. Accordingly, the district court erred in vacating and setting aside its order confirming the sale entered on August 21, 2003.

Attorney Fees

[4] Bel Fury argues that the district court erred in determining that it was not entitled to recover its attorney fees incurred in this action. As a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002). Here, the district court found no statutory authority or uniform course of procedure which would permit an award of attorney fees. We agree, and conclude that this assignment of error is without merit.

Cross-Appeal

[5,6] In its cross-appeal, Empire Title states that it "does not claim error by the Douglas County District Court on the issues that it addressed," but asserts that if error is found, the district court erred in not setting aside its original order confirming the sale based upon a claimed deficiency with respect to notice of the sheriff's sale and a "shocking discrepancy in sale price." We note that the issues which are the subject of the cross-appeal were not raised by timely appeal from the order confirming the sheriff's sale entered on August 21, 2003. After that order became final, Empire Title, as intervenor, asked the district court to vacate it on grounds that "the property was not sold in conformity to the provisions of Chapter 25, for fair value under the circumstances and conditions of the sale, and subsequent sale would realize a greater amount." We have concluded above that the procedure for vacating an order confirming a sheriff's sale for failure to give notice of homestead exemption as set forth in § 25-1531 does not apply to an action to foreclose a lien for taxes represented by a

tax sale certificate. Thus, the cross-appeal presents the question of whether the district court erred in not vacating the order on one or both of the alternative grounds now urged by Empire Title. In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered. *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994); *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). We review a ruling on a motion to vacate for abuse of discretion. See *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995).

[7] Empire Title's first argument on cross-appeal is that Destiny 98 failed to comply with the requirements of Neb. Rev. Stat. § 25-520.01 (Reissue 1995) with respect to mailing published notice of the sheriff's sale to the Miodowskis. Assuming without deciding that Empire Title has standing to raise this issue on appeal, we nevertheless decline to reach it. Neither Empire Title nor the Miodowskis alleged inadequate notice of the sale in their motions to vacate the order of confirmation. Compare, *KLH Retirement Planning v. Okwumuo*, 263 Neb. 760, 642 N.W.2d 801 (2002), and *Kleeb v. Kleeb*, 210 Neb. 637, 316 N.W.2d 583 (1982) (both asserting inadequacy of notice as basis for setting aside sheriff's sales prior to confirmation and assigning such error on direct appeal from orders confirming sales). Although counsel for Empire Title alluded to this issue in oral argument before the district court, it was not specifically alleged in any pleading or motion filed in the case. We have held that the purpose of pleadings is to frame the issues upon which a cause of action is to be tried, and the issues in a given case will be limited to those which are pled. *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002); *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002). The same principles apply to a motion requesting that a court exercise its inherent power to vacate a prior judgment. Based upon this record, we conclude that the issue of whether the Miodowskis received adequate notice of the sheriff's sale was not properly raised in the district court as a basis for vacating the order confirming the sale, and we decline Empire Title's request that we reach it as "plain error." Thus, Empire Title's first assignment of error is without merit.

In its second assignment of error, Empire Title contends that the district court should have vacated its order confirming the sale on grounds that there was a "shocking discrepancy" in the sale price of the property. It bases its argument on an appraisal of the subject property at a value of $80,000 and its own "Irrevocable Minimum Offer" to pay at least $12,000 for the property, neither of which were shown to have been before the district court when it confirmed the sheriff's sale on August 21, 2003. In *Kleeb v. Kleeb*, 210 Neb. at 643, 316 N.W.2d at 588, an appeal from an order confirming a partition sale, we considered the significance of two " 'upset' bids," the first made after the sale and prior to confirmation, and the second made during the pendency of the appeal from the order confirming the sale. With respect to the first, we noted that

> [a]n upset bid following a judicial sale and before a final confirmation should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permits its acceptance.

Id. at 644, 316 N.W.2d at 588. We held that the trial court did not abuse its discretion in confirming the sale notwithstanding notification during the confirmation hearing of a slightly higher bid made by an unknown party. We also declined to remand the matter for a new sale on the basis of the second upset bid, even though it was significantly higher than the sale price. We noted that "[u]pset bids to set aside public sales of property in this situation must end somewhere . . . ." *Id.* at 647, 316 N.W.2d at 589. The same reasoning is even more compelling here, where the order confirming the sheriff's sale had become final before any effort was made to show that the sale price was inadequate. Accordingly, assuming without deciding that Empire Title has standing to raise this issue, we find no merit in its argument that the district court abused its discretion in not vacating the order confirming the sale on the basis of the upset bid and appraisal submitted after the order had become final.

CONCLUSION

We affirm only that part of the judgment of the district court denying Bel Fury's application for attorney fees. We reverse that

part of the judgment which vacated the August 21, 2003, order confirming the sale based upon our determination that the district court erred in concluding that the Miodowskis had a legal right to notice of homestead exemption rights prior to confirmation. Accordingly, the cause is remanded to the district court with directions to reinstate the order confirming the sale and for such further proceedings consistent with this opinion as may be necessary to conclude the foreclosure.

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

IN RE GRAND JURY OF LANCASTER COUNTY. STATE OF NEBRASKA, APPELLEE, V. LANCASTER COUNTY DISTRICT COURT, APPELLEE, AND CELIA MILWOOD, FORMERLY KNOWN AS CELIA SHEPPARD, APPELLANT.

693 N.W.2d 285

Filed March 11, 2005. No. S-04-587.

1. **Juries: Records: Appeal and Error.** The request for the release of grand jury testimony by the State, through the county attorney, presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.
3. **Criminal Law: Juries: Records.** To evaluate the propriety of a district court's order regarding the release of grand jury testimony, the analysis must be made by reference to Nebraska statutes rather than to the Federal Rules of Criminal Procedure.
4. **Juries: Records.** Nebraska statutes governing grand juries permit only limited access to grand jury records.
5. ____: ____. Court approval for the release of grand jury proceedings when there has been a "no true bill" is limited under the Nebraska statutes to witnesses and to other courts.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed.

Kirk E. Naylor, Jr., for appellant.

Joseph P. Kelly, Chief Deputy Lancaster County Attorney, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

On March 10, 2004, the State of Nebraska, through the Lancaster County Attorney, filed a motion requesting that the district court for Lancaster County release certain grand jury testimony originally presented in March 1990 to the county attorney and the Lincoln Police Department. The testimony requested was that of the appellant, Celia Milwood, formerly known as Celia Sheppard. The grand jury had been convened to investigate the circumstances surrounding the October 19, 1986, death of Bruce Sheppard, Milwood's deceased husband. An evidentiary hearing was conducted on the State's motion seeking release of Milwood's grand jury testimony. Relying on several exceptions to the secrecy of grand jury proceedings found in the Federal Rules of Criminal Procedure, on April 12, 2004, the district court sustained the State's motion with certain conditions. Milwood appeals from the district court's order.

We conclude that the district court's reliance on the Federal Rules of Criminal Procedure was error. Further, because the Nebraska Legislature has provided for the judicial release of grand jury materials in only limited circumstances, and the case at bar does not present a situation for which release is authorized, we conclude the district court erred as a matter of law when it granted the motion seeking release of Milwood's grand jury testimony. We reverse.

STATEMENT OF FACTS

On October 19, 1986, Sheppard died in his bedroom in Lincoln, Nebraska, of a single gunshot wound to the head. The only other person known to be present in Sheppard's home at the time of his death was his wife, Milwood. During the police investigation of Sheppard's death, Milwood told the police in an unsworn statement that she was in the kitchen when she heard a gunshot. She told investigators she went into the bedroom and found Sheppard on the bed with a gun in his hand. She stated that she took the gun out of his hand and then called police.

The police initially determined that Sheppard had committed suicide. Later, his death certificate was changed to read "undetermined cause." In March 1990, a grand jury was convened in

Lancaster County to determine whether any person committed a crime in connection with Sheppard's death. Milwood testified before the grand jury. The grand jury returned a "no true bill," which this court recently indicated means that at least 12 of the 16 grand jurors found no probable cause to believe that a crime had been committed. See *In re Grand Jury of Douglas Cty.*, 263 Neb. 981, 644 N.W.2d 858 (2002). See, also, Neb. Rev. Stat. § 25-1633 (Cum. Supp. 2004); Neb. Rev. Stat. §§ 29-1406(2)(e) and 29-1416 (Reissue 1995). The police department's file on Sheppard's death was closed.

In June 1990, Milwood gave deposition testimony in a civil case. In her deposition, she stated that she was in the bedroom with Sheppard when she saw him place the gun to his head. She stated that she grabbed the gun and that the gun went off.

Some time in 2003, Sheppard's sister contacted the Lincoln Police Department, requesting that the department reopen its investigation into Sheppard's death, based upon what she felt were inconsistencies between Milwood's statement to the police at the time of Sheppard's death and Milwood's later deposition testimony. Gregory Sorensen, a Lincoln police officer, reviewed the police file and the deposition testimony and concluded there was a significant discrepancy between the two statements.

Based upon this discrepancy and other information in the police file, Sorensen sought access to Milwood's grand jury testimony. On January 27, 2004, the county attorney's office filed an ex parte "Motion to Make Certain Records Available," seeking to have Milwood's grand jury testimony read to Sorensen as part of his investigation into Sheppard's death. The motion was denied without prejudice.

On March 10, 2004, the county attorney's office filed a second motion seeking the release of Milwood's testimony. This second motion came on for an evidentiary hearing on April 7. The county attorney and counsel for Milwood appeared. Sorensen was the sole witness to testify at the hearing.

According to Sorensen's testimony, Sorensen wanted to review Milwood's grand jury testimony

> to see how [she] testified before the grand jury. If she testified before the grand jury differently than what she testified in her deposition, obviously she must have perjured herself

> at one place or the other, either in [March] 1990 or when she gave the deposition . . . .
>
> At this point in time, there's definitely two different stories, and I'm wondering which one the grand jury heard. And, if the grand jury heard the initial story where she was in the kitchen when the gunshot went off, as opposed to the grand jury [having heard] that she was in the bedroom at the time the gun went off, I think it could have a significant effect on how the grand jury may [have] decide[d] to rule on whether this death was in fact a homicide.

On April 12, 2004, the district court, relying on the Federal Rules of Criminal Procedure, entered an order permitting the release of Milwood's testimony under certain conditions, including the following:

1. The grand jury court reporter would read Milwood's testimony to Sorensen.
2. Milwood and/or her attorney could be present during the reading.
3. Milwood's testimony would be read only once.
4. Sorensen could take handwritten notes of the testimony. If he took notes, he was required to provide Milwood or her attorney with a copy of those notes. He could also give a copy of the notes to the county attorney. Sorensen could not make any other copies of the notes.
5. Sorensen was prohibited, absent written authorization from the court, from discussing Milwood's testimony with anyone other than the county attorney.
6. Other than as provided in the order, the grand jury court reporter was prohibited from disclosing Milwood's testimony.
7. The disclosure of Milwood's grand jury testimony was not to occur until 30 days after the date of the court's order. In the event of an appeal of the court's order, the disclosure was stayed pending the outcome of the appeal.

Milwood appeals the district court's order permitting the release of her grand jury testimony.

ASSIGNMENT OF ERROR

On appeal, Milwood claims the district court erred in ordering the release of her testimony given before the Lancaster County grand jury in March 1990.

STANDARDS OF REVIEW

[1,2] The request for the release of grand jury testimony by the State, through the county attorney, presents a question of law. *In re Grand Jury of Douglas Cty.*, 263 Neb. 981, 644 N.W.2d 858 (2002). When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

District Court's Reliance on Rule 6(e) of Federal Rules of Criminal Procedure Was Error.

In its April 12, 2004, order, the district court acknowledged that "Nebraska's grand jury statutes allow only limited access to grand jury records, none of which applies [sic] to the instant case." Notwithstanding the strictures of the Nebraska statutes, the district court, in apparent reliance on *In re Grand Jury of Douglas Cty., supra*, proceeded to analyze the State's motion to release by reference to Fed. R. Crim. P. 6(e), which provides various exceptions, not recited here, to the general rule of secrecy regarding grand jury proceedings. The district court found that the request of the State related, inter alia, to whether there had been a violation of state criminal law and further found that "the interest in secrecy in this case is minimal." The district court concluded that release was proper under the exceptions found in rule 6(e) of the Federal Rules of Criminal Procedure.

On appeal, the State acknowledges that "there is not a Nebraska statute which expressly applies to this case to justify the release of the grand jury testimony of [Milwood]." Brief for appellee at 3. The State, however, asserts that the district court correctly decided the motion under federal standards.

On appeal, Milwood notes that "[t]he limited circumstances under which grand jury records may be released by the court are set forth by statute" and asserts that the district court's reliance on the Federal Rules of Criminal Procedure constituted error. Brief for appellant at 11. We agree with Milwood that Nebraska statutes do not provide for the release of her testimony under the facts of this case and that the district court's order granting the release stemming from its reliance on the Federal Rules of Criminal Procedure was error. Accordingly, we reverse.

The district court's order and the arguments of the parties indicate that both the district court and the State read our decision in *In re Grand Jury of Douglas Cty., supra*, as having adopted the various exceptions to secrecy embodied in rule 6(e) of the Federal Rules of Criminal Procedure. Contrary to this reading, our references in *In re Grand Jury of Douglas Cty.* to the Federal Rules of Criminal Procedure were limited to a recapitulation of the arguments of the parties in *In re Grand Jury of Douglas Cty.* and the district court's pronouncements in that case. Further, although we acknowledged the considerable differences between the federal and state methods of initiating criminal proceedings, we referred to federal authority in *In re Grand Jury of Douglas Cty.* not as an endorsement of rule 6(e) of the Federal Rules of Criminal Procedure, but, rather, as an expression of agreement with remarks in the federal cases extolling in general the virtues of the secrecy of grand jury proceedings. In view of the foregoing, the district court's reliance on the Federal Rules of Criminal Procedure in granting the release was error.

Release of Milwood's Grand Jury Testimony Under Nebraska Statutes Is Error.

[3] To evaluate the propriety of the district court's order of April 12, 2004, our analysis must be made by reference to Nebraska statutes rather than to the Federal Rules of Criminal Procedure. Thus, we turn to the Nebraska statutes pertaining to grand jury proceedings to determine whether the release of the grand jury testimony can be made to the county attorney in this case when a no true bill was returned.

[4] A review of the Nebraska statutes governing grand juries reveals only limited access to grand jury records. See Neb. Rev. Stat. § 29-1401 et seq. (Reissue 1995 & Cum. Supp. 2004). Section 29-1407.01(1) provides in part: "No release or destruction of the notes or transcripts [of grand jury proceedings] shall occur without prior court approval." Elsewhere in the statutes, the circumstances for "release" are indicated.

Section 29-1407.01(2) provides: "Upon application by the prosecutor, or by any witness after notice to the prosecutor, the court, for good cause, may enter an order to furnish to that witness a transcript of his or her own grand jury testimony, or minutes, reports, or exhibits relating thereto."

Section 29-1420(2) provides: "A district judge under whose direction a grand jury has been impaneled may, upon good cause shown, transfer to a court of competent jurisdiction in another county or jurisdiction any evidence gathered by the grand jury that offenses have been committed in such other county or jurisdiction."

For the sake of completeness, we note that release is addressed elsewhere in § 29-1420. Section 29-1420(1) describes the circumstances for the release of a grand jury report, but the grand jury in this case did not prepare a report, but, rather, returned a no true bill and nothing more. See, similarly, *In re Grand Jury of Douglas Cty.*, 263 Neb. 981, 644 N.W.2d 858 (2002). Thus, § 29-1420(1) is not applicable.

[5] Given the foregoing statutes, it is clear that court approval for the release of grand jury proceedings when there has been a no true bill is limited by statute to witnesses and to other courts. See §§ 29-1407.01(2) and 29-1420(2). The instant case does not present either of the situations described above, and therefore, the release of Milwood's testimony to the county attorney was not consistent with Nebraska statutes and was error.

As indicated earlier in this opinion, the State urges this court to affirm the April 12, 2004, order of release because release would facilitate the investigation into the circumstances of Sheppard's death. We have recently observed that "[t]he failure of the grand jury to return an indictment does not prevent the County Attorney from proceeding independently." *In re Grand Jury of Douglas Cty.*, 263 Neb. at 988, 644 N.W.2d at 863. In this regard, we note that § 29-1402 provides that "[t]he convening of a grand jury shall in no way limit the right of prosecution on information or complaint during the time the grand jury is in session." Further, and more on point for present purposes, § 29-1416(2) provides:

> Once a grand jury has returned a no true bill based upon a transaction, set of transactions, event, or events, a grand jury inquiry into the same transaction or events shall not be initiated unless the court finds, upon a proper showing by the prosecuting attorney, that the prosecuting attorney has discovered additional evidence relevant to such inquiry.

The statutes clearly provide that although a no true bill was originally returned, upon the discovery of additional evidence

and a proper showing to the court, an additional grand jury inquiry can be initiated. The statutes do not evince an impediment to the continued investigation which the State seeks to pursue in this case. Given case law and the relevant statutory provisions, and notwithstanding the secrecy of grand jury proceedings generally, the ability of the office of the county attorney to pursue an investigation following the return of a no true bill is not prevented by Nebraska statutes.

The State's request for the release of Milwood's grand jury testimony presents a question of law, which we resolve independently of the conclusion reached by the district court. See *In re Grand Jury of Douglas Cty., supra*. Given our foregoing analysis, we conclude the district court erred in granting the State's request for the release of Milwood's grand jury testimony.

CONCLUSION

Based on Nebraska statutes governing grand jury proceedings, we conclude that the district court erred in granting the release of Milwood's grand jury testimony to the county attorney. The judgment of the district court is reversed.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
ARTHUR LEE GALES, JR., APPELLANT.

694 N.W.2d 124

Filed March 18, 2005. No. S-04-015.

1. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, regarding which the Nebraska Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. **Appeal and Error.** Matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts.
3. ____. Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
4. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.

5. **Courts: Public Policy.** The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.
6. **Statutes: Constitutional Law: Sentences.** A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
7. ____: ____: ____. An ex post facto analysis applies when a statutory amendment changes the punishment of a crime.
8. **Public Officers and Employees: Presumptions.** In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is also presumed.
9. **Constitutional Law: Death Penalty: Aggravating and Mitigating Circumstances.** To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.
10. **Death Penalty.** There is no perfect procedure for deciding in which cases governmental authority should be used to impose death.
11. **Constitutional Law: Due Process: Death Penalty.** While the Eighth Amendment does not require a court to engage in a proportionality review, where a state creates a right to proportionality review, the Due Process Clause entitles the defendant to procedures to ensure that the right is not arbitrarily denied.
12. **Constitutional Law: Statutes: Standing.** Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.
13. **Criminal Law: Due Process: Notice.** In the context of criminal proceedings, due process generally requires the defendant be given notice and an adequate opportunity to defend himself or herself.
14. **Constitutional Law: Death Penalty: Prosecuting Attorneys.** The U.S. Constitution does not require limitations to be placed on prosecutorial discretion in the context of capital sentencing.
15. **Criminal Law: Prosecuting Attorneys.** In our criminal justice system, the State retains broad discretion as to whom to prosecute and what charge to file.
16. ____: ____. To the extent that a prosecutor's discretion is subject to constitutional constraints, it is in the fact that a decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification.
17. **Criminal Law: Courts: Prosecuting Attorneys: Presumptions: Evidence.** The presumption of regularity supports prosecutorial decisions, and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. In order to dispel this presumption, a criminal defendant must present clear evidence to the contrary.
18. **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.
19. **Death Penalty.** Imposition of the death penalty is not, per se, cruel and unusual punishment.

20. **Criminal Law: Motions for Continuance: Appeal and Error.** A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
21. **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.
22. **Criminal Law: Trial: Juries: Appeal and Error.** Whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court.
23. ____: ____: ____: ____. To warrant reversal, denial of a motion to sequester the jury before submission of the cause must be shown to have prejudiced the defendant.
24. **Juror Qualifications: Appeal and Error.** The extent to which parties may examine jurors as to their qualifications rests in the discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice has been caused thereby.
25. **Trial: Juries.** Except where there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to examine an individual juror out of the presence of all the other potential jurors.
26. **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.
27. **Prior Convictions: Judgments: Sentences: Proof.** In order to establish evidence's sufficient probative force to prove an earlier conviction for the purpose of sentence enhancement, the evidence must, with some trustworthiness, reflect a court's act of rendering judgment.
28. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
29. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Proof.** Aggravating circumstances must be proved beyond a reasonable doubt.
30. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given.
31. ____: ____. All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
32. **Homicide: Death Penalty: Supreme Court.** The Nebraska Supreme Court has narrowed the class of especially heinous, atrocious, or cruel murders to include those involving torture, sadism, or sexual abuse. This circumstance includes a pitiless crime which is unnecessarily torturous to the victim.
33. **Homicide: Death Penalty: Words and Phrases.** The term "especially heinous, atrocious, or cruel" is limited to cases where torture, sadism, or the imposition of extreme suffering exists, or where the murder was preceded by acts performed for the satisfaction of inflicting either mental or physical pain or when such pain existed for any prolonged period of time. This class includes murders involving torture, sadism, or sexual abuse.

34. **Aggravating and Mitigating Circumstances.** The two prongs of aggravating circumstance (1)(d) of Neb. Rev. Stat. § 29-2523 (Cum. Supp. 2004) describe, in the disjunctive, two separate circumstances which may operate in conjunction with or independently of one another.
35. **Jury Instructions.** An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given.
36. **Trial.** The general conduct of the trial rests within the discretion of the trial court.
37. ____. The general rule is that the party with the burden of proof is entitled to open and close argument.
38. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
39. **Courts: Appeal and Error.** When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate.
40. ____: ____. The order of an appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.
41. **Effectiveness of Counsel: Appeal and Error.** When the issue of ineffective assistance of counsel has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
42. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
43. **Sentences: Death Penalty: Appeal and Error.** In a capital sentencing proceeding, the Nebraska Supreme Court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty.
44. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** In reviewing a sentence of death on appeal, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.
45. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence.
46. **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.

47. **Constitutional Law: Juries: Aggravating and Mitigating Circumstances.** An aggravating circumstance must be found by a jury beyond a reasonable doubt in order to satisfy the Sixth Amendment.
48. **Sentences: Aggravating and Mitigating Circumstances: Appeal and Error.** When reviewing the sufficiency of the evidence to sustain the trier of fact's finding of an aggravating circumstance, the relevant question for the Nebraska Supreme Court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the aggravating circumstance beyond a reasonable doubt.
49. **Supreme Court: Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** The Nebraska Supreme Court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review. This review requires the Nebraska Supreme Court to compare the aggravating and mitigating circumstances of the case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in the case is no greater than those imposed in other cases with the same or similar circumstances.
50. **Supreme Court: Jurisdiction: Statutes.** The jurisdiction conferred upon the Nebraska Supreme Court by the Constitution may not be increased or extended by legislative enactment.
51. **Constitutional Law: Criminal Law: Statutes.** A penal statute must be construed so as to meet constitutional requirements if such can be reasonably done.
52. **Constitutional Law: Statutes: Appeal and Error.** It is the duty of an appellate court to give a statute an interpretation which meets constitutional requirements, if it can.
53. **Criminal Law: Statutes.** Although a penal statute must be strictly construed, it is to be given a sensible construction, and general terms are to be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence.
54. **Statutes: Presumptions: Legislature: Intent.** In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result.
55. **Statutes: Legislature: Intent.** In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.
56. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
57. **Supreme Court.** The Nebraska Supreme Court is the final arbiter of Nebraska law.
58. **Statutes: Supreme Court: Sentences: Death Penalty.** Nebraska's capital sentencing statutes create a two-tier sentencing process and differentiate between the role performed by the sentencing panel and the role of the Nebraska Supreme Court in reviewing that sentence.
59. **Supreme Court: Sentences: Death Penalty: Appeal and Error.** The Nebraska Supreme Court's proportionality review in capital cases is conducted independently from the sentencing panel's proportionality review and the Nebraska Supreme Court's appellate review of the sentencing decision made by the trial court.
60. **Statutes: Supreme Court: Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** While the Nebraska statutes do not authorize the Nebraska Supreme Court to reweigh aggravating and mitigating circumstances as a

basis for resentencing a defendant, they expressly authorize and require the Nebraska Supreme Court to conduct an independent review of the proportionality of the defendant's sentence.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Susan M. Bazis, of Bazis Law Offices, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, J. Kirk Brown, Solicitor General, and Kimberly A. Klein for appellee.

James R. Mowbray and Jerry L. Soucie, for amicus curiae Nebraska Commission on Public Advocacy.

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

GERRARD, J.

I. NATURE OF CASE

Arthur Lee Gales, Jr., was convicted pursuant to jury verdict of two counts of first degree murder and one count of attempted second degree murder in the district court. Gales was sentenced to consecutive sentences of death on each count of first degree murder and a sentence of imprisonment for a period of not less than 50 nor more than 50 years on the count of attempted second degree murder. On appeal, this court was required, by the U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), to vacate Gales' death sentences and remand the first degree murder causes for resentencing. See *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003) (*Gales I*). Upon remand, a three-judge panel of the district court again sentenced Gales to death on each count of first degree murder. The instant appeal is Gales' automatic direct appeal to this court from his resentencing. See Neb. Rev. Stat. § 29-2525 (Cum. Supp. 2004). For the reasons that follow, we affirm the judgment of the district court.

II. BACKGROUND

A three-count information was filed against Gales on May 22, 2001. Count I charged Gales with first degree murder based on an allegation that on or about November 12, 2000, he purposely and

with deliberate and premeditated malice or during the perpetration of a first degree sexual assault killed Latara Chandler. Count II charged first degree murder based upon an allegation that on or about November 12, Gales purposely and with deliberate and premeditated malice killed Tramar Chandler. Count III charged Gales with attempted second degree murder, alleging that on or about November 12, he intentionally, but without premeditation, attempted to kill Judy Chandler.

Gales entered pleas of not guilty to all charges. Evidence at trial revealed that Gales had been at Judy's apartment in Omaha, Nebraska, on November 11, 2000, with Judy and her children, Latara and Tramar. Judy was found near 15th and Grace Streets in Omaha on the morning of November 12. She had been severely beaten. After Judy was identified, police went to Judy's apartment to check on the children and discovered 13-year-old Latara's body, nude from the waist down, in a bedroom. Seven-year-old Tramar's body was found lying in a bathtub. Autopsies indicated that Latara was killed by manual strangulation and that Tramar died from drowning and manual strangulation. The pathologist testified that each child had suffered at least 4 minutes of compression of the neck before death. Latara had been sexually assaulted.

The State's theory of the case was that Gales and Judy left Judy's children at her apartment on the evening of November 11, 2000, and that Gales later severely beat Judy and left her for dead. The State contended that Gales realized the children were potential witnesses who could place him with Judy that evening; therefore, he went back to the apartment and killed them. The State presented DNA evidence which linked Gales to both crime scenes and excluded other potential suspects. The DNA evidence particularly linked Gales to the sexual assault of Latara. Gales did not testify or offer evidence at trial and did not dispute the State's general theory of how the children were killed; instead, his defense was that he was not the person who assaulted Judy and killed the children. However, Gales is not, for purposes of this appeal, challenging the factual basis for his convictions.

On August 27, 2001, the jury returned a verdict finding Gales guilty of two counts of first degree murder and one count of attempted second degree murder. A sentencing hearing was

conducted by the judge who presided over the trial. The court found certain aggravating circumstances to exist, and based upon those findings, Gales was sentenced to death for each of the first degree murder convictions. See *Gales I*. However, in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the U.S. Supreme Court held with respect to Arizona's capital sentencing procedures that the Sixth Amendment precluded a sentencing judge, sitting without a jury, from finding an aggravating circumstance necessary for imposition of the death penalty. Because *Ring* was decided during the pendency of Gales' direct appeal, we were required to review his death sentences in accordance with the constitutional principle announced in *Ring*. See *Gales I*. Because Nebraska's judge-based capital sentencing procedures were functionally identical to Arizona's, we vacated Gales' death sentences. *Gales I*.

While *Gales I* was under submission to this court, the Nebraska Legislature enacted 2002 Neb. Laws, L.B. 1, of the 97th Legislature, Third Special Session, in order to satisfy *Ring*. For reasons that will be examined in more detail below, we concluded that the provisions of L.B. 1 would apply to Gales' new penalty phase proceeding.

Upon remand, the State filed a notice of aggravating circumstances, indicating its intent to produce evidence that

(1) Gales was previously convicted of a crime involving the use of violence to the person;

(2) each murder was committed in an effort to conceal the identity of the perpetrator of the crime of second degree murder;

(3) at the time each murder was committed, Gales also committed another murder; and

(4) the murder of Latara was especially heinous, atrocious, or cruel.

Following jury selection procedures that will be addressed in more detail below, a jury was impaneled and evidence adduced. The jury unanimously found each of the statutory aggravating circumstances set forth above to exist. The jury was discharged; a three-judge sentencing panel of the district court was convened to preside over a mitigation hearing and received evidence of mitigation and sentence excessiveness or disproportionality. The sentencing panel found no statutory mitigating circumstances to

be present in this case and considered two nonstatutory mitigating circumstances proffered by Gales: Gales' strong relationship with members of his family and his ability to adapt to life in prison. However, the panel concluded that the nonstatutory mitigating circumstances were not of sufficient weight to approach or exceed the weight which the panel gave to the aggravating circumstances applicable to each murder, and concluded that the sentence of death should be imposed on Gales for each of the murders of which he had been convicted. The panel concluded that the imposition of a sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Consequently, the panel imposed two sentences of death on Gales.

Other factual details will be set forth below as relevant to our discussion of the issues presented in this appeal.

III. ANALYSIS

Gales assigns that the court erred in imposing the death penalty for a number of reasons. Because Gales assigns a great many errors, we have for the sake of clarity consolidated, restated, and reordered Gales' assignments of error. Those assignments of error, and the appropriate standards of review, are set forth below in the individual sections of our analysis.

1. Applicability of L.B. 1

(a) Assignments of Error

(1) L.B. 1 is an ex post facto law that cannot be applied retroactively to Gales' case;

(2) the Nebraska death penalty statutes in effect at the time of the murders were unconstitutional and void pursuant to the principle announced in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); and

(3) L.B. 1 is ineffective because it does not require aggravating circumstances to be alleged in the information.

(b) Standard of Review

[1] The constitutionality of a statute is a question of law, regarding which the Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003).

(c) Analysis

Gales assigns several errors with respect to the applicability of L.B. 1 to his resentencing. We discussed the general provisions of L.B. 1 in our decision in *Gales I*.

> Generally, L.B. 1 makes two significant changes in Nebraska's capital sentencing procedure. First, it provides for an "aggravation hearing" following a determination of guilt in a first degree murder case, at which a jury determines whether aggravating circumstances alleged by the State exist, unless such determination by a jury is waived by the defendant. L.B. 1, § 11. Second, it removes the option of sentencing by the trial judge and requires sentencing by a panel of three judges. *Id.*, § 12. L.B. 1 does not change the statutory definitions of aggravating and mitigating circumstances or the manner in which they are to be balanced. *Id.*, §§ 14 and 15.

Gales I, 265 Neb. at 627, 658 N.W.2d at 626.

[2-5] Gales challenges the applicability of L.B. 1's sentencing procedures to his resentencing. Gales also challenges several specific provisions of L.B. 1. However, we have previously considered and rejected several of these arguments, most pertinently in our decision in *Gales I.* Consequently, it is relevant that matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts. *Thomas v. State*, 268 Neb. 594, 685 N.W.2d 66 (2004). Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *Id.* The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. *State v. White*, 257 Neb. 943, 601 N.W.2d 731 (1999). Furthermore, it is well established that the doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

These principles, compelling adherence to our prior resolution of issues, will prove dispositive of several of Gales' claims.

(i) Ex Post Facto Law

[6,7] Gales first argues that L.B. 1 was an impermissible ex post facto law, because, according to Gales, L.B. 1 transformed the statutory aggravating circumstances from sentencing factors into elements of "capital felony murder." Brief for appellant at 9. Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. *Gales I.* A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts. *Id*. This ex post facto analysis applies when a statutory amendment changes the punishment of a crime. *Id*.

In *Gales I*, we considered and rejected Gales' ex post facto argument. We held that L.B. 1's provisions for jury determination of aggravating circumstances affected a procedural change in the law which applied to all proceedings which occurred after the effective date of the amendment. See *id*. We specifically concluded that application of those provisions would not violate ex post facto principles. See *id*. Accord *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005). This holding represents the law of the case and precludes Gales' claim. Gales presents no argument persuading us to reconsider our prior determination on this issue.

Thus, we reject Gales' first assignment of error. Furthermore, it appears from our examination of the briefs that Gales' second assignment of error, although somewhat confusing, is based in the same underlying legal theory as his first assignment of error. We also reject Gales' second assignment of error.

(ii) Allegation of Aggravating Circumstances

In his next assignment of error, Gales claims that L.B. 1 is "ineffective" because it does not require aggravating circumstances to be alleged in the information, without which the defendant has not been charged with a crime. We first note that although Gales' situation is somewhat different because L.B. 1 was enacted

during the pendency of his first direct appeal, Gales' characterization of Nebraska law is incorrect.

> Any information charging a violation of section 28-303 [murder in the first degree] and in which the death penalty is sought shall contain a notice of aggravation which alleges one or more aggravating circumstances, as such aggravating circumstances are provided in section 29-2523. The notice of aggravation shall be filed as provided in section 29-1602. It shall constitute sufficient notice to describe the alleged aggravating circumstances in the language provided in section 29-2523.

Neb. Rev. Stat. § 29-1603(2)(a) (Cum. Supp. 2004).

Second, to the extent that Gales' argument can be construed to complain about the fact that aggravating circumstances were not alleged in his charging information, we addressed that complaint in *Gales I.* We noted that the filing of a notice of aggravation was a new procedure established by L.B. 1 and concluded that because the pretrial and trial "steps" of Gales' litigation were completed and became final at a time when the law did not require the State to file a notice of aggravation in order to seek the death penalty, this new procedural requirement was not applicable to Gales. *Gales I.* This determination is the law of the case, and we decline to reconsider it.

Finally, we note that Gales was aware, from our opinion in *Gales I*, of precisely which aggravating circumstances would be at issue in the penalty phase proceedings of his resentencing and that the State filed a notice of aggravating circumstances prior to resentencing even though it was not required, under our opinion in *Gales I*, to do so. Thus, to the extent Gales is arguing that he was not afforded the notice necessary to allow him to prepare a defense, we find such argument to be without merit. See *Ortiz v. Stewart*, 149 F.3d 923 (9th Cir. 1998) (rejecting argument that defendant had insufficient notice of aggravating factors).

2. Constitutional Challenges to Capital Sentencing Procedures

(a) Assignment of Error

Nebraska's capital sentencing provisions, Neb. Rev. Stat. § 29-2519 et seq. (Reissue 1995 & Cum. Supp. 2004), are overly

broad and violate Gales' rights to due process and equal protection in that those provisions:

(1) set forth no criteria for the selection of the three-judge panel;

(2) set forth no procedures to be followed by the three-judge panel;

(3) do not permit the defendant to select and voir dire the sentencing panel;

(4) do not require jury input into sentencing;

(5) do not permit the jury to determine mitigating factors, as required by *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002);

(6) limit the mitigating circumstances which can be presented by a defendant because there are no standards regarding the mechanism and burdens of proof for mitigating circumstances;

(7) provide no notice to the defendant of which cases the sentencing panel will consider in its proportionality review; and

(8) do not regulate prosecutorial discretion.

(b) Standard of Review

The constitutionality of a statute is a question of law, regarding which the Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003).

(c) Analysis

Gales advances several arguments challenging the constitutionality of the Nebraska capital sentencing provisions. These arguments are variously, if not consistently, based on the 8th or 14th Amendment to the U.S. Constitution.

(i) Three-Judge Panel

[8] Gales argues that the Nebraska capital sentencing procedures are unconstitutional because they

> do not specifically provide for the method for the Chief Judge [sic] of the Nebraska Supreme Court to select panel members; and panel members do not appear to be selected at random or by any visible or any articulated objective constitutional method, and the selection of panel members appears to be arbitrary and capricious.

Brief for appellant at 16. This argument is without merit. Section 29-2521 specifically provides that the panel of judges, including the judge who presided at the trial of guilt, shall be "named at random by the Chief Justice of the Supreme Court." We have previously stated that the statutory sentencing procedure provides appropriate standards for impaneling a three-judge panel. See, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989). Furthermore, in the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties and that absent evidence showing misconduct or disregard of law, the regularity of official acts is also presumed. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001). There was no evidence presented that the Chief Justice did anything other than randomly choose the names of the sentencing panel as required by § 29-2521.

Given the statutory requirement of a random selection of the panel, our holdings in *Bjorklund* and *Ryan*, the presumption of regularity which attaches to official acts, and the absence of any evidence which would serve to rebut that presumption, we find no merit to Gales' argument.

Gales further argues that his right to equal protection is violated because there are no statutory provisions or criteria governing the procedures to be followed by a three-judge panel. Gales does not explain precisely how his right to equal protection of the laws is implicated by this fact. However, we rejected an argument similar to Gales' in *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998). In that case, the defendant claimed that the lack of procedures for a three-judge panel violated Neb. Const. art. V, § 19, which requires uniformity in the force and effect of the proceedings, judgments, and decrees of the courts. We rejected this argument, stating that the statutes were not rendered unconstitutional because the district courts were given some discretion in sentencing proceedings. "Discretion indicates that proceedings will be inconsistent, but does not indicate that proceedings will lack uniformity in a constitutional sense." *Lotter*, 255 Neb. at 512, 586 N.W.2d at 630. To the extent that such proceedings lack uniformity due to the exercise of the district courts' discretion, the appropriate challenge is whether the discretion used by the district court in the case at issue amounted to abuse. *Id.*

Although a different constitutional provision is invoked in the instant case, we see no meaningful basis to distinguish our analysis from that in *Lotter*, particularly when Gales' argument in this case consists of little more than a citation to the Equal Protection Clause. Therefore, we find no merit in Gales' argument.

Gales also argues that the statutes are unconstitutional because they do not afford him the right to select and voir dire the members of the sentencing panel. Gales offers no authority for the rather remarkable proposition that a defendant has a constitutional right to select his or her sentencing judge, nor are we aware of any; in fact, the weight of the authority is to the contrary. Gales is essentially claiming a right to engage in "judge-shopping," which has been characterized as " 'conduct which abuses the judicial process.' " See *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998), quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). The random assignment system is intended to comport with due process, by preventing any person from choosing the judge to whom an action is to be assigned. Cf. *Cuzzort v. State*, 271 Ga. 464, 519 S.E.2d 687 (1999).

In short, the law clearly provides that selection of the members of the three-judge sentencing panel will be random, and there is no basis in this case to overcome the presumption that the selection of Gales' panel comported with this requirement. Gales' constitutional rights are not violated by a random assignment of judges. We reject Gales' arguments with respect to the composition and procedures of the sentencing panel.

(ii) Jury Input Into Sentencing

Gales next argues that the capital sentencing procedures are unconstitutional because they do not provide for any jury input into the issue of what sentence should be imposed upon a defendant convicted of a capital crime. He also contends that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), requires a jury to determine mitigating circumstances.

In his appeal in *Gales I*, however, Gales argued that because *Ring* conferred a right to a jury determination of whether aggravating circumstances exist, we should also determine, pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.

2d 435 (2000), that a jury must also conduct the weighing function of capital sentencing. We rejected that argument, stating that

> we understand *Ring* as recognizing a Sixth Amendment right to a jury determination of the existence of aggravating circumstances which determine "death eligibility," because in the absence of at least one such circumstance, the death penalty cannot be imposed. It is the determination of "death eligibility" which exposes the defendant to greater punishment, and such exposure triggers the Sixth Amendment right to jury determination as delineated in *Apprendi* and *Ring*. In contrast, the determination of mitigating circumstances, the balancing of aggravating circumstances against mitigating circumstances, and proportionality review are part of the "selection decision" in capital sentencing, which, under the current and prior statutes, occurs only after eligibility has been determined. See § 29-2522; L.B. 1, § 14. These determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination. Accordingly, we do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury.

Gales I, 265 Neb. at 628-29, 658 N.W.2d at 626-27. Cf. *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (Sixth Amendment prohibits judicial factfinding that enables judge to increase sentences, but not judicial factfinding to reduce sentences).

Gales presents no basis for us to reconsider our decision in *Gales I*, and the U.S. Supreme Court's rearticulation in *Booker* of the *Apprendi*/*Ring* principles we discussed in *Gales I* only reinforces our original conclusion. Consequently, we reject Gales' argument.

(iii) Limitation of Evidence of Mitigating Circumstances

[9,10] Gales contends that the capital sentencing statutes are unconstitutional "in that they limit the mitigating circumstances which can be presented by a defendant, because there are no standards regarding the mechanism and burdens of proof for mitigating circumstance[s]." Brief for appellant at 17. To meet

constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating circumstances. *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). But there is no perfect procedure for deciding in which cases governmental authority should be used to impose death. *Id*. We conclude that appropriate standards for the submission and consideration of mitigating circumstances have been established by statute and this court's case law.

Section 29-2521(3) provides that

> [w]hen a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520, the panel of judges shall, as soon as practicable after receipt of the written report resulting from the presentence investigation ordered as provided in section 29-2261, hold a hearing to receive evidence of mitigation and sentence excessiveness or disproportionality. *Evidence may be presented as to any matter that the presiding judge deems relevant to (a) mitigation, including, but not limited to, the mitigating circumstances set forth in section 29-2523*, and (b) sentence excessiveness or disproportionality as provided in subdivision (3) of section 29-2522. Any such evidence which the presiding judge deems to have probative value may be received. The state and the defendant and his or her counsel shall be permitted to present argument for or against sentence of death. The presiding judge shall set forth the general order of procedure at the outset of the sentencing determination proceeding. After the presentation and receipt of evidence and argument, the panel shall determine an appropriate sentence as provided in section 29-2522.

(Emphasis supplied.) Furthermore, this court has stated that while there is no burden of proof with respect to mitigating circumstances, and the defendant may present evidence which is probative of the existence of a statutory or nonstatutory mitigating circumstance, the risk of nonproduction and nonpersuasion is on the defendant. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998). Nebraska's death penalty sentencing procedures allow the defendant a constitutionally sufficient opportunity to adduce evidence relevant to mitigation.

(iv) Notice of Cases Considered in Proportionality Review

[11] Gales argues that the death penalty sentencing statutes are unconstitutional because there is no notice requirement providing the defendant with information as to which cases the sentencing panel will review and analyze as part of its proportionality review. While the Eighth Amendment does not require a court to engage in a proportionality review, see *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984), where a state creates a right to proportionality review, the Due Process Clause entitles the defendant to procedures to ensure that the right is not arbitrarily denied. See *Foster v. Delo*, 39 F.3d 873 (8th Cir. 1994).

[12] But Gales does not argue—nor would the record support an argument—that he did not have sufficient notice of what the sentencing panel considered in this case. Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right. *State v. Cushman*, 256 Neb. 335, 589 N.W.2d 533 (1999). Here, the sentencing order indicates that the sentencing panel's proportionality review was based upon this court's published opinions in capital cases, see *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), and exhibits 150 through 155, which were introduced by Gales at his first sentencing. That the sentencing panel would consider other cases in which the death penalty had been imposed was clear from our opinion in *Bjorklund*; to the extent that Gales believed other evidence was relevant to the proportionality of his sentences, he had the opportunity to present that evidence.

[13] In the context of criminal proceedings, due process generally requires the defendant be given notice and an adequate opportunity to defend himself or herself. *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001). The record shows that in this case, Gales received notice and an opportunity to be heard on the proportionality of his sentences. Consequently, the record provides

Gales with no basis to challenge the constitutional adequacy of the statutory scheme.

(v) Regulation of Prosecutorial Discretion

[14-16] Gales argues that the death penalty sentencing procedures are unconstitutional because they do not regulate the exercise of prosecutorial discretion. But the U.S. Supreme Court has rejected the argument that the U.S. Constitution requires limitations to be placed on prosecutorial discretion in the context of capital sentencing. See *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). See, also, *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990). In our criminal justice system, the State retains broad discretion as to whom to prosecute and what charge to file. See *Wayte v. United States*, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985). Instead, to the extent that a prosecutor's discretion is subject to constitutional constraints, it is in the fact that a decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification. *United States v. Armstrong*, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). In that regard, Gales claims:

> In support thereof, there have been a number of murder cases in Nebraska with evidence of similar, and in some cases more "aggravating circumstances" than others which have, by way of plea agreements, resulted in convictions other than first degree murder and therefore no sentence of death. Further, there have been numerous first degree murder convictions in Nebraska in which, by plea agreement or otherwise, the prosecution has refrained (for a variety of reasons, on information and belief including but not limited to projected costs for a death penalty case) from seeking the death penalty or refrained from offering any evidence as to aggravating circumstances at the sentencing phase of a defendant's trial.

Brief for appellant at 17.

[17] The purpose of setting forth Gales' appellate argument, in its entirety, is to illustrate the degree to which it depends on assertions of fact that are unsupported by evidence. Gales has simply

failed to present any record that would justify a conclusion that prosecutorial discretion has been abused. Gales' allegations are not only unsubstantiated, but even if supported by evidence, would not establish that the State has exercised prosecutorial discretion for reasons forbidden by the Constitution. See *Armstrong, supra*. The presumption of regularity supports prosecutorial decisions, and in the absence of clear evidence to the contrary, courts presume that prosecutors have properly discharged their official duties. *Id*. In order to dispel this presumption, a criminal defendant must present clear evidence to the contrary. *Id*. Such evidence is completely lacking here; thus, Gales' constitutional claim fails. See *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986).

3. Unconstitutional Vagueness

(a) Assignments of Error

(1) The Nebraska death penalty statutes are facially unconstitutional because they are vague;

(2) the aggravating circumstance that the defendant was previously convicted of "a crime involving the use or threat of violence to the person" is unconstitutionally vague;

(3) the aggravating circumstance that "[t]he murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime" is unconstitutionally vague;

(4) the aggravating circumstance that the murder was "especially heinous, atrocious, [or] cruel" is unconstitutionally vague; and

(5) the aggravating circumstance that "[a]t the time the murder was committed, the offender also committed another murder" is unconstitutionally vague.

(b) Standard of Review

The constitutionality of a statute is a question of law, regarding which the Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003).

(c) Analysis

Gales' assignments of error allege that the Nebraska death penalty statutes are unconstitutionally vague and that each of the

aggravating circumstances found to have been proved in this case is unconstitutionally vague. However, Gales' appellate brief offers little in the way of argument for any of these claims. For instance, in support of the first assignment of error listed in this section, Gales' argument consists of a list of the constitutional provisions that § 29-2519 et seq. allegedly violates. Gales does not offer any propositions of law, or articulate any constitutional standards, to substantiate these claims, nor, with the sole exception of a reference to *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), does Gales cite any relevant legal authority.

We assume, given this lack of specificity, that Gales' assignment of error is simply intended to be a restatement of the constitutional arguments that Gales argued more specifically elsewhere in his brief. Nonetheless, to the extent that Gales' assignment of error is intended to raise any issues beyond the more specific constitutional claims we discuss elsewhere in this opinion, we decline to address them, as they have not been properly raised. Gales presents us with no basis to reconsider our well-established holding that Nebraska's death penalty statutes are neither vague nor overbroad. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

Similarly, with respect to the alleged unconstitutional vagueness of each of the aggravating circumstances found to exist in this case, Gales' argument is limited to a nearly identical list of the constitutional provisions allegedly violated. We first note that while Gales lists a number of constitutional provisions, his assignments of error simply claim that the aggravating circumstances are "unconstitutionally vague," which in the context of capital sentencing, implicates the Eighth Amendment's requirement that they "furnish principled guidance for the choice between death and a lesser penalty." See *Richmond v. Lewis*, 506 U.S. 40, 46, 113 S. Ct. 528, 121 L. Ed. 2d 411 (1992).

Second, we have previously rejected constitutional challenges to each of the aggravating circumstances Gales challenges in this appeal. As relevant, the aggravating circumstances at issue in this case are as follows:

> (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person . . . ;

> (b) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime;
>
> . . . .
>
> (d) The murder was especially heinous, atrocious, [or] cruel . . . ;
>
> (e) At the time the murder was committed, the offender also committed another murder . . . .

§ 29-2523(1). Each of these aggravating factors has been held constitutional in response to an argument of unconstitutional vagueness. See, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000) (effort to conceal identity of perpetrator; especially heinous, atrocious, or cruel); *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984) (previous conviction of crime involving use or threat of violence to person), citing *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977) (another murder), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990). In the absence of any particular argument explaining the alleged vagueness of each of these terms, we decline to reconsider our established holdings rejecting Gales' arguments.

We also note, with respect to aggravating circumstance (1)(b), that Gales' argument is directed at the alleged vagueness of the phrase "apparent effort" to conceal the commission of a crime or conceal the identity of the perpetrator. Compare § 29-2523 (Reissue 1995). Gales complains that there is no clear definition of what constitutes an "apparent effort." However, the current wording of aggravating circumstance (1)(b), quoted above, does not contain the word "apparent." See § 29-2523 (Cum. Supp. 2004). The word "apparent" was removed from the statute effective July 15, 1998, well before the murders of Latara and Tramar. See, 1998 Neb. Laws, L.B. 422; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

The alleged vagueness of aggravating circumstance (1)(d) will be addressed below in more depth, as it relates to our analysis of Gales' challenge to the jury instruction based on that aggravating circumstance. At this point, however, it suffices to state that we find each of Gales' assignments of error alleging the vagueness of Nebraska's capital sentencing statutes to be without merit.

4. Cruel and Unusual Punishment

(a) Assignment of Error

The Nebraska death penalty statutes subject a defendant to cruel and unusual punishment.

(b) Standard of Review

The constitutionality of a statute is a question of law, regarding which the Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003).

(c) Analysis

Gales contends that inflicting the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment. Gales first claims that the death penalty "is in fact administered and applied arbitrarily, capriciously and whimsically in the State of Nebraska." Brief for appellant at 27. Again, there is little in the way of evidence or argument to substantiate this claim, and to the extent that this claim is not subsumed in his other arguments, we decline to consider it.

[18,19] Gales also makes several contentions that, characterized generally, attack the death penalty as being unsound public policy. For instance, Gales contends that the death penalty is irrational, induces violence, and does not deter crime. But it is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state. *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004). Our responsibility, in this context, is to ensure that the Legislature has, in promulgating public policy, acted within constitutional boundaries. It is well established that imposition of the death penalty is not, per se, cruel and unusual punishment. *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). Cf. *Jones v. United States*, 527 U.S. 373, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999). See, also, *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003) (Nebraska Constitution does not require more than Eighth Amendment to U.S. Constitution with reference to cruel and unusual punishment), *cert. denied* 541 U.S. 910, 124 S. Ct. 1618, 158 L. Ed. 2d 257 (2004).

Gales also argues that death by electrocution is cruel and unusual punishment. As in *State v. Mata*, 266 Neb. 668, 668 N.W.2d

448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005), we note recent events at the U.S. Supreme Court that cast substantial doubt upon whether that Court will continue to regard electrocution as consistent with the Eighth Amendment. See *id.*, citing *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002); *Bryan v. Moore*, 528 U.S. 960, 120 S. Ct. 394, 145 L. Ed. 2d 306 (1999) (granting certiorari on question), *cert. dismissed as improvidently granted* 528 U.S. 1133, 120 S. Ct. 1003, 145 L. Ed. 2d 927 (2000) (dismissing certiorari due to legislative enactment of lethal injection); *Campbell v. Wood*, 511 U.S. 1119, 114 S. Ct. 2125, 128 L. Ed. 2d 682 (1994) (Blackmun, J., dissenting from denial of certiorari; Stevens and Ginsburg, JJ., voting to grant stay of execution); and *Poyner v. Murray*, 508 U.S. 931, 113 S. Ct. 2397, 124 L. Ed. 2d 299 (1993) (Souter, J., joined by Blackmun and Stevens, JJ., respecting denial of petition for writ of certiorari). See, also, *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

In the present case, however, Gales has presented no evidence that would warrant reconsideration of our prior decisions holding that death by electrocution as administered in this state is not cruel and unusual punishment. See *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003), *cert. denied* 542 U.S. 939, 124 S. Ct. 2904, 159 L. Ed. 2d 815 (2004), citing *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). In the absence of such a record, we continue to adhere to those holdings. We find Gales' assignment of error to be without merit.

5. Retroactivity of *Ring v. Arizona*

(a) Assignment of Error

Gales' death sentence should be vacated because of *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), *reversed sub nom. Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

(b) Analysis

In *Summerlin v. Stewart*, the Ninth Circuit held that *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), applied retroactively to final judgments that were the subject of collateral review on postconviction appeal from death sentences. But that holding was reversed by the U.S. Supreme

Court in *Schriro v. Summerlin, supra*, which held that *Ring* did not apply retroactively. See, also, *Lotter, supra*.

That having been said, we find Gales' argument is somewhat confusing, given that *Ring* clearly applies to his case, as we determined in *Gales I*, and that his case is not on collateral review. Gales appears to be arguing that if *Ring* applied retroactively, defendants who collaterally attacked their death sentences would have those sentences commuted; thus, argues Gales, it would be unfair to sentence him to death when others, whose convictions had become final, were sentenced to life imprisonment.

Gales' argument fails for several reasons. First, his assumption that retroactive application of *Ring* would result in the commutation of sentences, as opposed to resentencing proceedings, is without support. Second, taken to its logical extreme, Gales' argument would amount to a revocation of the death penalty, as there is no principled basis to distinguish between Gales and any other defendant charged after *Ring* who could be sentenced to death while others' death sentences were commuted. There is simply no support for the contention that the decision to afford an individual defendant mercy violates the U.S. Constitution. See *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). In any event, however, Gales' argument fails at its most basic premise. The U.S. Supreme Court's decision in *Schriro v. Summerlin, supra*, forecloses Gales' claim.

6. Motion for Continuance

(a) Assignment of Error

The district court erred in denying Gales' request for a continuance.

(b) Standard of Review

[20,21] A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Gutierrez*, 260 Neb. 1008, 620 N.W.2d 738 (2001). 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. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004).

(c) Analysis

On October 1, 2003, Gales filed a motion to continue the aggravation hearing. The motion was heard on October 16, at which time, the district court overruled the motion. The court explained its reasoning at length.

> First of all, the record reveals that defense counsel was appointed for this sentencing determination hearing — or this penalty phase of the case on August the 22nd of 2003, approximately two months prior to the actual commencement of the sentencing hearing. And on August 25th of 2003, the notice of the penalty phase hearing was sent to then the Douglas County Attorney's Office, as well as to Defendant's counsel.
>
> I would say that I know that [defense counsel] has been working very hard to get prepared on this case. For example, I know that you have reviewed the presentence investigation report several times. You have been up to my chambers to the court reporter's office to examine trial exhibits and various bills of exceptions from the trial. . . . The bill of exceptions is and it has been available, but, frankly, much of the trial evidence isn't relevant to the penalty phase hearing.
>
> The aggravators that are being alleged to exist are — and these are the four — and if you recall from the supreme court opinion, it's very limited, and even some of the aggravators have been subdivided down to just the specific prong of the aggravator that I had originally found at the original sentencing hearing, so it's not a wide-open situation. . . .
>
> . . . .
>
> In addition to the motion to continue and as far as counsel's preparation is concerned, frankly, it's quite impressive. I note that you filed ten motions in addition to the motion to continue . . . .
>
> . . . [I]t's apparent to me that you are more than adequately prepared and ready to enter into this sentencing phase.
>
> Finally, the crimes [Gales] has been convicted of occurred in November of 2000. He was convicted in August of 2001 and sentenced originally in November of 2001 and it is now almost November of 2003 and he is still awaiting sentencing for crimes he was convicted of over two years

> ago. I don't believe it's fair to [Gales], the State of Nebraska, or to the victims' family to delay this any longer, and so I am going to overrule your motion . . . .

Given the district court's well-reasoned basis for denying Gales' motion for a continuance, we find no abuse of the court's discretion. Gales argues that to be prepared for the aggravation hearing, his counsel needed more time to review all the available information. Yet in his appellate brief, Gales does not identify any specific way in which he was prejudiced by the court's denial of his motion. Presumably, before preparing Gales' appellate brief, Gales' counsel would have had sufficient time to examine the evidence thoroughly and locate any critical information that was missed prior to the aggravation hearing. The fact that no prejudice has been explained lends support to our determination that the district court did not abuse its discretion in assessing counsel's preparedness for the aggravation hearing.

7. Jury Sequestration

(a) Assignment of Error

The jury was not sequestered from the time it was impaneled until the case was submitted.

(b) Standard of Review

[22] Whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000).

(c) Analysis

Prior to voir dire, Gales filed a motion to sequester the jurors from the time the jury was impaneled until a decision was reached. The district court denied the motion in part, and ordered that the jurors be sequestered only after the case was submitted to them. Gales claims this was error.

[23] But to warrant reversal, denial of a motion to sequester the jury before submission of the cause must be shown to have prejudiced the defendant. *Bjorklund, supra*; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998). Here, no such prejudice is shown. The jurors in this case were, immediately after they were sworn, admonished not to discuss the case among themselves or anyone else when court was not in session, and not to read, view,

or listen to any news reports regarding the case. The court went well beyond the admonition set forth in NJI2d Crim. 1.0(7), and it explained to the jury at length the reasons for the admonition and the possible consequences if the admonition was not respected. At each recess prior to submission of the case to the jury, the jurors were reminded not to discuss the case with anyone or view any news reports about the case.

Gales presents no evidence rebutting the presumption that the jurors followed the instructions they were given. See *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003). See, also, *Bjorklund, supra*. In addition, the sole basis on which Gales argues he was prejudiced was that the jury might have learned that in his previous sentencing, the judge sentenced him to death. We will deal with this issue in the context of Gales' next two assignments of error, but at this point, it suffices to say that Gales' argument does not establish he was prejudiced by the district court's refusal to sequester the jury prior to submission of the case.

8. Voir Dire and Motion to Quash Penalty Phase Hearing

(a) Assignments of Error

(1) The members of the venire were not individually questioned on their knowledge of Gales' previous sentence and the issue of rape, and

(2) the aggravation hearing was fundamentally unfair because the jurors "probably" knew that Gales had previously been sentenced to death.

(b) Standard of Review

[24] The extent to which parties may examine jurors as to their qualifications rests in the discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice has been caused thereby. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

(c) Analysis

(i) Individual Questioning

Prior to jury selection, Gales filed a motion to individually question the jurors during jury selection. Specifically, at the hearing on the motion, Gales sought to individually question the

members of the venire with respect to Gales' previous sentencing and the issue of rape. The court overruled the motion, explaining:

> I am going to overrule the motion, but insofar as potential jurors' opinions or reservations about the death penalty that would prevent or substantially impair their ability to act as a juror or any personal knowledge, that — and this would take into account your concern about whether or not they had heard about a prior sentence being given to . . . Gales — that the issue of a potential juror who has either formed or expressed an opinion as to what punishment [Gales] should receive, then those potential jurors would be questioned individually and out of the presence of the other jurors.
>
> And the way I intend to do that is if it's not covered by counsel, I may well just take over that part of the jury selection process myself, get it down to the point where we're asking the jurors just if they have an opinion one way or another to raise their hand and then all of those people will be questioned individually.

The court specifically instructed the parties not to discuss Gales' prior death sentences with the venire. Later, during voir dire, Gales' counsel again raised the issue of prehearing publicity with the court. The court responded by noting that it had asked the potential jurors about their knowledge of the case and that Gales could follow that up in voir dire if he chose. When Gales' counsel asked specifically about examining the potential jurors to see if they knew anything about Gales' previous sentences, the court stated:

> Well, if they do, then I suppose if you ask them about the case, you better be very, very careful that they don't blurt something out in front of the rest of the jurors that might potentially taint them, but I think I indicated at our pretrial motion hearing the other day that should that happen, that, frankly, I think we put this responsibility in the hands of the jurors, and so while we try to treat them with kid gloves and we try to insulate them as much as possible from any outside influence, it is what it is. The case was sent back, and so the fact is it is as if . . . Gales were just convicted yesterday. He has no sentence. Regardless of what may have happened in the past, there simply is no sentence right now, and if I have

> to, I will admonish them on that, but I don't think that we need to get to that point because I think they are mature enough that if you tell them these are the parameters and you are supposed to decide the case within these parameters and that's why — actually, I was going to tell them initially that he was convicted on August 27th of 2001 and I changed that to previously, because I don't think at this point it has anything to do with the case and I almost feel like we would be kind of stirring something up by getting into that, but I will leave that up to you. *If you feel that that's something you want to try to pursue with them, certainly feel free to do so, but just be careful that you don't ask a question that would elicit some type of answer about any previous sentence he might have had* because he simply does not have a sentence at this point. That's why we're here.

(Emphasis supplied.) Gales ultimately did not ask the potential jurors if they were aware of Gales' prior sentences.

[25] It is helpful, at the outset, to be specific about precisely what issue is presented here. The question decided by the district court was whether Gales would be permitted to sequester and *individually* question the members of the venire regarding Gales' prior sentences and the issue of rape. However, except where there is a showing that without sequestration a party's rights would be prejudiced, a party has no right to examine an individual juror out of the presence of all the other potential jurors. *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999); *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996). Gales has failed to explain why individual questioning was necessary or show how he was prejudiced by the district court's denial of his motion.

In *McHenry, supra*, the defendant, who was being retried, argued that the court should have permitted sequestration and individual questioning of jurors so that he could question each juror about pretrial publicity without exposing the other potential jurors to that publicity. However, we rejected that argument, stating that

> we find that the circumstances of the voir dire do not demonstrate how [the defendant] was prejudiced. The prospective jurors were admonished by the court on numerous occasions concerning pretrial publicity and the irrelevance

> of the fact that the case was a retrial. The panel was questioned several times as to whether any of the members thought that they could determine [the defendant's] guilt based solely on the evidence presented at trial. The judge specifically instructed the panel that if any panel member had further concerns, he or she should contact the bailiff so that the court, along with the parties, could individually hear and address the concerns. In each case, when a panel member stated that he or she could not put aside pretrial publicity, the member was dismissed for cause. [The defendant] has not shown how further indepth questioning of sequestered jurors would have revealed anything more than was ascertained during the jury selection. Therefore, [the defendant] has not established that his rights were prejudiced by the failure of the district court to sequester the panel to permit individual questioning.

Id. at 627, 550 N.W.2d at 374. See, also, *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990).

Similarly, in this case, the members of the venire were told that if there was any question asked that they did not want to answer publicly, they could do it privately in the judge's chambers. Seven of the potential jurors were questioned separately for various reasons, and each of the five of those potential jurors who indicated an inability to be fair and impartial in deciding the case was immediately excused for cause. The members of the venire were specifically asked, by the court, whether they recalled reading or hearing about the case, and none of the jurors indicated that their knowledge of the case, if any, would preclude them from being fair and impartial.

With respect to the issue of rape, the venire was specifically asked if anything about the allegation of sexual assault would cause any of the potential jurors to say that they could not be fair and impartial, and none of the potential jurors indicated any reservations. The potential jurors were repeatedly asked about their ability to be fair and impartial and to decide the case based solely on the evidence presented at the hearing. Gales had the opportunity to ask the members of the venire about their knowledge of the case and whether it would affect their ability to be fair and impartial. As in *State v. McHenry*, 250 Neb. 614, 550

N.W.2d 364 (1996), Gales has not established that his rights were prejudiced by the district court's denial of his motion to sequester and individually question the members of the venire. See, also, *Bradley, supra*. Thus, we find no abuse of discretion.

(ii) Fairness of Aggravation Hearing

Gales also argues that because the jury "probably" knew about Gales' prior death sentences, the aggravation hearing was fundamentally unfair. The U.S. Supreme Court addressed a similar issue in *Romano v. Oklahoma*, 512 U.S. 1, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994). In that case, the defendant had been charged with two separate murders: that of Roger Sarfaty, committed in 1985, and that of Lloyd Thompson in 1986. The defendant was first convicted and sentenced to death for the Thompson murder, and then tried for the Sarfaty murder in a separate proceeding. During the sentencing phase of the trial for the Sarfaty murder, the prosecution introduced a copy of the judgment and sentence for the Thompson murder, thus revealing to the jury that the defendant had already been sentenced to death.

The defendant was convicted and sentenced to death for the Sarfaty murder, and on direct appeal from that judgment, he argued that the trial court had erred in admitting evidence of the conviction and sentence for the Thompson murder. The Oklahoma Court of Criminal Appeals agreed that evidence of the Thompson judgment was irrelevant, but concluded the irrelevant evidence had not so infected the sentencing determination as to make the determination to impose the death penalty a violation of due process. See *Romano v. State*, 847 P.2d 368 (Okla. Crim. App. 1993), *affirmed, Romano v. Oklahoma, supra*.

The U.S. Supreme Court affirmed the decision of the Oklahoma court. *Romano v. Oklahoma, supra*. The Court stated:

> The relevant question in this case, therefore, is whether the admission of evidence regarding petitioner's prior death sentence so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process. . . . Under this standard of review, we agree with the Oklahoma Court of Criminal Appeals that the admission of this evidence did not deprive petitioner of a fair sentencing proceeding.

> The evidence that petitioner received a death sentence for murdering Thompson was deemed irrelevant by the Oklahoma Court of Criminal Appeals. . . . However, if the jurors followed the trial court's instructions, which we presume they did . . . this evidence should have had little—if any—effect on their deliberations. Those instructions clearly and properly described the jurors' paramount role in determining petitioner's sentence, and they also explicitly limited the jurors' consideration of aggravating factors to the four which the State sought to prove. Regardless of the evidence as to petitioner's death sentence in the Thompson case, the jury had sufficient evidence to justify its conclusion that these four aggravating circumstances existed. . . . In short, the instructions did not offer the jurors any means by which to give effect to the evidence of petitioner's sentence in the Thompson murder, and the other relevant evidence presented by the State was sufficient to justify the imposition of the death sentence in this case.

(Citations omitted.) *Id.* at 12-13.

The instant case is distinguished by the fact that here, the jury was (according to Gales) aware of prior, vacated sentences of death for the same murders, rather than another death sentence arising from a different crime. However, the reasoning of the U.S. Supreme Court in *Romano v. Oklahoma*, 512 U.S. 1, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994), is equally applicable to such a situation. See, *Anderson v. Calderon*, 232 F.3d 1053 (9th Cir. 2000); *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), *affirmed* 71 F.3d 1404 (8th Cir. 1995); *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998); *People v. Ramos*, 15 Cal. 4th 1133, 938 P.2d 950, 64 Cal. Rptr. 2d 892 (1997).

As in *Romano v. Oklahoma, supra*, the jury instructions in this case (as will be analyzed below) accurately stated the jurors' role in determining Gales' sentences, set forth the correct burden of proof, and limited the jurors' deliberations to the four aggravating factors the State sought to prove. And, as in *Romano v. Oklahoma*, 512 U.S. at 13, these instructions "did not offer the jurors any means by which to give effect" to any knowledge of Gales' prior sentences.

In other words, even if some of the jurors were aware that Gales had previously been sentenced to death, there is no evidence to overcome the presumption that they faithfully followed the instructions they were given. See *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003). In fact, this case presents stronger facts than *Romano v. Oklahoma* in some respects. In this case, the district court acted correctly in seeking to keep irrelevant information about Gales' prior sentences from being revealed to potential jurors who were not already aware of it. Furthermore, the jurors in this case, if they were aware of Gales' prior death sentences at all, would have been aware of Gales' prior sentences *before* jury selection, yet they still indicated during voir dire that they could be fair and impartial. See *Stafford v. Saffle*, 34 F.3d 1557 (10th Cir. 1994). As noted above, Gales has not presented evidence to overcome our reliance on these assurances. See *id*.

In sum, Gales has not demonstrated that he was prejudiced by the district court's refusal to permit sequestration and individual questioning of the potential jurors on the issues of rape and Gales' prior sentences. This conclusion is reinforced by our determination that the jurors' awareness, if any, of Gales' prior death sentences did not render the sentencing proceeding fundamentally unfair, pursuant to the reasoning articulated in *Romano v. Oklahoma, supra*. Gales' sole argument for how he was prejudiced by the district court's refusal to sequester the potential jurors is based on the alleged prejudice from their knowledge of his prior sentences. The fact that any awareness of his prior sentences was itself not unduly prejudicial provides another basis for rejecting his argument regarding voir dire.

9. Evidence of Prior Convictions

(a) Assignment of Error

Evidence of Gales' prior convictions from Florida was not properly authenticated.

(b) Standard of Review

[26] A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004).

(c) Analysis

As previously noted, § 29-2523(1)(a) provides that it is an aggravating circumstance, for capital sentencing purposes, if "[t]he offender was previously convicted of another murder or a crime involving the use or threat of violence to the person . . . ." In this case, the State sought to prove that aggravating circumstance by introducing evidence of Gales' Florida convictions, from 1987, for armed robbery and armed sexual battery. See Fla. Stat. Ann. §§ 812.13 (West 2000) (robbery) and 794.011 (West Cum. Supp. 2005) (sexual battery). Gales contends that the evidence of his Florida convictions, contained in exhibit 229, was not properly authenticated and should not have been admitted into evidence.

Gales relies upon *State v. Miller*, 11 Neb. App. 404, 651 N.W.2d 594 (2002), in which the Nebraska Court of Appeals determined that an Iowa conviction for driving under the influence of alcohol (DUI) was admissible for sentence enhancement purposes in a Nebraska DUI prosecution, because the first page of the exhibit containing evidence of the Iowa conviction bore the seal of the court and the signatures of the judge and the clerk of the court. Gales argues that the Florida convictions in this case were not properly authenticated because "[t]he prior used in this case was not signed by a judge . . . ." Brief for appellant at 34. But our review of exhibit 229 reveals that it satisfies the Nebraska evidentiary requirements applied in *Miller, supra*.

Neb. Evid. R. 901 provides, generally, that 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. Neb. Evid. R. 902 further provides that certain documents are self-authenticating; that is, no extrinsic evidence of authenticity as a condition precedent to admissibility is required. The *Miller* court relied upon *Dugan v. Jensen*, 229 Neb. 672, 673-74, 428 N.W.2d 504, 505 (1988), in which we explained that rule 902

> does not require authentication of a document bearing a seal and a signature purporting to be an attestation, a document purporting to bear the signature in his official capacity of an officer who has no seal if a public officer having a seal certifies under seal that the previous officer signing has

the official capacity to sign, or a copy of an official record certified as correct by the custodian by certificate complying with either of the previous two subdivisions.

[27] We further explained, in *State v. Linn*, 248 Neb. 809, 539 N.W.2d 435 (1995), that in order to establish evidence's sufficient probative force to prove an earlier conviction for the purpose of sentence enhancement, the evidence must, with some trustworthiness, reflect a court's act of rendering judgment. In that case, we held one record of a prior DUI conviction to be properly authenticated when it contained a journal entry signed by the judge, was stamped with the court's seal, and was certified by the court clerk as a true copy of the original document on file with the court. In contrast, we found the record of a second DUI conviction to be inadequate where it contained no journal entry signed by the judge and, thus, did not reflect the judicial act of rendering judgment. See *id*. See, also, *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987).

Exhibit 229 amply satisfies the foregoing rules. It consists of the record of a case brought against "Arthur Lee Gales, Jr.," in the circuit court for Alachua County, Florida. It appears to be what, in Nebraska practice, would be referred to as a transcript of judgment. It bears the seal, and is signed by the deputy clerk, of that court. Each of the filings contained in the record is file stamped and separately authenticated by the clerk of the court. The record contains a judgment of conviction, signed by the circuit court judge, convicting Gales, pursuant to a plea agreement, of armed sexual battery and strong armed robbery in violation of the previously cited Florida statutes. The judgment of conviction contains Gales' fingerprints. The record also contains a sentencing order, signed by the circuit court judge, sentencing Gales to 12 years' imprisonment on the charge of sexual battery and 12 years' imprisonment for the robbery, with the sentences to be served concurrently. The record reflects that Gales was represented by counsel at the time of his plea agreement, convictions, and sentencing.

In short, we conclude that exhibit 229 is sufficiently self-authenticating and was properly admitted into evidence for purposes of proving Gales' previous conviction of a crime involving

the use or threat of violence to the person. Gales' assignment of error is without merit.

10. Jury Instructions

(a) Assignments of Error

(1) The district court refused to amend instruction No. 2 to indicate that aggravating circumstances were nothing more than accusations that the State must prove beyond a reasonable doubt;

(2) the district court did not give Gales' suggested paragraph for instruction No. 2 stating that the fact that Gales had been convicted of two murders did not, standing alone, establish that Gales had murdered more than one person during the same criminal transaction;

(3) the wording of instruction No. 2 required the jury to find that Latara's murder was especially heinous, atrocious, or cruel if it believed that she was sexually assaulted; and

(4) the jury should have been instructed to unanimously find that the murder was either especially heinous, atrocious, or cruel, and have each one separately listed on the verdict form.

(b) Standard of Review

[28] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004). See, also, *State v. Manning*, 263 Neb. 61, 638 N.W.2d 231 (2002).

(c) Analysis

(i) Reasonable Doubt

[29] Gales argues that instruction No. 2 did not instruct the jury that aggravating circumstances were simply accusations and that the State must prove them beyond a reasonable doubt. Aggravating circumstances must be proved beyond a reasonable doubt. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). However, instruction No. 2 stated in part:

> Aggravating circumstances are those which increase the guilt or enormity of the crime or add to its injurious consequences. Aggravating circumstances are reasons why the defendant should be sentenced to death. The State has the

> burden of proving the truth of an aggravating circumstance by evidence beyond a reasonable doubt. If you have a reasonable doubt as to whether an aggravating circumstance is true, or you cannot unanimously agree beyond a reasonable doubt that an aggravating circumstance is true, you must find it to be not true.

The jury had also been instructed before the sentencing hearing that the State's burden was to prove aggravating circumstances beyond a reasonable doubt. The jury was instructed to the same effect in the instructions relating to each aggravating circumstance and again after the aggravating circumstances were explained. The verdict form required the jury to determine whether each aggravating circumstance had been found beyond a reasonable doubt. In addition, the jury was instructed that the "[s]tatements, arguments, and questions of the lawyers for the [S]tate and the defendant" were not evidence from which they were to find the facts.

[30,31] It is not error for a trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given. *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002). When the instructions are read as a whole, the jury was more than amply instructed that the State was required to prove, from the evidence adduced, the existence of aggravating circumstances beyond a reasonable doubt.

(ii) Multiple Murders During Same Criminal Transaction

The jury was instructed that in order to find the aggravating circumstance of "murder committed at the time the offender also committed another murder," it must find the essential element that "[t]he offender murdered more than one person during the same criminal transaction." Gales argues that the jury should have been instructed that Gales' convictions for two murders did not, standing alone, establish this aggravating circumstance. However, the

substance of Gales' instruction is implicit in the instruction that was given, which directed the jury to find this aggravating circumstance only if more than one person was murdered "during the same criminal transaction." This was a correct statement of the law, see *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990); was not misleading; and adequately covered the issues supported by the pleadings and evidence. See *Pruett, supra*. Therefore, we find no reversible error with respect to this instruction.

(iii) Especially Heinous, Atrocious, or Cruel

Finally, the jury was instructed that in order to find that the murder of Latara was especially heinous, atrocious, or cruel, it must find the essential element that "[t]he defendant inflicted serious mental anguish or serious physical abuse — meaning sexual abuse — on the victim, Latara Chandler, before her death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate." Gales' counsel objected and stated:

> I think the reason that the Court has provided this instruction the way it has is the Court previously found that sexual abuse was the reason they found that the murder was especially heinous, atrocious, or cruel. The problem that I have with that is the instruction appears that if they just find that Latara Chandler was sexually abused, that that alone makes it especially heinous, atrocious, or cruel, and I would argue to this Court that based on the findings of the case law in the State of Nebraska, on the basis of that, that there is more than just the sexual assault. It's the facts and circumstances leading up and during and after the sexual assault that occurred that goes into that, and by this instruction, the jury isn't going to be instructed to take that into account to determine if the sexual abuse is, in fact, heinous, atrocious, and cruel.

[32,33] This court has narrowed the class of especially heinous, atrocious, or cruel murders to include those involving torture, sadism, or sexual abuse. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). This circumstance includes a pitiless crime which is unnecessarily torturous to the victim. *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991). Thus, the term "especially heinous,

atrocious, or cruel" is limited to cases where torture, sadism, or the imposition of extreme suffering exists, or where the murder was preceded by acts performed for the satisfaction of inflicting either mental or physical pain or when such pain existed for any prolonged period of time. See, *Ryan, supra*; *Reeves, supra*; *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991). This class includes murders involving torture, sadism, or sexual abuse. *Ryan, supra*; *Reeves, supra*. In other words, this prong must be looked upon through the eyes of the victim. *Ryan, supra*. In *Ryan*, 248 Neb. at 447-48, 534 N.W.2d at 793-94, we explained:

> The U.S. Supreme Court has held the words "heinous," "atrocious," and "cruel" to be unconstitutionally vague in an Oklahoma sentencing statute which is very comparable to Nebraska's § 29-2523(1)(d). See *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). See, also, *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980) (holding Georgia's " 'outrageously or wantonly vile, horrible or inhuman' " aggravating circumstance to be unconstitutional because the Georgia court failed to limit the statute in such a way as to provide a principled distinction between death penalty and non-death-penalty cases).
>
> In both *Maynard* and *Godfrey*, the defendant was sentenced to death by a jury which had been instructed in only the bare language of the sentencing statute or in language which was similarly vague.
>
> Likewise, the U.S. Court of Appeals for the Eighth Circuit has found the text of Nebraska's aggravating circumstance (1)(d), standing alone, to be constitutionally insufficient. *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *reh'g denied* 951 F.2d 895 (8th Cir. 1991), *cert. denied* 504 U.S. 930, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992). However, "a state supreme court may salvage a facially-vague statute by construing it to provide the sentencing body with objective criteria for applying the statute." *Moore v. Clarke*, 904 F.2d at 1229. The Eighth Circuit, in several recent cases, has looked beyond the text of § 29-2523(1)(d) to determine whether (1)(d) has been limited and defined by this court in such a way as to provide sentencing bodies in

> Nebraska with objective criteria for the application of that aggravating circumstance.
>
> The Eighth Circuit has held that the first prong of aggravating circumstance (1)(d) of § 29-2523, narrowed by this court's decisions defining the phrase "especially heinous, atrocious, cruel" to mean unnecessarily torturous to the victim, satisfies the constitutional requirements of *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Godfrey v. Georgia, supra*; and *Maynard v. Cartwright, supra*. See *Harper v. Grammer*, 895 F.2d 473 (8th Cir. 1990).

Therefore, we concluded that the first prong of aggravating circumstance (1)(d) was facially constitutional to the extent that it had been narrowed and defined by this court. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995). See *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). See, also, *Bell v. Cone*, 543 U.S. 447, 450, 125 S. Ct. 847, 160 L. Ed. 2d 881 (2005) (reversing grant of writ of habeas corpus, based on presumption that Tennessee Supreme Court cured error in jury instruction by applying narrowing construction of " 'heinous, atrocious, or cruel' " aggravator). Furthermore, the Eighth Circuit has specifically approved our identification of sexual abuse as an objective identifier of the existence of the first prong of aggravating circumstance (1)(d).

> We conclude that sexual abuse was an objective element that satisfied and appropriately limited the definition of aggravating circumstance (1)(d) under the law of Nebraska . . . . We are further satisfied that a finding of sexual abuse is an objective factor that appropriately and constitutionally narrows the definition of the "especially heinous" phrase.

Williams v. Clarke, 40 F.3d 1529, 1537 (8th Cir. 1994).

In this case, as previously noted, the jury was instructed that in order to find that the murder of Latara was especially heinous, atrocious, or cruel, it must find that "[t]he defendant inflicted serious mental anguish or serious physical abuse — meaning sexual abuse — on the victim, Latara Chandler, before her death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate." With respect to the phrase "sexual abuse," the court's instruction was constitutionally sound and consistent

with Nebraska law as explained in *Ryan, supra*. Neither Gales' objection at trial, nor his appellate brief, take issue with the district court's use of the phrase "serious mental anguish," and whether that phrase is consistent with prior Nebraska law is not before us in this appeal. We note, however, that the phrase " '[m]ental anguish includ[ing] a victim's uncertainty as to his ultimate fate' " has been held not to be unconstitutionally vague. See *Tuilaepa v. California*, 512 U.S. 967, 974, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994), quoting *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).

[34,35] Gales also contends that the verdict form with respect to this aggravating circumstance should have provided that the jury must unanimously agree the crime was either especially heinous, atrocious, or cruel, and have each one listed separately on the verdict form. We have stated that the two prongs of aggravating circumstance (1)(d) describe, in the disjunctive, two separate circumstances which may operate in conjunction with or independently of one another. *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982). However, we have never indicated that the words "heinous," "atrocious," and "cruel" operate disjunctively; rather, as previously stated, we have considered and construed the phrase as a whole, and Gales presents no argument explaining why our previous decisions are incorrect on that point. An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given. *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003). Gales' proposed instruction was not a correct statement of the law, and the district court did not err in rejecting it.

11. Rebuttal Argument in Aggravation Hearing

(a) Assignment of Error

The State should not have been allowed rebuttal argument during the aggravation hearing.

(b) Standard of Review

[36] The general conduct of the trial rests within the discretion of the trial court. *State v. Osborn*, 241 Neb. 424, 490 N.W.2d 160 (1992).

(c) Analysis

Gales argues that the district court erred in permitting the State, in closing arguments of the aggravation hearing, to have a rebuttal argument. Section 29-2520(4)(d) simply provides that "[a]fter the presentation and receipt of evidence at the aggravation hearing, the state and the defendant or his or her counsel may present arguments before the jury as to the existence or nonexistence of the alleged aggravating circumstances." Gales contends that since § 29-2520(4)(d) does not specifically allow the State rebuttal, the district court erred in permitting it.

[37] However, Neb. Rev. Stat. § 29-2016(6) (Reissue 1995), which generally governs trial procedure in criminal cases, provides that "when the evidence is concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury." This is consistent with the general rule that the party with the burden of proof is entitled to open and close argument. See *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989). We find no abuse of discretion in the district court's decision to apply § 29-2016(6) to the aggravation hearing.

12. Ineffective Assistance of Counsel

(a) Assignments of Error

(1) Gales received ineffective assistance of counsel at his original trial because trial counsel

(a) stipulated to Judy's deposition testimony,

(b) did not call Gales' wife as an alibi witness, and

(c) did not allow Gales to testify, and

(2) Gales' counsel on his first direct appeal was ineffective for not assigning any trial errors.

(b) Standard of Review

[38] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated

in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Benzel, ante* p. 1, 689 N.W.2d 852 (2004).

(c) Analysis

Having just articulated the standard of review, however, we observe that the record contains no findings by the district court to review. This is because the issue of ineffective assistance of counsel was not presented to the district court.

Since the allegations of ineffective assistance of counsel now advanced by Gales were not pertinent to the district court's task in resentencing Gales following our decision in *Gales I*, it is not surprising that the parties and the district court would not consider the issue. But because of this, we conclude that the record is insufficient for us to resolve Gales' arguments.

[39,40] This appeal was taken from a resentencing proceeding held pursuant to the mandate issued by this court pursuant to our opinion in *Gales I*. When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of an appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court. *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001). Here, our opinion in *Gales I*, 265 Neb. at 636, 658 N.W.2d at 632, vacated Gales' death sentences on both counts of first degree murder and remanded the causes to the district court "with directions to conduct a new penalty phase hearing and to resentence Gales on those counts." The allegations of ineffective assistance of counsel now raised by Gales were beyond the scope of the district court's jurisdiction pursuant to our mandate in *Gales I*, and consequently, the allegations are also inappropriate for us to address in this appeal.

[41] When the issue of ineffective assistance of counsel has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004). Because the issues raised by Gales

were beyond the scope of this resentencing proceeding and we conclude that the matter necessitates an evidentiary hearing, we will not address Gales' ineffective assistance of counsel claims.

[42] The evident reason for Gales' argument in this appeal is that in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review. See *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000). However, because the record before us does not allow us to properly evaluate Gales' claims, we decline to consider them in this proceeding.

13. Sufficiency of Evidence

(a) Assignment of Error

[43] Gales argues that his motion for a new aggravation hearing should have been granted because there was insufficient evidence that Latara's murder was especially heinous, atrocious, or cruel. In addition, in a capital sentencing proceeding, this court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005).

(b) Standard of Review

[44] We have stated that in reviewing a sentence of death on appeal, we conduct a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty. *Id.* However, our decisions have not specifically explained our standard of review with respect to the trier of fact's finding that a particular aggravating circumstance was proved. That issue is particularly pertinent in this case, as this is the first direct appeal to be taken from a sentence imposed pursuant to the jury findings required by L.B. 1.

[45,46] Generally, in reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. *State v. Canady*,

263 Neb. 552, 641 N.W.2d 43 (2002). 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. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004).

The question is whether findings of aggravating circumstances, as factual findings now made by a jury, are subject to this standard of review. The overwhelming majority of jurisdictions to have considered the issue have applied this familiar standard of appellate review, or a similarly deferential standard, to a fact finder's determination of the existence of aggravating circumstances. See, *State v. Bell*, 359 N.C. 1, 603 S.E.2d 93 (2004); *Hutchinson v. State*, 882 So. 2d 943 (Fla. 2004); *Washington v. State*, 808 N.E.2d 617 (Ind. 2004); *State v. Edwards*, 116 S.W.3d 511 (Mo. 2003) (en banc), *cert. denied* 540 U.S. 1186, 124 S. Ct. 1417, 158 L. Ed. 2d 92 (2004); *Olsen v. State*, 67 P.3d 536 (Wyo. 2003); *State v. Stevens*, 78 S.W.3d 817 (Tenn. 2002); *State v. Honie*, 57 P.3d 977 (Utah 2002); *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001); *Abshier v. State*, 28 P.3d 579 (Okla. Crim. App. 2001); *People v. Hart*, 20 Cal. 4th 546, 976 P.2d 683, 85 Cal. Rptr. 2d 132 (1999); *State v. Johnson*, 291 Mont. 501, 969 P.2d 925 (1998); *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998); *State v. Porter*, 130 Idaho 772, 948 P.2d 127 (1997); *Com. v. Lee*, 541 Pa. 260, 662 A.2d 645 (1995); *State v. Ross*, 230 Conn. 183, 646 A.2d 1318 (1994); *Barnes v. State*, 876 S.W.2d 316 (Tex. Crim. App. 1994) (en banc); *Canape v. State*, 109 Nev. 864, 859 P.2d 1023 (1993). Cf. *State v. Ball*, 824 So. 2d 1089 (La. 2002). See, also, *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990) (applying standard of review to federal habeas review of state court's finding of aggravating circumstances). But see, *People v. Dunlap*, 975 P.2d 723 (Colo. 1999) (en banc); *State v. Djerf*, 191 Ariz. 583, 959 P.2d 1274 (1998) (conducting statutorily required independent reviews).

This application of the standard of review for a criminal conviction to findings of aggravating circumstances is sensible and consistent with our established law. First, unlike the ultimate sentencing determination made by the sentencing panel, a finding of

the existence of an aggravating circumstance is a factual finding, and factual findings are generally affirmed where there is sufficient evidence to support them. It would make little sense to treat the jury's finding of an aggravating circumstance differently than the other findings of fact with which the jury is entrusted. See, generally, *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989).

[47] Moreover, *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), stands for the proposition that an aggravating circumstance must be found by a jury beyond a reasonable doubt in order to satisfy the Sixth Amendment. We do not read *Ring* as requiring an appellate court to apply any particular standard of review to such a finding. Nonetheless, proper regard for the Sixth Amendment principle articulated in *Ring* suggests that we should treat the jury's findings of aggravating circumstances with the same degree of respect we give its findings of the elements of first degree murder.

[48] Consequently, we hold that when reviewing the sufficiency of the evidence to sustain the trier of fact's finding of an aggravating circumstance, the relevant question for this court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the aggravating circumstance beyond a reasonable doubt. See *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004). However, as previously stated, when considering the sentencing panel's weighing of the aggravating and mitigating circumstances, and the sentencing panel's determination that the mitigating circumstances found did not approach or exceed the weight to be given to the aggravating circumstances, this court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005).

(c) Analysis

Gales' primary argument is based upon *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). In that case, the defendant was convicted of first degree murder and

sentenced to death based upon his confession that he had murdered his victim and then performed sexual acts on her. On appeal, the defendant challenged the district court's finding that the murder was "especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." See § 29-2523(1)(d).

This court concluded that aggravating circumstance (1)(d) was not present on the facts of that case. The court noted that according to the defendant's confession, he strangled the victim and then committed sexual acts on her after she was either unconscious or dead. The court stated that in order for aggravating circumstance (1)(d) to be present, the method of killing must "entail something more than the ordinary circumstances which attend any death-dealing violence." *Hunt*, 220 Neb. at 725, 371 N.W.2d at 721. Since the victim in *Hunt* was not conscious when the defendant committed his sexual acts, the court concluded that "[a]lthough the method by which defendant achieved sexual gratification may be accurately described as exceptionally heinous and atrocious, and as manifesting exceptional depravity by ordinary standards of morality and intelligence, the murder itself, given the inherent nature of a killing, cannot." *Id*. at 726, 371 N.W.2d at 721.

Gales argues that pursuant to *Hunt, supra*, the murder of Latara was not especially heinous, atrocious, or cruel. However, as will be explained below, the circumstances of *Hunt* are distinguishable from those present in this case. The record here contains sufficient evidence to support the jury's finding that Latara's murder was especially heinous, atrocious, or cruel.

Dr. Jerry Jones, a coroner's pathologist, testified at the aggravation hearing regarding the results of the autopsy he performed on Latara. Jones testified that Latara died of asphyxiation caused by manual strangulation, specifically, pressure to the neck. Jones was unable to exclude the possibility of rape. Jones testified that a person may lose consciousness from manual strangulation in "perhaps 10 to 15 seconds," but that pressure on the neck for 4 to 5 minutes was required for death to result. Jones opined that hemorrhaging present on Latara's neck was "produced by pressure to the neck and probably also by struggle of the individual to the pressure applied to the neck." A condom was found in the

bathroom of Judy's apartment and genetic material was found on the condom that DNA testing showed to be consistent with the known genetic profiles of Latara and Gales.

One inference from the evidence presented at the aggravation hearing—the inference advocated by Gales—is that Latara was strangled, lost consciousness after 10 to 15 seconds, and was sexually assaulted after she lost consciousness. It is based on this inference that Gales argues for the application of *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985). However, that is not the only inference supported by the evidence. The record also supports a finding that Latara was sexually assaulted by Gales, struggled against her attacker, and was rendered unconscious by pressure to the neck during or after the sexual assault. We are required to give the benefit of this reasonable inference to the State. See *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999).

As previously discussed, we have narrowed the phrase "especially heinous, atrocious, or cruel" to include murders involving torture, sadism, or sexual abuse. *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995); *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991). See, also, *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994). We have already concluded that the jury was properly instructed that Latara's murder was especially heinous, atrocious, or cruel if Gales inflicted "serious physical abuse — meaning sexual abuse — on the victim, Latara Chandler, before her death." Taken in the light most favorable to the State, the evidence was sufficient for the jury to find beyond a reasonable doubt that Latara's murder was especially heinous, atrocious, or cruel.

We also conclude that the record supports the sentencing panel's determination that the mitigating circumstances found did not approach or exceed the weight to be given to the aggravating circumstances found in this case. The mitigating factors found to be present—Gales' relationship with his family and his ability to adapt to life in prison—are not compelling and do not approach the weight to be given to the aggravating circumstances that the jury found. On our de novo review of the record, we find that the evidence is sufficient to support imposition of the death penalty.

14. Proportionality Review

(a) Comparison to Other Cases

[49] Pursuant to § 29-2521.03, this court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review. This review requires us to compare the aggravating and mitigating circumstances of this case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in this case is no greater than those imposed in other cases with the same or similar circumstances. See, *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

In this case, as we have already noted, the aggravating circumstances are severe, and the mitigating circumstances are far from compelling. We have reviewed our relevant decisions on direct appeal from other cases in which aggravating and mitigating circumstances were found and the death penalty was imposed by the district court. See, e.g., *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005); *Dunster, supra*; *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000), *overruled on other grounds, Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *Bjorklund, supra*; *Lotter, supra*; *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *disapproved on other grounds, State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000); *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990); *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982); *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981); *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *disapproved on other grounds, State v.*

Reeves, 234 Neb. 711, 453 N.W.2d 359 (1990); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *disapproved on other grounds, Palmer, supra*; *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), *disapproved on other grounds, Palmer, supra*.

We take particular note of the circumstances presented in *Joubert, supra*, in which the defendant was convicted of the murders of two children and sentenced to death based upon aggravating circumstances (1)(a), (b), and (d), and *Williams, supra*, in which the defendant was convicted of two murders and one sexual assault and sentenced to death based upon the same aggravating circumstances found to exist in this case with respect to Latara. Having reviewed the relevant cases, we find that the imposition of sentences in this case is proportional to that in the same or similar circumstances.

(b) Federal Due Process

We are aware of the decision in *Palmer v. Clarke*, 293 F. Supp. 2d 1011 (D. Neb. 2003), *overruled on other grounds, Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), in which the U.S. District Court for the District of Nebraska held that our method of appellate proportionality review violates the U.S. Constitution. We have respect for our colleague on the federal bench. However, we disagree with the determinations of Nebraska law upon which the court's analysis was based. Because this appeal requires us to engage in the same process of proportionality review that the court held unconstitutional, it is our responsibility to respond to the court's analysis.

Proportionality review is not constitutionally mandated. *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). It exists in Nebraska by virtue of § 29-2521.01 et seq., which direct this court to conduct a proportionality review in each appeal in which a death sentence is imposed. The U.S. District Court's holding was premised on the principle, previously cited in this opinion, that where a state creates a right, such as a defendant's right to proportionality review of his or her sentence, the Due Process Clause entitles the defendant to procedures to ensure that the right is not arbitrarily denied. *Palmer v. Clarke, supra*, citing *Foster v. Delo*, 39 F.3d 873 (8th Cir. 1994). The court held that our

process of appellate proportionality review violates that principle in three ways. First, the court held that we erred in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), when we "effectively rewrote the [proportionality review] statute to require comparison to other death sentences rather than to other 'criminal homicides' or at least to all other first degree murders." (Emphasis omitted.) *Palmer v. Clarke*, 293 F. Supp. 2d at 1041-42. Second, the court held that we denied the defendant in *State v. Palmer, supra*, his constitutional right to a two-tiered review process in our application of a different comparison in our proportionality review than the sentencing panel had used. Finally, the court held that our proportionality review was an exercise in appellate resentencing that was not permitted by state law. We will address each of these points in turn.

(i) Interpretation of Proportionality Review Statutes

[50] First, we revisit our decision in *State v. Palmer, supra*, which the U.S. District Court found to be erroneous. That decision relied, in large measure, upon our earlier decision in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), in which we held that a literal application of § 29-2521.01 et seq. would violate the separation of powers provisions of the Nebraska Constitution. We explained that the limits of the jurisdiction conferred upon us by the constitution may not be increased or extended by legislative enactment. *Id.* We determined that applied literally, § 29-2521.01 et seq. would require us to gather evidence and examine prosecutorial discretion, which are executive and not judicial functions. We further determined that the statutes, literally applied, would intrude on the judicial function. Therefore, we construed the statutes to require an appellate comparison of only those cases in which a defendant had been convicted of first degree murder. See *Moore, supra*.

In *State v. Palmer, supra*, we further limited the scope of our review. We determined that a literal reading of the statutes would effectively repeal the death penalty, which we understood to be against the Legislature's intent. In order to effectuate the Legislature's intent, within the constitutional limitations identified in *Moore, supra*, we concluded that our proportionality review should include only those cases in which the death penalty was imposed. *State v. Palmer, supra*.

[51-56] The principles of statutory interpretation which led us to that conclusion are well established. A penal statute must be construed so as to meet constitutional requirements if such can be reasonably done. *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999). It is the duty of this court to give a statute an interpretation which meets constitutional requirements, if it can. *State v. Manley*, 189 Neb. 415, 202 N.W.2d 831 (1972). Although a penal statute must be strictly construed, it is to be given a sensible construction, and general terms are to be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result. *State v. Stein*, 241 Neb. 225, 486 N.W.2d 921 (1992). In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998). In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *State v. Portsche*, 261 Neb. 160, 622 N.W.2d 582 (2001).

[57] In other words, our holdings in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), and *Moore, supra*, were based upon this court's rules of statutory interpretation, undertaken in a good-faith attempt to effectuate the intent of the Legislature and remain consistent with the requirements of our state Constitution. Those holdings are certainly not immune from criticism, and we respect our federal colleague's principled disagreement with our exposition of state law. But *it is* a matter of state law we are discussing, and we are the final arbiter of Nebraska law. *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir. 1996). "By performing an exhaustive review of Nebraska statutory law in an attempt to show the Nebraska Supreme Court the inadequacy of its interpretation of its own authority under its own law, the district court exceeded the bounds of federal court authority." *Id.* at 1427, citing *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (it is not province of federal courts to reexamine state court determinations of state law questions).

Consequently, we also respectfully disagree with the U.S. District Court's conclusion that our alleged error in *State v. Palmer, supra*, amounted to a violation of the federal Due Process Clause. The court's reasoning was that our interpretation of state law arbitrarily denied the defendant a state-created right. But state law can only afford a defendant an appellate proportionality review that is consistent with the requirements of the Nebraska Constitution. The scope of the due process liberty interest created by state law is, as a question of state law, defined by this court. Proportionality review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). The Due Process Clause, as relevant here, only requires that defendants receive the process they are due under Nebraska law, as we have explained it. Some members of this court have expressed concerns about our holding in *State v. Palmer, supra*. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998) (Connolly, J., concurring; Gerrard, J., concurring, joined by Stephan, J.). But there is no question that our holding in *State v. Palmer, supra*, is the law.

(ii) Two-Tiered Review

The U.S. District Court further held that the defendant's right to due process was violated when we applied a different proportionality review than was applied by the sentencing court. The court found that the defendant "had a statutory right to: (1) have the sentencing panel conduct a proportionality review, and (2) have the determination of that sentencing panel reviewed in the Nebraska Supreme Court." *Palmer v. Clarke*, 293 F. Supp. 2d 1011, 1043 (D. Neb. 2003), *overruled on other grounds, Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). The court concluded that our "[use of] a different universe of defendants" denied the defendant the benefit of the "two-tiered" scheme of the statutes. *Id*. The court's conclusion, however, is based on a misunderstanding of the requirements of Nebraska law.

[58,59] The court was correct insofar as Nebraska's capital sentencing statutes create a two-tier sentencing process and differentiate between the role performed by the sentencing panel and the role of this court in reviewing that sentence. See *State v.*

Reeves, 258 Neb. 511, 604 N.W.2d 151 (2000). But the proportionality review performed by this court is not part of that process. Instead, this court's proportionality review in capital cases is conducted independently from the sentencing panel's proportionality review and our appellate review of the sentencing decision made by the trial court.

This conclusion is derived from an examination of the sentencing scheme set forth in § 29-2520 et seq., which is in relevant part unchanged from the sentencing scheme in effect at the time that *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), was decided. Section 29-2521(3) provides that the sentencing panel shall receive evidence, from the parties, regarding "sentence excessiveness or disproportionality as provided in subdivision (3) of section 29-2522." Accord § 29-2520(4)(h). The sentencing panel is to consider in imposing sentence, pursuant to § 29-2522,

> (1) Whether the aggravating circumstances as determined to exist justify imposition of a sentence of death;
>
> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
>
> (3) *Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.*

(Emphasis supplied.)

In short, these provisions charge the sentencing court with conducting a proportionality review as part of determining whether the death sentence should be imposed. We may, of course, examine that determination on appeal.

This court's proportionality review, on the other hand, occurs pursuant to § 29-2521.03, which directs us to, "upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances." The statutory scheme clearly contemplates that this court should conduct an independent review of the proportionality of a death sentence, not merely an appellate review of the proportionality determination made by the sentencing court. While the sentencing court conducts a proportionality review that can be appealed to this court,

the statutes clearly charge this court with conducting its own independent proportionality review.

Consequently, we disagree with the U.S. District Court's conclusion that the defendant's due process rights were violated by our consideration of different cases from those that may have been considered by the sentencing court. The court was correct in stating that the defendant had the right to a two-tiered sentencing procedure in which this court reviews the determination of the sentencing panel. But the defendant *also* has a right to an independent proportionality review conducted by this court, the scope of which is discussed above. This court's consideration of different evidence in its independent proportionality review does not implicate the two-tiered appellate process we described in *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000). This court's independent proportionality review did not deprive the defendant of due process; to the contrary, principles of due process required us to conduct an independent proportionality review to the extent available under our authoritative interpretation of Nebraska law.

(iii) Appellate Resentencing

Finally, in a closely related analysis, the U.S. District Court concluded that our independent proportionality review " 'effectively resentenced' " the defendant. *Palmer v. Clarke*, 293 F. Supp. 2d 1011, 1044 (D. Neb. 2003), *overruled on other grounds, Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). Because the Nebraska statutes do not authorize appellate reweighing and resentencing, see *Reeves, supra*, the court found this to be another basis for its conclusion that the defendant's due process rights were violated.

[60] But while the Nebraska statutes do not authorize this court to reweigh aggravating and mitigating circumstances as a basis for resentencing a defendant, they do expressly authorize—in fact, require—this court to conduct an independent review of the proportionality of the defendant's sentence. This court did not act as an "unreviewable sentencing panel," see *Palmer v. Clarke*, 293 F. Supp. 2d at 1044; rather, we both reviewed the sentencing court's determination *and* conducted the independent proportionality review required by state law.

In short, in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), as in the instant case, this court "undertook its proportionality review in good faith" and found that the defendant's sentence was proportional to the sentences imposed in similar cases. See *Walton v. Arizona*, 497 U.S. 639, 656, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Accord, e.g., *LaRette v. Delo*, 44 F.3d 681 (8th Cir. 1995); *Personal Restraint of Benn*, 134 Wash. 2d 868, 952 P.2d 116 (1998). The U.S. Constitution does not require the federal courts to look behind that conclusion. See *id*.

IV. CONCLUSION

For the foregoing reasons, we reject each of Gales' assignments of error. We have independently reviewed Gales' sentences and find that the aggravating and mitigating circumstances support the imposition of the death penalty and that the imposition of sentence was not disproportionate to that in similar cases. We affirm the judgment of the district court.

AFFIRMED.

HENDRY, C.J., not participating.

STATE OF NEBRASKA, APPELLANT, V.
DONNA J. RABOURN, APPELLEE.

693 N.W.2d 291

Filed March 18, 2005. No. S-04-405.

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. **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. **Constitutional Law.** The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions.
4. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
5. **Constitutional Law: Statutes: Proof.** The burden of establishing a statute's unconstitutionality is on the party claiming it to be unconstitutional.

6. **Constitutional Law: Criminal Law: Statutes.** A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done.
7. **Constitutional Law: Statutes.** A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech.
8. ____: ____. A statute may be invalidated on its face only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies.
9. ____: ____. In order to prevail upon a facial attack to the constitutionality of a statute, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court.
10. ____: ____. When a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted.
11. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.

Appeal from the District Court for Platte County, MICHAEL OWENS, Judge, on appeal thereto from the County Court for Platte County, FRANK J. SKORUPA, Judge. Exception sustained, and cause remanded with directions.

Jon Bruning, Attorney General, and J. Kirk Brown, Solicitor General, for appellant.

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

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

STEPHAN, J.

The issue presented in this criminal appeal is whether portions of Nebraska's Abstracters Act, Neb. Rev. Stat. §§ 76-535 to 76-558 (Reissue 1996 & Cum. Supp. 2000), are overbroad and therefore unconstitutional. The county and district courts for Platte County so held, and the State has timely perfected this appeal pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004).

FACTS

On March 20, 2003, a complaint was filed against Donna J. Rabourn in the county court for Platte County alleging that she had committed a Class III misdemeanor by unlawfully failing to comply with the Abstracters Act and illegally engaging in the business of abstracting. The complaint was subsequently amended to specifically allege that Rabourn, "on or about the 21st day of November, 2001 through the 22nd day of February, 2002," failed to comply with the Abstracters Act and "illegally engaged in the business of abstracting" by "preparing reports of title to real property without an abstractor's license."

Rabourn filed a motion to quash the complaint, asserting that the Abstracters Act was void for vagueness and facially overbroad. After conducting a hearing, the county court issued an order on July 22, 2003, in which it concluded that the Abstracters Act was unconstitutionally overbroad only in the use of the term " 'Report of Title' " and therefore sustained Rabourn's motion to quash. The court did not reach the issue of whether the Abstracters Act was void for vagueness, other than to note that "it is questionable that [Rabourn] has established standing to challenge the statute for vagueness." The State appealed this ruling to the district court, which affirmed.

ASSIGNMENT OF ERROR

In its sole assignment of error, the State asserts, restated, that the lower courts erred in concluding that the Abstracters Act is unconstitutionally overbroad on its face.

STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *Welvaert v. Nebraska State Patrol*, 268 Neb. 400, 683 N.W.2d 357 (2004); *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004).

[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. *Hogan v. Garden County*, 268 Neb. 631, 686

N.W.2d 356 (2004); *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004).

ANALYSIS

[3] Rabourn asserts that the Abstracters Act infringes on the right to freedom of speech protected by both the U.S. and Nebraska Constitutions. The parameters of the constitutional right to freedom of speech are the same under both the federal and the state Constitutions. *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002); *Village of Winslow v. Sheets*, 261 Neb. 203, 622 N.W.2d 595 (2001); *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995). Accordingly, we apply the same analysis to the state and federal constitutional claims.

During the time period referenced in the operative complaint, the Abstracters Act was codified in the 1996 reissue of the Nebraska Revised Statutes. Section 76-537 provided in relevant part:

> As used in the Abstracters Act, unless the context otherwise requires:
>
> (1) Abstract of title shall mean a compilation in orderly arrangement of the materials and facts of record affecting the title to a specific piece of land, issued under a certificate certifying to the matters contained in such compilation;
>
> . . . .
>
> (3) Business of abstracting shall mean the making, compiling, and selling of abstracts of title or any part thereof or preparing written reports of title to real property;
>
> . . . .
>
> (8) Registered abstracter shall mean an individual, registered under the Abstracters Act, holding an operative certificate of registration who for a fee or other valuable consideration compiles or certifies abstracts of title or any part thereof to real property in any county within this state or who prepares reports of title; and
>
> (9) Report of title shall mean any type of summary of facts of record affecting the title to a specific piece of land which does not purport to constitute an opinion as to the state of the title and which is prepared by a person other than an attorney licensed to practice law in the State of Nebraska.

> Report of title shall not include a title insurance commitment or policy or information or opinions given by a register of deeds in response to inquiries from the public.

Section 76-538 provided: "Any person . . . engaged in the business of abstracting shall be required to be licensed as required by the Abstracters Act." Section 76-558 provided in part: "Any individual or business entity engaged in the business of abstracting in this state without having complied with the Abstracters Act shall be guilty of a Class III misdemeanor." For the sake of completeness, we note that the Abstracters Act is now codified in the 2003 reissue of the Nebraska Revised Statutes and includes certain amendments, enacted in 2002, which are not relevant to the issue before us here. See 2002 Neb. Laws, L.B. 1071. We will refer to the Abstracters Act as it existed during the time period stated in the operative complaint.

[4-9] Familiar general principles govern our consideration of whether the statutes in question are unconstitutional. A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). The burden of establishing a statute's unconstitutionality is on the party claiming it to be unconstitutional. *State v. Van, supra*; *State v. Gamez-Lira*, 264 Neb. 96, 645 N.W.2d 562 (2002). A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done. *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994). A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech. *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002). A statute may be invalidated on its face, however, only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies. *Id.*; *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). Stated another way, in order to prevail upon a facial attack to the constitutionality of a statute, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas or that the statute is "substantially" overbroad, which requires the court to find a

realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court. *Id*. The requirement that the overbreadth be substantial arose from the recognition that the application of the overbreadth doctrine is "'"'manifestly strong medicine.'"'" *State v. Hookstra*, 263 Neb. at 122, 638 N.W.2d at 834, quoting *State v. Kipf, supra*, and *Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987).

Rabourn contends that the Abstracters Act, as it relates to the preparation of reports of title, is unconstitutionally overbroad because it criminalizes the preparation of any written summary of facts of record pertaining to real property, regardless of whether the summary purports to constitute an opinion as to the state of title and regardless of whether a fee is charged. Rabourn contends that neither § 76-538, § 76-537(3), nor § 76-537(9) requires that a report of title be done "'for a fee or other valuable consideration'" in order to come within the statutory definition of the "business of abstracting." Brief for appellee at 6. As an example of the claimed overbreadth, Rabourn argues that an unlicensed person who examines and prepares a summary of public records pertaining to real property as a favor to a relative would commit a criminal offense under the Abstracters Act as written. The State, on the other hand, argues that the Abstracters Act legitimately regulates only the "'business'" of abstracting, which it claims involves the preparation of reports of title gathered from public records and provided to members of the public for a fee or other valuable consideration. Brief for appellant at 10.

Generally, the "business of abstracting titles to real estate is affected with a public interest" such that a state may utilize its police power to regulate those who engage in such business for the protection of the public. 1 Am. Jur. 2d *Abstracts of Title* § 5 at 368 (1994). In enacting the Abstracters Act, the Nebraska Legislature expressly stated that its purpose was "to safeguard the welfare and property of citizens of this state and to insure that abstracters serving the public meet minimum standards of proficiency and competency." § 76-536. To that end, the Abstracters Act regulates the "business of abstracting," § 76-538, by requiring that any person or entity engaged in such business be "licensed as required by the Abstracters Act," *id*., and by further

providing that an "individual or business entity engaged in the business of abstracting in this state without having complied with the Abstracters Act shall be guilty of a Class III misdemeanor," § 76-558.

Generally, the term "business" denotes "[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." Black's Law Dictionary 211 (8th ed. 2004). However, the issue presented in this case arises from the fact that in § 76-537(3), the Legislature specifically defined the phrase "[b]usiness of abstracting" as used in the Abstracters Act as "the making, compiling, and selling of abstracts of title or any part thereof *or* preparing written reports of title to real property." (Emphasis supplied.) Also, § 76-537(8) defines "[r]egistered abstracter" for purposes of the Abstracters Act as one "who for a fee or other valuable consideration compiles or certifies abstracts of title or any part thereof . . . *or* who prepares reports of title." (Emphasis supplied.) The emphasized conjunctive "or" in each of these statutory provisions, together with the absence of any specific reference to fees or valuable consideration with respect to "reports of title," lends support to Rabourn's interpretation that the "business of abstracting" includes both the preparation and certification of abstracts for a fee and the preparation of title reports regardless of whether done in exchange for some form of compensation. While grammatically defensible, this interpretation is inconsistent with the Legislature's use of the word "business" in describing what it sought to regulate and its stated purpose of safeguarding the welfare and property of the citizenry. Thus, we conclude that an ambiguity exists in the statutory language defining the phrase "business of abstracting" as used in the Abstracters Act.

[10,11] As noted, the unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *Swanson v. State*, 249 Neb. 466, 544 N.W.2d 333 (1996). Although we construe penal statutes strictly, we nonetheless give them a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. See, *State v. Hynek*, 263 Neb.

310, 640 N.W.2d 1 (2002); *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002); *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987). When a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted. *Id.* Also, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *State v. March*, 265 Neb. 447, 658 N.W.2d 20 (2003); *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364 (2001).

Historically, the doctrine of facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. *State v. Hookstra, supra.* We conclude that the statutory definition of the "business of abstracting" as used in the Abstracters Act is reasonably amenable to a limiting construction which is consistent with legislative intent while preventing unconstitutional overbreadth. Accordingly, we hold that "preparing written reports of title to real property" constitutes the "business of abstracting" for purposes of the Abstracters Act only when done in exchange for a fee or other valuable consideration. See § 76-537(3) and (8). So construed, the Abstracters Act is not unconstitutionally overbroad on its face.

CONCLUSION

For the reasons stated herein, we conclude that the district court erred in affirming the judgment of the county court sustaining Rabourn's motion to quash and dismissing the complaint. We therefore sustain the State's exception. Because jeopardy had not attached prior to the entry of the judgment of the county court, our disposition of this appeal permits the cause to proceed as set forth in Neb. Rev. Stat. § 29-2316 (Cum. Supp. 2004). See *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000). Accordingly, we remand the cause to the district court with directions to reverse the judgment of the county court and remand for further proceedings consistent with this opinion.

EXCEPTION SUSTAINED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. KENNETH JOHNSON, APPELLANT.

695 N.W.2d 165

Filed March 25, 2005. No. S-02-1503.

1. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Constitutional Law: Criminal Law: Statutes.** A claim that a statute fails to define a criminal offense with sufficient definiteness to put ordinary people on notice of the prohibited conduct is a facial challenge to the constitutionality of the statute.
3. **Criminal Law: Statutes: Jurisdiction: Presumptions: Waiver.** A facial challenge to a presumptively valid criminal statute does not raise an issue of subject matter jurisdiction in a criminal prosecution and thus may be waived if not timely asserted.
4. **Constitutional Law: Statutes: Demurrer: Waiver: Appeal and Error.** In order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash or a demurrer. Absent plain error, the failure to do so waives the right to assert the constitutional challenge on appeal.
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: Statutes: Proof.** The unconstitutionality of a statute must be clearly established before a court may declare it void.
7. **Statutes.** Statutory language is to be given its plain and ordinary meaning.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Lancaster County, STEVEN D. BURNS, Judge. Judgment of Court of Appeals affirmed.

Brett McArthur and Franklin E. Miner for appellant.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

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

PER CURIAM.

NATURE OF CASE

Kenneth Johnson was tried in the district court for Lancaster County for incest and for first degree sexual assault on a child, based on acts allegedly committed against his stepdaughter. He was acquitted by a jury of the first degree sexual assault charge but convicted of incest. Johnson appealed to the Nebraska Court

of Appeals. Included in the issues raised on appeal relative to the incest statute, Neb. Rev. Stat. § 28-703(1) (Reissue 1995), was a consideration of the correct definition of "minor" under the incest statute for acts committed against a stepchild and whether § 28-703 is unconstitutionally vague for failing to define "minor." The Court of Appeals affirmed Johnson's conviction. *State v. Johnson*, 12 Neb. App. 247, 670 N.W.2d 802 (2003). We granted Johnson's petition for further review. We affirm.

STATEMENT OF FACTS

Johnson and his wife were married in 1991. Johnson's wife had four children from previous relationships, all of whom lived with the couple. Johnson had five children, two of whom lived periodically with the couple. At the time of the marriage, C.K., a stepdaughter of Johnson, was around 10 years old.

Johnson admitted to police that when C.K. was around the age of 17, Johnson and C.K. had sexual contact, and that they had sexual intercourse when C.K. was 18 years old. C.K., however, testified that the contact started at age 12 and that intercourse started a year later and continued until she contacted the police.

On November 30, 2001, Johnson was charged with first degree sexual assault on a child (count I), in violation of Neb. Rev. Stat. § 28-319 (Reissue 1995), and incest (count II), in violation of § 28-703(1). Section 28-703(1) provides, "Any person who shall knowingly intermarry or engage in sexual penetration with any person who falls within the degrees of consanguinity set forth in section 28-702 or any person who engages in sexual penetration with his or her minor stepchild commits incest."

Johnson filed a motion in limine asking the court to exclude the evidence of his statement made to police officers on October 4, 2001. Specifically, Johnson objected to any statement he made regarding sexual contact with the alleged victim when she was 16 years or older. At the hearing, Johnson argued, in part, that any alleged sexual contact with C.K. when she was above the age of consent would not constitute incest and that the statement would be unfairly prejudicial. The court overruled the motion in limine.

The case proceeded to a jury trial. Before the case was submitted to the jury, Johnson objected to jury instruction No. 4 which

stated in relevant part that an element of the charge of incest was that C.K. "was, at the time of the offense, less than nineteen (19) years old." The court overruled the objection and refused to give Johnson's proposed jury instruction No. 4 which would have stated in relevant part that an element of the charge of incest was that C.K. "was, at the time of the offense, less than sixteen (16) years old." The jury found Johnson not guilty of first degree sexual assault on a child but found him guilty of stepchild incest. The court entered judgment in conformity with the jury verdict and sentenced Johnson.

Johnson appealed to the Court of Appeals. He asserted that the district court erred in (1) overruling his motion for directed verdict for the reason that the State failed to make a prima facie showing of all the elements of its case and because the statute upon which the charge was based is unconstitutionally vague; (2) allowing the State to amend the information to include the word "minor" in the charge of incest; (3) overruling his motion for mistrial; (4) refusing to grant him a new arraignment after the information was amended, thereby denying him an opportunity to file a motion to quash; (5) overruling his objection to jury instruction No. 4; and (6) refusing to give his proposed jury instruction in place of jury instruction No. 4. The Court of Appeals rejected each of these assignments of error. *State v. Johnson*, 12 Neb. App. 247, 670 N.W.2d 802 (2003).

With respect to Johnson's claim that § 28-703 was unconstitutional, the Court of Appeals determined that Johnson had not complied with Neb. Ct. R. of Prac. 9E (rev. 2000) and therefore concluded that the claim had not been properly preserved for appellate review. Rule 9E generally provides for the filing of a separate notice challenging the constitutionality of a statute and serving a brief on the Attorney General. The Court of Appeals also rejected Johnson's assertions that the district court erred in giving the State's instruction No. 4 on the definition of "minor," as it pertained to the stepchild incest charge in count II, and in refusing to give Johnson's proposed instruction on the definition of "minor."

The Court of Appeals noted that § 28-703 does not define "minor" and that minors are described as being persons of different ages for different purposes in various Nebraska statutes. The

Court of Appeals concluded that Neb. Rev. Stat. § 43-2101 (Reissue 2004) provided the correct definition of the term "minor" in § 28-703. The Court of Appeals reasoned as follows:

> Use of § 43-2101 to define "minor" for purposes of the incest statute, § 28-703, is appropriate because the incest statute is obviously intended to protect the familial structure of both blood relatives and stepfamilies. Minor stepchildren are included in the incest statute because a stepparent and a minor stepchild can have the same relationship as a natural parent has with a natural child. Even if the relationship is not the same, the stepparent is still in a position of power, authority, and dominance vis-a-vis the stepchild.
>
> For parents and natural children, there is no age at which sexual relations become lawful. See § 28-703. In short, the law does not permit consent to such a relationship. However, for the crime of incest in a stepfamily, the stepchild must be a minor, meaning that an adult stepchild can consent to such a relationship. The Legislature apparently recognized that the makeup of a stepfamily may eventually change once a child becomes an adult and that a sexual relationship between an adult stepchild and a stepparent could occur, because it does not have the inherent criminality, danger to offspring, and destructiveness to the entire family that arises when sex occurs between parent and child. It is evident that the Legislature saw incest as a very serious crime and wanted to provide as much protection as possible for stepchildren and their families without denying the fact that the status of stepfamilies may change. While the Legislature did not define "minor" within the incest statute, it is reasonable to assume a legislative intent to provide the maximum degree of protection for stepchildren and their families while recognizing the difference between stepchildren and natural children and to construe the statute accordingly. For a sexual relationship between the latter to truly be consensual, the stepchild, of necessity, must be an adult. Thus, we reject the use of younger ages for minor children as found in other statutes we have listed and hold that for the crime of incest, any stepchild under the age of 19 is a minor. Thus, we hold that § 43-2101

> defines "minor" as a person under 19 years of age for purposes of the incest statute, § 28-703.
>
> Further support for § 43-2101 being applicable to the incest statute is found in its location in the statutes. Even though § 43-2101 is not contained in the criminal code, it is in the chapter entitled "Infants and Juveniles," and it is well known that the juvenile code has as its overriding concern the child's best interests. That chapter also provides the definition of stepparent that is applicable to the incest statute. See Judiciary Committee Hearing, L.B. 89, 89th Leg., 1st Sess. 43 (Jan. 30, 1985). It is appropriate for the term "minor" to be defined as under the age of 19 for purposes of the incest statute, as it is in the child's best interests to be protected from incest by a stepparent until adulthood.

State v. Johnson, 12 Neb. App. 247, 259-60, 670 N.W.2d 802, 813 (2003).

The Court of Appeals therefore concluded that the instruction given by the district court correctly stated the law and that the instruction proposed by Johnson did not correctly state the law. The Court of Appeals rejected all of Johnson's remaining assignments of error and affirmed his conviction. We granted Johnson's petition for further review.

ASSIGNMENTS OF ERROR

Johnson asserts that the Court of Appeals erred in rejecting his arguments that the district court had erred in (1) overruling his motion for directed verdict for the reason that the State failed to make a prima facie showing of all the elements of its case and for the further reason that § 28-703, the statute upon which the charge was based, is unconstitutionally vague; (2) allowing the State to amend the information; (3) overruling his motion for mistrial; (4) refusing to grant him a new arraignment after the information was amended; (5) overruling his objection to jury instruction No. 4; and (6) refusing to give his proposed jury instruction.

STANDARD OF REVIEW

[1] Interpretation of a statute presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004).

ANALYSIS

Constitutionality of § 28-703.

We first consider Johnson's assertion that § 28-703 is unconstitutionally vague in its description of the offense of stepchild incest. We conclude that the constitutional issue has not been preserved for appeal, and we therefore make no determination whether or not the statute is unconstitutionally vague.

The Court of Appeals held that Johnson's claim that § 28-703 is unconstitutionally vague was not properly preserved for appellate review. *Johnson, supra*. The Court of Appeals stated:

> It has been established that the Nebraska Supreme Court insists upon strict compliance with Neb. Ct. R. of Prac. 9E (rev. 2000) before it will consider a constitutional challenge. [Citations omitted.] Johnson did not comply with rule 9E, which requires that when filing a brief, a party alleging unconstitutionality of a federal or state statute must file and serve a separate written notice of the challenge to the statute with the Clerk of the Supreme Court. Additionally, the Attorney General must be served a copy of the brief assigning unconstitutionality within 5 days of the filing of the brief with the Clerk of the Supreme Court. Johnson did not comply with either of these requirements of rule 9E.

12 Neb. App. at 253, 670 N.W.2d at 809.

We have held that rule 9E is applicable to a criminal defendant challenging the constitutionality of the statute defining the offense with which he or she was charged. *State v. Feiling*, 255 Neb. 427, 585 N.W.2d 456 (1998); *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996). See also, *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994). We have also insisted on strict compliance with the requirements of rule 9E. *Feiling, supra*; *McDowell, supra*.

We note that rule 9E requires the filing of "a *separate* written notice" to the Supreme Court Clerk that the appeal involves an issue of constitutionality of a statute as well as service of the brief on the Attorney General. We think that compliance with rule 9E requires "a *separate* written notice" to the Supreme Court Clerk and that such notice ordinarily ought not to be contained in a filing that has as its main purpose something other than giving notice to the clerk that constitutionality of a statute is at issue.

As set forth in the separate opinion in this case, some members of this court would find that Johnson in effect complied with rule 9E because he filed a "Petition to Bypass," in which he stated that in his appeal, he claimed the statute under which he was convicted was unconstitutionally vague. Although we have not insisted on rule 9E compliance where we have granted a petition to bypass for the explicit purpose of analyzing the constitutionality of a statute, we note that the petition to bypass in this case was denied and that therefore, the separate written notice requirement ought not to be forgiven.

We further observe that when the issue of the constitutionality of a statute is merely contained in an ordinary pleading, the Supreme Court Clerk is not put on notice that the case should be specially processed. We note that Neb. Const. art. V, § 2, requires that the "judges of the Supreme Court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute" and that "[n]o legislative act shall be held unconstitutional except by the concurrence of five judges." The rule 9E notice to the Supreme Court Clerk assists the clerk and this court in ensuring that an appeal involving the constitutionality of a statute is heard by the full court. As the separate opinion notes and we acknowledge, the second requirement of rule 9E, that a copy of the brief be served on the Attorney General, has been met in this case. However, we would determine that Johnson failed to comply with rule 9E.

[2-4] We further note that it is undisputed that at the trial level, Johnson filed neither a motion to quash nor a demurrer challenging the constitutionality of § 28-703. A claim that a statute fails to define a criminal offense with sufficient definiteness to put ordinary people on notice of the prohibited conduct is a facial challenge to the constitutionality of the statute. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002) (challenge to statute, asserting that no valid application exists, is facial challenge); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001). We have recently clarified that a facial challenge to a presumptively valid criminal statute does not raise an issue of subject matter jurisdiction in a criminal prosecution and thus may be waived if not timely asserted. See *Thomas, supra.* "This court has repeatedly held that in order to

bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash or a demurrer." *State v. Kanarick*, 257 Neb. 358, 362, 598 N.W.2d 430, 433 (1999). Absent plain error, the failure to do so waives the right to assert the constitutional challenge on appeal. *Thomas, supra*.

As set forth in a separate opinion, some members of this court would rule that because Johnson's conviction was based on § 28-703 and because this appeal cannot be fairly resolved without interpretation of § 28-703, the constitutionality of § 28-703 must be considered despite Johnson's failure to file a motion to quash or a demurrer challenging the statute. They cite to *State v. Goodseal*, 186 Neb. 359, 368, 183 N.W.2d 258, 263-64 (1971), in which this court stated that "where the invalidity of the act is plain, and such a determination is necessary to a reasonable and sensible disposition of the issues presented, we are required by necessity to notice the plain error in the premise on which the case was tried." Although we share some of the concerns expressed in the separate opinion, we would not invoke the *Goodseal* rationale because the Court of Appeals' opinion demonstrates that the issues in this appeal can be resolved without addressing the constitutionality of § 28-703 and, more important, the invalidity of § 28-703 is not plainly evident. See *Goodseal, supra* (Spencer and Boslaugh, JJ., dissenting).

[5,6] We have set forth well-recognized principles of statutory interpretation providing the framework within which the constitutionality of a statute is considered. " 'It is well established that all reasonable intendments must be indulged to support the constitutionality of legislative acts . . . .' " *State v. Ruzicka*, 218 Neb. 594, 597, 357 N.W.2d 457, 461 (1984). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004). A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done. *State v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002). "When a statute is susceptible of two constructions, under one of which the statute is valid while under the other of which the statute would be unconstitutional or of doubtful validity, that construction which results in validity is to be adopted." *Hookstra*, 263 Neb. at 124, 638 N.W.2d at 836. The unconstitutionality of a statute must be clearly established before

a court may declare it void. *State v. Spady*, 264 Neb. 99, 645 N.W.2d 539 (2002). " 'The courts will not declare an act of the Legislature unconstitutional except as a last resort on the facts before the court.' " *Goodseal*, 186 Neb. at 369, 183 N.W.2d at 264 (Spencer and Boslaugh, JJ., dissenting), quoting *Stanton v. Mattson*, 175 Neb. 767, 123 N.W.2d 844 (1963).

Given this strong presumption of constitutionality, we cannot say that § 28-703 is plainly invalid. The fact that reasonable arguments can be made does not make a statute's unconstitutionality plainly evident, *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993), and a statute is not vague merely because a reviewing court believes the Legislature could have drafted it with greater precision, *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001). Rather, the void-for-vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applications. *Caddy, supra.* This is not a case in which the Legislature has failed to supply a material element; rather, it is a case in which the Legislature has failed to specifically define a term.

In our consideration of § 28-703, we note that there is weighty precedent which suggests that § 28-703 is not unconstitutionally vague for failing to specifically define "minor." The U.S. Supreme Court in *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990), reviewed *State v. Young*, 37 Ohio St. 3d 249, 525 N.E.2d 1363 (1988), in which the Ohio Supreme Court applied the plain meaning of the term "minor" as being a person under the age of majority and then looked to the general civil statute specifying the age of majority. Although reversing the defendant's conviction on other grounds, the U.S. Supreme Court found no merit in the defendant's claim that the Ohio Supreme Court's resorting to Ohio Rev. Code Ann. § 3109.01 (Anderson 1989) could not save the statute from his vagueness claim. *Osborne, supra*.

The separate opinion concludes that although the reasoning in cases such as *Young, supra*, "may have merit, [the reasoning] is not applicable" as "the Nebraska statutes contain several provisions that define the term 'minor' for specific purposes." However, a statutory pattern similar to that in Nebraska existed in Ohio at the time that *Young* was decided. See, § 3109.01 (defining age of

majority as 18); Ohio Rev. Code Ann. § 2907.04(A) (Anderson 1987) (criminalizing adult's sexual conduct with person over 12 but under 15); Ohio Rev. Code Ann. § 2907.05(A)(3) (Anderson 1987) (criminalizing gross sexual imposition of person less than 13); Ohio Rev. Code Ann. § 2907.21(A)(2) (Anderson 1987) (criminalizing, inducing, or procuring minor under 16 to engage in sexual activity for hire).

We further note that various other courts have rejected vagueness challenges to penal statutes that fail to define the term "minor" when the meaning can be determined by reference to other statutes or to common law. See, *State v. Ehlers*, 252 Conn. 579, 750 A.2d 1079 (2000) (child pornography criminal statute not vague for failing to define "minor"; definition of "minor" as under age 16 could be found in closely related criminal statutes); *State v. Duggar*, 806 S.W.2d 407 (Mo. 1991) (statute making it crime to fail to support minor not vague for failing to define "minor"; common-law understanding was that 21 was age of majority); *State v. Jackson*, 280 N.C. 563, 187 S.E.2d 27 (1972) (statute criminalizing sale of narcotics to minor not vague for failing to define "minor"; common-law definition of "minor" as under age 21 applies to statute); *People v. Vassar*, 207 Cal. App. 2d 318, 24 Cal. Rptr. 481 (1962) (statute criminalizing furnishing narcotics to minor not vague for failure to define "minor"; definition of "minor" as under age 21 contained in civil code may be used to define "minor"). Both the reasoning set forth above and the reasoning set forth in the separate opinion present rational arguments supporting the respective views as to whether § 28-703 is unconstitutionally vague. Having come to such determination, we are unable to conclude that the unconstitutionality of § 28-703 is "plainly evident." Without deciding whether the statute is or is not unconstitutionally vague, we conclude that because the invalidity of the statute is not plainly evident, we cannot, under the standard set out in *State v. Goodseal*, 186 Neb. 359, 183 N.W.2d 258 (1971), consider the constitutionality of the statute where the defendant has failed to properly preserve the issue for appeal.

We note that the separate opinion concluding that § 28-703 is unconstitutionally vague sets forth the opinion of four of the seven members of this court. Despite the fact that this number is

a majority of the court which would normally control the outcome of a case, article V, § 2, of the Nebraska Constitution provides that "[n]o legislative act shall be held unconstitutional except by the concurrence of five judges." Therefore, our opinion that the constitutionality of the statute cannot be considered in this appeal controls the outcome of this case. We therefore will proceed to consider Johnson's other assignments of error on further review.

Definition of "Minor" Under § 28-703.

Johnson asserts that the Court of Appeals erred in concluding that "minor" as used in § 28-703 means a person under 19 years of age. The Court of Appeals determined that such definition was appropriate by reference to § 43-2101, and it therefore concluded that the district court did not err when it instructed the jury that an element of the charge of incest was that Johnson's stepdaughter "was, at the time of the offense, less than nineteen (19) years old." Although we use different reasoning than that used by the Court of Appeals, we agree that the district court did not err in so instructing the jury.

In concluding that § 43-2101 provides the correct definition of the term "minor" under § 28-703, the Court of Appeals reasoned that the incest statute, § 28-703, "is obviously intended to protect the familial structure of both blood relatives and stepfamilies" and that § 43-2101 is part of the juvenile code which "has as its overriding concern the child's best interests." *State v. Johnson*, 12 Neb. App. 247, 259, 260, 670 N.W.2d 802, 813 (2003). The Court of Appeals also noted that the juvenile code "provides the definition of stepparent that is applicable to the incest statute." *Id*. at 260, 670 N.W.2d at 813. Because the two statutes had similar goals and dealt with similar subject matter, the Court of Appeals concluded that the definition of "minor" in § 43-2101 was the proper definition of "minor" in § 28-703.

We think that a more straightforward construction of § 28-703 would follow the reasoning approved by the U.S. Supreme Court and initially articulated by the Ohio Supreme Court in *State v. Young*, 37 Ohio St. 3d 249, 525 N.E.2d 1363 (1988), *reversed in part on other grounds sub nom. Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990). In *Young*, defendants in

two separate cases were convicted for possession of child pornography under Ohio Rev. Code Ann. § 2907.323(A)(3) (Anderson 1987), which provided that no person shall "[p]ossess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity . . . ." The defendants asserted, among other things, that § 2907.323(A)(3) was unconstitutionally vague because the term "minor" was not defined. They argued that in using only the word "minor" without elaboration, the statute failed to limit its proscription to conduct involving children below a specified numeric age. The Ohio Supreme Court rejected the defendants' argument, concluding that while the statute did not define "minor," the omission was not fatal. The Ohio Supreme Court reasoned:

> Any term which is not defined by a statute is accorded its common ordinary meaning. [Citation omitted.] We encounter no difficulty in finding the term "minor" to be generally understood as signifying a person who has not yet attained the age of majority. See Webster's Third New International Dictionary, Unabridged (1986) 1439. The age of majority in Ohio is eighteen. R.C. 3109.01. Therefore, the term "minor," as employed in R.C. 2907.323(A)(3), connotes a person under eighteen years of age.

37 Ohio St. 3d at 252, 525 N.E.2d at 1368.

[7] We have stated that "[s]tatutory language is to be given its plain and ordinary meaning . . . ." *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 41, 680 N.W.2d 142, 149-50 (2004). Like the Ohio Supreme Court in *Young*, we believe that the plain and ordinary meaning of the term "minor" is "generally understood as signifying a person who has not yet attained the age of majority." The statute used by the Ohio Supreme Court in *Young* to define "minor" for purposes of § 2907.323 was § 3109.01, the Ohio statute generally defining the age of majority in that state. Nebraska's § 43-2101 is titled "Persons declared minors; marriage, effect" and is located in chapter 43, article 21, of the Nebraska Revised Statutes, which article is titled "Age of Majority." The plain and ordinary meaning of the term "minor" is a person who has not reached the age of majority, *Young, supra*, and in Nebraska, the age of majority is defined by § 43-2101 as age 19.

While we acknowledge that various other Nebraska statutes refer to "minor" as a person under an age other than 19, we think it is significant that § 43-2101 makes a general statement that "[a]ll persons under nineteen years of age are declared to be minors . . ." and does not limit its application to a specific section of the statutes. In contrast to § 43-2101, other statutes giving a different definition of "minor" do not purport to declare who is a "minor" as a general matter, and they imply or explicitly state that the definition of "minor" provided therein is for the purpose of a specific section of the statutes. See, Neb. Rev. Stat. § 53-103(23) (Supp. 2003) (stating that for purposes of Nebraska Liquor Control Act, minor means any person under 21 years of age, regardless of marital status); Neb. Rev. Stat. § 25-508.01(2) (Reissue 1995) (prescribing method of personal service for any person under 14 years of age and referring to such person as "minor," but does not purport to declare "minor" for other purposes); Neb. Rev. Stat. § 28-443 (Reissue 1995) (statute is titled "Delivery of drug paraphernalia to a minor; penalty" and proscribes delivery to a person under 18 years of age who is at least 3 years younger than actor, but does not purport to declare "minor" for other purposes); Neb. Rev. Stat. § 28-805 (Reissue 1995) (describing offense of "debauching a minor" as act involving a boy or girl under age of 17, but does not purport to declare "minor" for other purposes); Neb. Rev. Stat. § 28-1418 (Reissue 1995) (proscribing use of tobacco by person "being a minor under the age of eighteen years," but does not purport to declare "minor" for other purposes).

We think it is a proper reading of the Nebraska Revised Statutes that § 43-2101 sets the age of majority and that, except where a statute references a specific age, § 43-2101 defines "minor" for general purposes. Where the word "minor" is used elsewhere in the statutes without further definition, it may be presumed to have the general meaning declared under § 43-2101. Where the Legislature wishes to provide a different definition or wishes to proscribe conduct based on an age other than the age of majority, the Legislature will explicitly do so, as it has done in the statutes cited above.

Because our analysis leads us to determine that the proper definition of "minor" for purposes of § 28-703 is that provided in

§ 43-2101, we conclude that the Court of Appeals did not err in construing "minor" under § 28-703 to have the same meaning and in concluding that the district court did not err in instructing the jury as such.

Other Assignments of Error.

We have reviewed Johnson's remaining assignments of error, and we find no merit to such assignments. We therefore affirm the decision of the Court of Appeals.

CONCLUSION

We conclude that Johnson did not properly preserve the issue of the constitutionality of § 28-703 and that because the alleged invalidity of § 28-703 is not "plainly evident," we cannot consider the issue in this appeal. We further conclude that the Court of Appeals did not err in concluding that the proper definition of "minor" as used in § 28-703 is that provided in § 43-2101 and that the district court did not err in so instructing the jury. Having rejected Johnson's remaining assignments of error on further review, we affirm the Court of Appeals' decision affirming Johnson's conviction.

AFFIRMED.

GERRARD, J., dissenting.

The defendant argues the offense of stepchild incest under Neb. Rev. Stat. § 28-703 (Reissue 1995) is unconstitutionally vague and therefore violates the due process provisions of the U.S. Constitution and the Nebraska Constitution, because it prohibits incest with a "minor" stepchild but does not define "minor." I agree, as does a majority of this court. But the opinion of this court does not decide whether § 28-703 is unconstitutionally vague, based on the court's conclusion that the statute's unconstitutionality is not "plainly evident." Because this issue involves the constitutionality of a statute, the opinion of three judges of this court disposes of the appeal. However, I respectfully disagree with the court's reasoning, in both the interpretation of the plain error doctrine and the discussion on the constitutionality of § 28-703. Therefore, I respectfully dissent.

PLAIN ERROR

The Court of Appeals found that Johnson's claim that § 28-703 is unconstitutionally vague had not been properly preserved for

appellate review in this case, stating that Johnson did not comply with Neb. Ct. R. of Prac. 9E (rev. 2000) because he did not file and serve a separate written notice of the challenge to the statute and because he did not serve a copy of the brief assigning unconstitutionality on the Attorney General. The opinion of the court endorses that conclusion. However, on the same date that Johnson filed his appellate brief, he filed a "Petition to Bypass" with the Supreme Court Clerk's office, which stated, in relevant part, that "[f]or his appeal, Appellant has alleged that the statute under which he was convicted in [sic] unconstitutionally vague." Furthermore, rule 9E requires only that the Attorney General be served with a copy of the brief "[i]f the Attorney General is not already a party to an action where the constitutionality of the statute is in issue . . . ." In a criminal proceeding, the Attorney General, as the representative of the State of Nebraska, is a party to the proceeding. See Neb. Rev. Stat. § 84-205 (Cum. Supp. 2004). Beyond that, on the last page of Johnson's appellate brief, his counsel certifies that two copies of the brief were delivered to the Attorney General on the same date that the brief was filed with the Supreme Court Clerk's office. This suffices, by statute, as proof of service. See Neb. Rev. Stat. § 25-534 (Reissue 1995).

In short, I disagree with the Nebraska Court of Appeals' conclusion that Johnson failed to follow the requirements of rule 9E and obviously disagree with this court's endorsement of that conclusion. However, the State also argues that Johnson waived the issue of the constitutionality of § 28-703 because his counsel during pretrial proceedings, who was not his counsel at trial or on appeal, failed to file a motion to quash or a demurrer to either the original or amended information. See *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999). Because I agree that Johnson should have raised his constitutional claim in a motion to quash, I also agree that consideration of that constitutional claim requires the court to find plain error.

But because Johnson's conviction was based on § 28-703 and because this appeal cannot be resolved without interpretation of § 28-703, the constitutionality of § 28-703 should be considered despite Johnson's procedural failures. This court has stated that "where the invalidity of the act is plain, and such a determination is necessary to a reasonable and sensible disposition of the issues

presented, we are required by necessity to notice the plain error in the premise on which the case was tried." *State v. Goodseal*, 186 Neb. 359, 368, 183 N.W.2d 258, 263-64 (1971). Because the assignments of error in this appeal require interpretation of § 28-703, the court cannot reach a sound and reasonable disposition of this appeal without confronting the constitutionality of the stepchild incest statute—i.e., whether the meaning of § 28-703 *can be* reasonably determined.

In other words, the court cannot resolve the arguments Johnson has preserved for appellate review without, at least implicitly, resolving those that he arguably did not. The court should not permit the mistakes of counsel to force it into making a determination that inevitably results from attempting to discern the meaning of statutory language that defies meaningful definition. In my opinion, the court's "interpretation" of § 28-703 does what the Due Process Clause was intended to prevent—it retroactively purports to give validity to a statute that, without the court's interpretation, is effectively meaningless.

The court avoids discussing the due process issue by stating that "the issues in this appeal can be resolved without *addressing* the constitutionality of § 28-703." (Emphasis supplied.) This is true, but the question is whether the issues *should* be resolved without addressing the constitutionality issue. The problem is that the resolution of the issues in this appeal *implicates* the constitutionality of § 28-703, regardless of whether it is openly addressed. It is simply not possible to construe a statute yet avoid determining whether the statute is capable of meaningful construction in the first instance. That the court includes a significant amount of discussion regarding the vagueness of § 28-703 provides some indication of how much the constitutional issue is a necessary concomitant to the other issues presented in this appeal.

The opinion of the court further concludes that the plain error doctrine is not satisfied in this case because the error is not "plainly evident from the record." See *State v. Mata*, 266 Neb. 668, 699, 668 N.W.2d 448, 477 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005). For reasons I will explain below, I respectfully disagree. But my initial dispute with the court's reasoning is that it is mistaken to invoke that proposition at all, because the constitutional issue the court is called

upon to decide is a necessary and intrinsic part of its analysis of § 28-703, regardless of whether the error is plainly evident from the record. See *State v. Goodseal, supra.* "The Nebraska Supreme Court will not pass upon the constitutionality of legislation *absent a need to do so in order to properly dispose of an action*." (Emphasis supplied.) *State v. VanAckeren*, 263 Neb. 222, 229-30, 639 N.W.2d 112, 118 (2002). Consideration of plain error occurs at the discretion of an appellate court. *State v. Al-Zubaidy*, 257 Neb. 935, 602 N.W.2d 8 (1999). In my opinion, the court should exercise that discretion under these circumstances.

Beyond that, however, the court has conflated the plainness of error, and the degree of prejudice sustained by the defendant, with the difficulty of the legal question presented. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999). The court concludes that the error in this case was not "plainly evident" because statutes are presumably constitutional, and there is a rational argument supporting the constitutionality of § 28-703. The court seems to be saying that for error to be plain, it must be indisputable. But the foregoing standard for plain error does not say that. Instead, it refers to error "plainly evident *from the record*." (Emphasis supplied.) See *State v. Bartholomew*, 258 Neb. at 180, 602 N.W.2d at 514. In other words, the record must plainly demonstrate that the error occurred. It is not required that the legal issue before the court be an easy one to decide. Whether error is plainly evident cannot be dependent on the mental exertion necessary for a judge to decide the issue.

The constitutionality of a statute is a question of law, and the Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Diaz*, 266 Neb. 966, 670 N.W.2d 794 (2003). While I agree that Johnson should have raised his constitutional claim with a timely motion to quash, see *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999), it is worth noting that Johnson did make his constitutional argument, albeit belatedly, in the trial court and that the trial court ruled on his motion. We have said that generally, a constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. See *State v. Diaz, supra*. While

Johnson's motion was untimely, he nonetheless made a record of his constitutional objection in the trial court, the parties were heard on the matter, and the trial court ruled on the objection. Moreover, whether a statute is unconstitutionally vague is determined from the language of the statute, which is obviously available to this court.

When a vagueness argument under the Due Process Clause is raised, the constitutionality or unconstitutionality of the statute is plainly evident one way or the other. Either a statute is unconstitutional or it is not—there is no middle ground. Whether § 28-703 is unconstitutional is a straightforward question of law that is as "plainly evident" in this case as it would be in any other.

VOID-FOR-VAGUENESS DOCTRINE

The void-for-vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applications. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001), citing *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). A statute is vague if its prohibitions are not clearly defined. *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984).

Due process of law requires that criminal statutes be clear and definite. *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991). A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject to the statute as to what conduct will render them liable to punishment, and the dividing line between what is lawful and unlawful cannot be left to conjecture. *Id.* A crime and its elements must be so clearly expressed that an ordinary person can intelligently choose in advance what course of conduct he or she may lawfully pursue. *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992).

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. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). Because § 28-703 does not define "minor," it does not define the crime of incest with a stepchild with sufficient definiteness that ordinary people can be certain what conduct is prohibited. As Johnson notes, Nebraska

statutes, including criminal statutes, give varying definitions of when a person is a "minor." The Court of Appeals recognized that

> [t]he age of majority is set at different ages for different purposes. See, e.g., Neb. Rev. Stat. § 25-508.01 (Reissue 1995) (for purposes of personal service, minor is person under 14 years of age); Neb. Rev. Stat. § 28-443 (Reissue 1995) (in regard to prohibition of delivery of drug paraphernalia to minor, minor is person under 18 years of age who is at least 3 years younger than actor); Neb. Rev. Stat. § 28-805 (Reissue 1995) (debauching minor prohibits nonminor from debauching morals of boy or girl under age of 17); Neb. Rev. Stat. § 28-1418 (Reissue 1995) (prohibiting use of tobacco by minor under age of 18); Neb. Rev. Stat. § 53-103(23) (Cum. Supp. 2002) (for purposes of Nebraska Liquor Control Act, minor means any person under 21 years of age, regardless of marital status).

State v. Johnson, 12 Neb. App. 247, 257-58, 670 N.W.2d 802, 812 (2003). Despite this multitude of definitions, the Court of Appeals concluded that Neb. Rev. Stat. § 43-2101 (Reissue 2004), which defines "minor" generally as a person under 19 years of age, defined "minor" for purposes of § 28-703. The opinion of the court endorses that conclusion, although that conclusion does not command a majority of this court.

Because of the varying definitions of "minor" in Nebraska statutes, I do not believe that the use of the word "minor" in § 28-703 was sufficiently definite to give the ordinary person notice of whether sexual conduct involving a stepchild between the ages of 16 and 19 was prohibited. Although the Court of Appeals and the opinion of the court have articulated plausible reasons to choose the definition provided in § 43-2101, there is nothing in § 28-703 or elsewhere that would alert the ordinary person that such was the definition of "minor" for purposes of § 28-703. Indeed, the Court of Appeals and the opinion of the court could have used the definition from one of the criminal statutes, such as Neb. Rev. Stat. § 28-805 (Reissue 1995) (debauching or depraving morals of minor, defined as under age 17) or Neb. Rev. Stat. § 28-319(1) (Reissue 1995) (criminalizing adult's sexual conduct when actor is age 19 or older and victim is under age of 16), and stated reasons for such a selection that would have been just as persuasive

as the reasons they have given for selecting the definition from § 43-2101.

The Court of Appeals relied, in interpreting § 28-703, upon the familiar proposition that in reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. See *State v. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004). However, the issue in this appeal is not what the Legislature may have intended to do—rather, the issue is whether the Legislature's intent, whatever it may have been, was successfully translated into a statute that effectively defined the line between lawful and unlawful conduct.

But beyond that, other familiar maxims of statutory interpretation support contrary conclusions. The Court of Appeals cited the proposition that

> " ' "[an appellate court], in construing a statute, looks to the objects to be accomplished, the evils and mischief sought to be remedied, or the purposes to be served, and places upon the statute a *reasonable or liberal construction* which will best effect its purpose rather than one which will defeat it. . . ." ' "

(Emphasis supplied.) *State v. Johnson*, 12 Neb. App. at 258, 670 N.W.2d at 812-13. Accord, e.g., *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004). But it is also a fundamental principle of statutory construction that penal statutes are to be *strictly construed* in favor of the defendant, and it is well understood that it is not for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there. See, *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001); *State v. Jansen*, 241 Neb. 196, 486 N.W.2d 913 (1992). Simply stated, § 28-703 is meaningless unless a definition of the word "minor" is imported from another statute, and our familiar maxims of statutory interpretation are of little assistance in determining which definition, if any, is to be applied. But more to the point, § 28-703 provides nothing that would suffice to inform the ordinary citizen which definition was applicable.

I recognize that difficulty in determining the meaning of the language of a statute does not automatically render it unconstitutionally vague and ambiguous. See *State v. Sodders*, 208 Neb.

504, 304 N.W.2d 62 (1981). But when a court could reasonably give conflicting definitions to a term used in a penal statute, the statute does not give an ordinary citizen adequate notice of prohibited conduct because the citizen cannot know which definition the court will choose. While this court could authoritatively articulate a meaning for § 28-703, that determination could not be applied retroactively, as the opinion of the court would hold, unless such application provided fair warning to the defendant. See *State v. Ehlers*, 252 Conn. 579, 750 A.2d 1079 (2000), citing *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965). All crimes in Nebraska are statutory in nature, *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999), and Nebraska's statutory scheme has not provided fair warning to the defendant of what conduct is prohibited under § 28-703.

I am aware, as noted by the opinion of the court, that courts in other jurisdictions have concluded that the failure to define the word "minor," under the respective statutory schemes presented in those cases, did not render those statutes unconstitutionally vague. See, *State v. Duggar*, 806 S.W.2d 407 (Mo. 1991) (en banc); *State v. Young*, 37 Ohio. St. 3d 249, 525 N.E.2d 1363 (1988), *reversed in part on other grounds sub nom. Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990); *State v. Jackson*, 280 N.C. 563, 187 S.E.2d 27 (1972); *People v. Vassar*, 207 Cal. App. 2d 318, 24 Cal. Rptr. 481 (1962). However, those conclusions are not persuasive in the instant case.

In each of those cases, the court found that the term "minor" could be defined by reference either to the common law, as in *Duggar* and *Jackson*, or to a civil statute that the court determined to be of general application, as in *Young* and *Vassar*. While that reasoning may have merit, it is not applicable to the circumstances of this case. As previously noted, the Nebraska statutes contain several provisions that define the term "minor" for specific purposes. While the court argues, as did the Court of Appeals, that § 43-2101 provides an applicable definition, I am not persuaded, for the reasons previously explained, that the ordinary citizen would have had sufficient reason to expect that definition, as opposed to any other, to be lifted from another chapter of the Nebraska Revised Statutes and used to provide clarity to an otherwise indefinite penal statute.

Because we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. See *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984), citing *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). Section 28-703, however, contains no definition for a critical term and provides no indication what definition, if any, is to be applicable. It does not meet the requirements of due process and is unconstitutionally vague. Johnson's conviction, pursuant to an unconstitutionally vague statute, was plain error.

CONCLUSION

I would conclude that the portion of § 28-703 dealing with conduct involving a minor stepchild is unconstitutionally vague because it does not define "minor" and that this error is plainly evident from the record. Consequently, I would reverse the judgment of the Court of Appeals and remand the cause with directions to reverse Johnson's conviction and sentence. Having determined that § 28-703 is unconstitutional, I would not reach Johnson's remaining assignments of error.

WRIGHT, CONNOLLY, and MCCORMACK, JJ., join in this dissent.

GEORGETT TADROS, APPELLANT AND CROSS-APPELLEE,
V. CITY OF OMAHA, A MUNICIPAL CORPORATION,
APPELLEE AND CROSS-APPELLANT.

694 N.W.2d 180

Filed March 25, 2005. No. S-03-1336.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Trial: Negligence: Proof: Appeal and Error.** Determining apportionment of negligence is solely a matter for the fact finder, and its action will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.

4. **Negligence: Damages.** The apportionment of damages is determined by considering the relative fault of the parties.
5. **Negligence: Liability.** An important factor to be considered in apportioning fault is the extent to which each person's risk-creating conduct failed to meet the applicable legal standard.
6. **Motor Vehicles: Highways.** Drivers are required to maintain a proper lookout for their own safety and the safety of others.
7. **Motor Vehicles: Highways: Right-of-Way.** A "go" signal at a street intersection confers no authority on the driver of an automobile who receives this signal to proceed across that intersection regardless of other persons or vehicles that may already be within it. It is not a command to go but a qualified permission to proceed lawfully and carefully in the direction indicated.
8. ____: ____: ____. A vehicle entering a street intersection with a traffic light in the driver of the vehicle's favor is under obligation to use due care and to yield the right-of-way to vehicles in the intersection. His right-of-way is subject to the rights of those already in the intersection.
9. **Pedestrians: Motor Vehicles: Highways: Words and Phrases.** A place of safety is any place established by the evidence that is occupied by a pedestrian just prior to sudden movement where he is then safe from injury, considering the facts and circumstances in each case then existing.
10. **Pedestrians: Motor Vehicles: Highways.** The determining element in a car-pedestrian accident is the pedestrian's sudden movement into the vehicle's path followed by an almost instantaneous collision.
11. **Political Subdivisions Tort Claims Act: Liability.** In determining whether the discretionary function exemption to the Political Subdivisions Tort Claims Act applies, the court must first consider whether the conduct is a matter of choice for the acting employee. If the court determines that the conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exemption was designed to shield.
12. **Public Officers and Employees: Immunity.** If a statute, regulation, or policy specifically prescribes a course of action which an employee must follow, then there is no discretionary immunity.
13. ____: ____. An employee's conduct must involve judgment or choice or there is no discretion for the discretionary function exemption to protect.
14. **Negligence: Damages: New Trial: Appeal and Error.** When a fact finder has used an incorrect standard of care in apportioning fault between a plaintiff and a defendant, the appropriate appellate remedy will generally be to remand for a new trial so the fact finder can employ the correct standard in its apportionment analysis.

Appeal from the District Court for Douglas County: J. RUSSELL DERR, Judge. Reversed and remanded for a new trial.

David M. Woodke and Aimee C. Bataillon, of Woodke & Gibbons, P.C., L.L.O., and Matthew G. Miller for appellant.

Robert J. Hamer, Deputy Omaha City Attorney, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Georgett Tadros was seriously injured when she was struck by a vehicle as she walked across West Center Road in Omaha, Nebraska. Tadros alleged that the City of Omaha (City) was negligent in programming the crosswalk signal at the intersection and that the driver who struck her was negligent in failing to yield the right-of-way to a pedestrian. The district court found that Tadros' contributory negligence precluded her from recovery, and it dismissed her petition. Tadros appealed, and the City has filed a cross-appeal.

SCOPE OF REVIEW

[1] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 267 Neb. 958, 679 N.W.2d 198 (2004).

FACTS

On December 16, 1999, Tadros was crossing West Center Road at the intersection of 133d Street and was struck by a pickup truck driven by James Bowley, Jr. When Tadros started to cross the street, the white "walk" light on the crosswalk signal was illuminated. According to Tadros' petition, the signal changed to red as she stepped from the median in the middle of West Center Road. As she crossed the northernmost eastbound lane, an eastbound white car that had entered the intersection came to a sudden stop and allowed Tadros to pass. She proceeded across the northernmost eastbound lane of traffic, but when she reached the southernmost eastbound lane, she was struck by Bowley's pickup.

West Center Road runs east and west. At the intersection in question, for westbound traffic, there is a right-turn lane, two through-traffic lanes, and a left-turn lane. A 7-foot-9-inch-wide median separates the westbound left-turn lane from the two eastbound lanes. The total crossing distance across West Center Road from the north curb to the south curb is 81 feet 10 inches. The distance from the north curb to the middle of the southernmost

eastbound lane of West Center Road, where Tadros was struck, measures 78 feet.

At the intersection of 133d Street and West Center Road, there is an unmarked crosswalk with a signal that may be activated only by a pedestrian manually pressing the crosswalk button. At the time of this accident, the crosswalk signal was set as follows: 7 seconds for the white "walk" light, 11 seconds for the flashing "don't walk" light, and 4 seconds for the solid "don't walk" light. There was also a 1-second period when the traffic lights were red in all directions. The total allotted time for the crosswalk signal was 23 seconds.

Tadros filed a petition in Douglas County District Court alleging that Bowley and the City were negligent and seeking to recover damages for injuries she sustained. She alleged that the City had failed to program the crosswalk signal to provide a sufficient amount of time for a pedestrian to cross all lanes of West Center Road, failed to provide a pedestrian-activated crosswalk signal or detector on the median, and failed to program the signal in accordance with the appropriate design standards in the industry. She alleged that Bowley was negligent in failing to keep a reasonable and proper lookout, failing to keep his vehicle under reasonable and proper control, failing to yield the right-of-way to a pedestrian in a crosswalk, and operating his vehicle at a speed unreasonable under the circumstances then and there existing.

The City answered, claiming that it had discretionary function immunity pursuant to Neb. Rev. Stat. § 13-910(2) (Cum. Supp. 2002). It also claimed that Tadros was contributorily negligent in failing to keep an adequate lookout for oncoming traffic and in leaving the median, a place of safety, and walking into the path of oncoming traffic without looking.

Tadros' last memory before the incident was leaving a bank near the northeast corner of 133d Street and West Center Road, where she had transacted business. She testified that she had crossed West Center Road using the pedestrian crosswalk many times, that she knew the pedestrian signal was "very short," that she had previously experienced trouble crossing in the time allotted, and that "everybody tried to speed up at this intersection."

The district court found that Tadros was walking in a slight southeasterly direction from the north curb to the south curb and

was within the general area where crosswalk markings would be if they existed. It found that Tadros had suffered extremely serious injuries and that many of the injuries were permanent and would likely be the source of additional health complications in the future.

The court found that the City was not entitled to discretionary function immunity under § 13-910(2) because its setting of the pedestrian crossing light was dictated by the Manual on Uniform Traffic Control Devices (manual). Upon reading the appropriate sections of the manual in pari materia, the court concluded that the "pedestrian clearance interval" included the flashing "don't walk" signal of 11 seconds, the solid "don't walk" signal of 4 seconds, and the additional 1-second "all red" signal, for a total of 16 seconds.

The court then considered the negligence of the City in failing to time the pedestrian clearance interval according to the manual. It found that Tadros had presented sufficient evidence to establish liability on the part of the City. However, the court found that Tadros was contributorily negligent when she left a place of safety on the median; proceeded against a solid "don't walk" signal, which indicated she did not have the right-of-way; and was struck by oncoming traffic.

In comparing the negligence of the parties, the court concluded that Tadros was guilty of contributory negligence equal to or greater than that of the City and that Bowley's negligence was, at best, minimal. The court accorded the following percentages of negligence: 50 percent to Tadros, 40 percent to the City, and 10 percent to Bowley. Because the court found that Tadros' percentage of negligence was 50 percent, she was precluded from recovery pursuant to Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995).

ASSIGNMENTS OF ERROR

Tadros assigns the following errors: The district court erred (1) in finding that the pedestrian clearance interval consists of more than the flashing "don't walk" signal, when the manual and expert testimony indicated otherwise; (2) in failing to consider the statutory and common-law duties of Bowley and the substantial evidence that he breached such duties; (3) in finding that

Tadros was 50 percent negligent for leaving a place of safety and proceeding into oncoming traffic without looking; (4) in failing to consider Tadros' statutory duty to immediately proceed to the sidewalk once she had partially completed her crossing of West Center Road; and (5) in misapplying the law when determining the degree of Tadros' contributory negligence, if any.

The City's cross-appeal asserts that the district court erred in not finding that the setting of traffic signal timing is a discretionary function, which would give the City immunity from liability.

ANALYSIS

Pedestrian Clearance Interval

Tadros claims the district court erred in its determination of what constitutes a pedestrian clearance interval. The amount of time allotted for a pedestrian to cross the intersection in question is an important element in assessing the City's negligence.

Neb. Rev. Stat. § 60-6,118 (Reissue 2004) states:

> Consistent with the provisions of the Nebraska Rules of the Road, the Department of Roads may adopt and promulgate rules and regulations adopting and implementing a manual providing a uniform system of traffic control devices on all highways within this state which, together with any supplements adopted by the department, shall be known as the Manual on Uniform Traffic Control Devices.

The parties do not dispute the fact that the manual is applicable to this case.

The manual states at paragraph 4D-7, "Pedestrian Intervals and Phases":

> Under normal conditions, the WALK interval should be at least 4 to 7 seconds in length so that pedestrians will have adequate opportunity to leave the curb before the clearance interval is shown. . . .
>
> A pedestrian clearance interval shall always be provided where pedestrian signal indications are used. It shall consist of a flashing DON[']T WALK indication. The duration should be sufficient to allow a pedestrian crossing in the crosswalk to leave the curb and travel to the center of the farthest traveled lane before opposing vehicles receive a

green indication (normal walking speed is assumed to be 4 feet per second).

The parties disagreed as to whether the pedestrian clearance interval for the crosswalk in question would include the flashing "don't walk" signal, the solid "don't walk" signal, and the 1-second period when the traffic signals were red in all directions.

The district court interpreted the manual to require that the pedestrian clearance interval include the flashing "don't walk" signal, the solid "don't walk" signal, and the additional 1-second "all red" period, for a total of 16 seconds. It concluded that a finding that the pedestrian clearance interval was limited to only the period when the flashing "don't walk" signal was activated would be inconsistent with an interpretation of paragraph 4D-7 in its entirety.

[2] The district court's interpretation of the manual 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. *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). Therefore, we review the terms of the manual independent of the determination made by the district court.

The plain language of the manual states that a pedestrian clearance interval consists of the flashing "don't walk" signal. We conclude that the district court's interpretation that the pedestrian clearance interval also included the solid "don't walk" signal and the 1-second "all red" period was incorrect. It is obvious that the purpose of the 4-second solid "don't walk" signal and the 1-second "all red" signal was to give pedestrians the necessary time to move from the middle of the "farthest traveled" traffic lane before oncoming traffic begins moving.

The intersection in question measured 78 feet from the north curb to the middle of the southernmost lane, which was the area where Tadros was struck. At a rate of 4 feet per second, a pedestrian would require 19.5 seconds to cross from the north curb to the middle of the southernmost lane during the flashing "don't walk" signal. The flashing "don't walk" signal at the intersection of 133d Street and West Center Road provided an interval of just 11 seconds. Assuming a normal walking speed of 4 feet per second, Tadros could have walked only 44 feet. This interval

could potentially strand pedestrians on the median with no way to reactivate the crosswalk signal. There was no pedestrian activation device on the median. A pedestrian would then have to either cross the eastbound lanes of traffic against the solid "don't walk" signal or wait for another pedestrian to activate the crosswalk signal.

Since the district court erred in its determination of the pedestrian clearance interval, the court also relied upon erroneous information in its apportionment of the City's negligence.

[3] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 267 Neb. 958, 679 N.W.2d 198 (2004). Determining apportionment of negligence is solely a matter for the fact finder, and its action will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial. *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

[4,5] In *Aguallo*, we stated that the common-law concept of contributory negligence has been abrogated by comparative negligence, which relieved the parties of an all-or-nothing situation. The apportionment of damages is determined by considering the relative fault of the parties.

> [An] important factor to be considered in apportioning fault is "the extent to which [each person's risk-creating] conduct failed to meet the applicable legal standard." Restatement (Third) of Torts: Apportionment of Liability § 8, comment *c*. at 87 (2000). That party X deviated substantially from its standard of care while party Y's deviation was only slight suggests that X should shoulder a higher burden for the damage done.

Aguallo, 267 Neb. at 808, 678 N.W.2d at 90.

In the case at bar, the district court failed to properly consider the extent to which the City's conduct failed to meet the applicable legal standard. The court's apportionment of negligence did not bear a reasonable relationship to the respective elements of negligence proved by Tadros at trial. Although the court found that the City was negligent in setting the pedestrian clearance

interval, it did not properly consider the effect of the City's failure to properly set the pedestrian clearance interval.

The City set an interval of only 11 seconds when it should have allowed 19.5 seconds. Eleven seconds would allow a pedestrian to walk 44 feet across the intersection instead of 78 feet, the distance from the north curb to the middle of the southernmost eastbound lane of West Center Road. This difference of 34 feet should have been considered by the district court in apportioning the City's negligence. The court did not properly consider the City's duty to ensure that the crosswalk signal provided sufficient time for a pedestrian to cross the intersection.

In comparing the relative fault of the parties, the proper amount of time for the pedestrian clearance interval was a significant factor that the district court did not consider in its assessment of the City's standard of care. The court's apportionment of the City's negligence was clearly wrong.

Bowley's Negligence

The district court found that Bowley's negligence was minimal in that "he possibly should have been more alert to the fact that he was approaching an intersection which contained an unmarked crosswalk and that the 'white vehicle' had quickly stopped in the next lane in front of him."

[6] The law imposes several duties upon drivers. Every driver is required to exercise due care to avoid colliding with a pedestrian upon any roadway. See Neb. Rev. Stat. § 60-6,109 (Reissue 2004). "Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle." Neb. Rev. Stat. § 60-6,153(3) (Reissue 2004). Drivers are required to maintain a proper lookout for their own safety and the safety of others. See *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

Tadros was struck within a crosswalk area. When she entered the northernmost eastbound lane, the driver of a white car in that lane stopped for her. Bowley did not see Tadros. He proceeded through the intersection and did not stop until his vehicle struck Tadros. An engineer who analyzed automobile accidents testified

that Bowley should have been able to see Tadros from as far west as 134th Street.

[7,8] In *Styskal v. Brickey*, 158 Neb. 208, 217, 62 N.W.2d 854, 861 (1954), this court stated:

> "A 'go' signal at a street intersection confers no authority on the driver of an automobile who receives this signal to proceed across that intersection regardless of other persons or vehicles that may already be within it. It is not a command to go but a qualified permission to proceed lawfully and carefully in the direction indicated . . . ."
>
> . . . .
>
> A vehicle entering a street intersection with a traffic light in his favor is under obligation to use due care and to yield the right-of-way to vehicles in the intersection. His right-of-way is subject to the rights of those already in the intersection.

Tadros was already in the intersection when Bowley approached. She was seen by the driver of the white car, and she had the right-of-way to proceed. Witnesses testified that Tadros was walking at a "slow" or "normal" pace across the intersection. No one stated that she suddenly left the median.

At trial, Bowley testified that he was driving east in the south or curb lane of West Center Road. He recalled a white car in the northernmost eastbound lane but could not recall if it was ahead of him. In an earlier deposition, he stated that the white car was farther east than he was. On cross-examination, Bowley said he hit Tadros after he had passed through the intersection. He did not notice the white car slowing down.

Paul Gilinsky testified that he was traveling eastbound on West Center Road just before the accident. He was in the right-hand lane as he approached the intersection of 133d Street and West Center Road, and a red pickup truck was in front of him. Gilinsky said that he was traveling at about 45 miles per hour and that the pickup was traveling at about the same speed. He saw a woman standing on the northeast corner of the intersection of 133d Street and West Center Road as he drove through the intersection of 134th Street and West Center Road. He saw her on the westernmost portion of the median, saw her step off the median, and saw her walk across the street at a normal pace. He saw a

white car in the left-hand eastbound lane stop, and he saw the woman walk in front of that car. Gilinsky then saw the pickup hit the woman.

[9,10] In *Bashus v. Turner*, 218 Neb. 17, 20, 352 N.W.2d 161, 164 (1984), we stated that a place of safety is "any place established by the evidence that is occupied by the pedestrian just prior to sudden movement where he is then safe from injury, considering the facts and circumstances in each case then existing." We held that the determining element in a car-pedestrian accident is the pedestrian's sudden movement into the vehicle's path followed by an almost instantaneous collision. *Id*. The record does not support a finding that Tadros made any sudden movement into the path of Bowley's pickup. Tadros had time to walk in front of the white car and into the southernmost lane of eastbound traffic before she was hit by Bowley.

Bowley had a duty to maintain a proper lookout. See *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002). He did not see Tadros; however, the driver of the white car saw her and stopped as she crossed the intersection. Tadros was also seen by Gilinsky, who saw her step off the median and walk across the street at a normal pace. He saw the white car stop for her, and he saw Tadros walk in front of that car. He then saw Bowley hit Tadros.

Bowley breached his duty to maintain a proper lookout and his duty not to overtake and pass a vehicle that had stopped at the crosswalk to allow Tadros to cross the street. He had a duty to yield to Tadros, who was still in the intersection. The district court failed to consider the extent to which Bowley's conduct failed to meet his duty to Tadros. The district court's apportionment of negligence to Bowley did not bear a reasonable relationship to the respective elements of Bowley's negligence which were proved at trial. The court's apportionment of Bowley's negligence was clearly wrong.

Discretionary Function Exemption

In its cross-appeal, the City argues that the district court erred in not finding that setting the pedestrian clearance interval was a discretionary function involving inherent public policy issues, which would therefore exempt the City from liability. Section 13-910 provides, in pertinent part:

> The Political Subdivisions Tort Claims Act . . . shall not apply to:
>
> . . . .
>
> (2) Any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused.

[11-13] A two-step analysis is used to determine whether the discretionary function exemption applies. *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004). The court must first consider whether the conduct is a matter of choice for the acting employee. *Id*. "This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice." *Id*. at 809, 678 N.W.2d at 90. If the court determines that the conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exemption was designed to shield. *Id.* If the statute, regulation, or policy specifically prescribes a course of action which an employee must follow, then there is no discretionary immunity. See *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). The employee's conduct must involve judgment or choice or there is no discretion for the discretionary function exemption to protect. See *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994).

In the case at bar, the district court concluded that the manual required the City to set the pedestrian clearance interval and that the City had no discretion in making that determination. We considered the issue of discretionary immunity in the installation of traffic control devices in *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002), and concluded that discretionary immunity protected the city's act or omission in not installing traffic control devices in response to changed traffic circumstances. In *Maresh*, we held that discretionary immunity did not protect the State from liability where the State did not require a contractor to use, place, or install traffic control devices or markings on a highway under construction as provided for in the manual.

Neb. Rev. Stat. § 60-6,121 (Reissue 2004) requires that all traffic control devices erected pursuant to the Nebraska Rules of the Road conform to the manual. Once the City elected to install the pedestrian crosswalk signal, it was required to conform to the manual in determining the pedestrian clearance interval. As previously stated, the placement of traffic control devices is a discretionary function. See *Maresh v. State, supra*. However, once such traffic control devices are in place, § 60-6,121 requires that "[a]ll such traffic control devices erected pursuant to the rules shall conform with the manual." Thus, the crosswalk signal was required to conform with the manual, and there was no element of choice for which discretionary immunity would apply.

The City did not state any reason for a deviation from the timing set forth in the manual. The district court correctly concluded that the setting of the pedestrian clearance interval was not the product of judgment or choice, because there was no discretion allowed in setting the interval.

> Where the challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing public policy considerations, the rationale for the exception falls away and the United States will be held responsible for the negligence of its employees. . . .
>
> "For the government to show merely that some choice was involved in the decision-making process is insufficient to activate the discretionary function exception. The balancing of policy considerations is a necessary prerequisite."

(Citations omitted.) *Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986).

The district court correctly concluded that any alleged discretion in setting the pedestrian clearance interval was not the kind of judgment that the discretionary function exemption was designed to shield. We find no merit to the City's cross-appeal because the City was not entitled to discretionary function immunity under § 13-910(2).

CONCLUSION

[14] The judgment of the district court finding that the City was not immune from liability was correct. However, the court's

apportionment of negligence did not bear a reasonable relationship to the respective elements of negligence proved at trial. The court's failure to consider the duties of the City and Bowley in determining their respective negligence invalidates the court's analysis of the comparative responsibility of the parties. In *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004), we stated that when a fact finder has used an incorrect standard of care in apportioning fault between a plaintiff and a defendant, the appropriate appellate remedy will generally be to remand for a new trial so the fact finder can employ the correct standard in its apportionment analysis. Pursuant to our decision in *Aguallo*, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STEPHAN, J., not participating.

STEVEN J. HAUSER, APPELLANT, V. NEBRASKA POLICE STANDARDS ADVISORY COUNCIL AND NEBRASKA COMMISSION ON LAW ENFORCEMENT AND CRIMINAL JUSTICE, APPELLEES.

694 N.W.2d 171

Filed March 25, 2005. No. S-03-1386.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
3. **Police Officers and Sheriffs.** A police officer is subject to rules that regulate his or her conduct on and off duty, whether in or out of uniform.
4. **Judgments: Appeal and Error.** 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.
5. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

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

Terri M. Weeks, of Boucher Law Firm, Special Assistant Attorney General, for appellees.

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

WRIGHT, J.

NATURE OF CASE

The Nebraska Commission on Law Enforcement and Criminal Justice (Commission) approved the revocation of Steven J. Hauser's Nebraska law enforcement certificate. The Hall County District Court affirmed the Commission's decision, and Hauser appeals.

SCOPE OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act (APA) may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Lein v. Nesbitt, ante* p. 109, 690 N.W.2d 799 (2005).

[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 not arbitrary, capricious, or unreasonable. *Id.*

BACKGROUND

Hauser received his certification as a law enforcement officer and became a Nebraska state trooper in 1978. In 1999, the executive director of the Commission received a petition signed by residents of North Platte, Nebraska, and the vicinity requesting revocation of Hauser's law enforcement certificate. The executive director requested an investigation pursuant to 79 Neb. Admin. Code, ch. 9, § 006.02 (1998), to determine whether the allegations against Hauser were within the purview of Neb. Rev. Stat. § 81-1403(5) (Reissue 1999) (now found at § 81-1403(6) (Cum. Supp. 2004)).

Following the investigation, the Nebraska Law Enforcement Training Center (Training Center), acting as the relator on behalf

of the State of Nebraska, filed an administrative complaint against Hauser with the Nebraska Police Standards Advisory Council (Council). The operative complaint alleged that he had abused his wife throughout 1998; provided false information to a law enforcement officer; and violated the duties and responsibilities set forth in his oath of office and various policies, codes, and canons of ethics of the Nebraska State Patrol (State Patrol). The complaint also alleged that Hauser's actions represented incompetence, neglect of duty, and/or physical, mental, or emotional incapacity which warranted revocation. Hauser's amended answer challenged the substance of the complaint and the procedure employed.

The matter came before the Council in August 2000, and at Hauser's request, the hearing was bifurcated. The first stage addressed claims relating to the Council's authority to hear the matter. The evidence presented established that the Council initially reviewed the rules in title 79, chapter 9, of the Nebraska Administrative Code; passed on the rules; and relayed them to the Commission, which then approved and formally promulgated the rules pursuant to the APA. There was no evidence adduced that the State Patrol's code of ethics or the State Patrol's disciplinary procedures and code of conduct had been promulgated under the APA or filed with the Nebraska Secretary of State. The Council determined that it had jurisdiction and proceeded to the merits of the allegations against Hauser.

After hearing evidence regarding the alleged misconduct, the Council found that Hauser had physically abused his wife several times in 1998 and had lied to an investigating officer regarding one of those incidents. It concluded that Hauser's actions amounted to a neglect of his duties and emotional incapacity. Finding that the State had proved the existence of one or more statutory grounds for revocation of Hauser's law enforcement certificate, the Council ordered such revocation.

The matter was then forwarded to the Commission. The Commission found that Hauser's behavior violated the State Patrol's code of ethics, the canons of police ethics, and those regulations governing general rules of conduct and demonstrated neglect of duty and emotional incapacity as set out in § 81-1403(5). It found that lying to an investigating officer also

violated the codes set forth above. Based upon such findings and conclusions of law, the Commission approved revocation of the Nebraska law enforcement officer certificate issued to Hauser.

Hauser appealed to the district court under the APA. The district court reversed the Commission's decision, concluding that it was made in excess of the Commission's statutory authority, that the Commission had no power to revoke Hauser's certificate, and that the Council had not passed any rules or regulations governing the revocation of law enforcement certificates.

The Council and the Commission appealed, and we reversed, finding that the district court erred in determining that the regulations promulgated concerning the revocation of certificates were invalid. See *Hauser v. Nebraska Police Stds. Adv. Council*, 264 Neb. 605, 650 N.W.2d 760 (2002). We noted that the Commission and the Council were not separate agencies; rather, the Council was a standing committee of the Commission. As such, the Commission was charged with the promulgation, adoption, and filing of rules and regulations with the Secretary of State. We concluded that the Commission had performed these functions with respect to the regulations concerning revocation of certificates and that such regulations were valid. We therefore remanded the cause to the district court for further proceedings.

On remand, the district court found that the Council and the Commission could consider the internal policies and oath of office of the State Patrol in determining whether there were statutory grounds for revoking Hauser's law enforcement certificate. It found by clear and convincing evidence that Hauser had violated § 81-1403(5) by neglecting his duties and conducting himself in such a manner as to show emotional incapacity to continue to be a certified law enforcement officer. It therefore affirmed the decisions of the Council and the Commission which revoked Hauser's law enforcement certificate. Hauser timely appealed.

ASSIGNMENTS OF ERROR

Hauser assigns the following errors to the decision of the district court: (1) the court's conclusion that it was proper for the Council and the Commission to rely on the State Patrol's codes of ethics and conduct and Hauser's oath of office in revoking his law enforcement certificate; (2) the court's finding that clear and

convincing evidence established the statutory grounds for revoking his law enforcement certificate; (3) the court's failure to find due process violations stemming from the participation of the Nebraska Attorney General in the revocation process; and (4) the court's application of 2000 Neb. Laws, L.B. 994, in reaching its decision.

ANALYSIS

Codes of Conduct and Ethics

Hauser argues that the district court erred in finding that the State Patrol's codes of conduct and ethics and his oath of office could be taken into consideration in determining whether he neglected his duties or lacked the emotional capacity to possess a law enforcement certificate. He claims that these policies should not have been considered because they were not adopted pursuant to the APA.

Hauser asserts that our decision in *McAllister v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 910, 573 N.W.2d 143 (1998), prevents the use of the State Patrol codes of conduct and ethics and the oath of office in evaluating his conduct because they have not been filed with the Secretary of State. *McAllister* involved an agency's disciplinary regulations that had not been filed with the Secretary of State pursuant to the APA. We held that agency rules and regulations that prescribe a penalty must be filed pursuant to the APA. The disciplinary regulations applied in *McAllister* contained a penalty provision, and therefore, we held they were invalid.

Hauser's argument ignores the fact that the district court did not use the State Patrol's internal policies or the oath of office to prescribe a penalty. Instead, the court based its decision to affirm the revocation of Hauser's certificate on the statutory grounds set forth in § 81-1403(5). The court merely used the codes to determine whether the grounds described in § 81-1403(5) had been violated. The only agency rules used to prescribe a penalty were the Commission's rules for revocation of law enforcement certificates, and evidence was presented which showed that these rules had been established pursuant to the APA.

The duties of the Council and the Commission are currently set out in Neb. Rev. Stat. § 81-1401 et seq. (Reissue 1999 &

Cum. Supp. 2004). At all times relevant to this case, § 81-1403 provided:

> Subject to review and approval by the commission, the council shall:
>
> . . . .
>
> (5) Revoke such certificates according to rules and regulations established by the council which shall include, but not be limited to, revocation for (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 of his or her certificate was in error.

The district court found that the code of conduct, the code of ethics, and the oath of office were guidelines for evaluating and making determinations as to the duties and conduct expected of a State Patrol trooper and that they could be used in deciding whether a certificate should be revoked under § 81-1403(5).

Throughout 1998, Hauser engaged in numerous acts of domestic violence against his wife. On September 26, Hauser slapped his wife's face multiple times and grabbed her around the neck, causing her to fall to the floor. A call was made to the 911 emergency dispatch center because Hauser's wife was unresponsive. When law enforcement officers arrived following the call, Hauser denied having had any physical contact with his wife. This directly contradicted her testimony and the physical evidence. The court also found that Hauser had numerous opportunities during 1998 to extricate himself from this pattern of domestic violence.

The district court concluded that a certified law enforcement officer who violated the laws of the State of Nebraska by assaulting his wife and who then gave false information to police officers about that assault had violated § 81-1403(5) by neglecting his duties and conducting himself in a manner that demonstrated emotional incapacity to be a certified law enforcement officer.

In concluding that these codes and Hauser's oath of office were properly taken into consideration in determining whether Hauser neglected his duties, the district court relied upon *Scott v. State ex rel. Board of Nursing*, 196 Neb. 681, 244 N.W.2d 683

(1976), *overruled on other grounds, Langvardt v. Horton*, 254 Neb. 878, 581 N.W.2d 60 (1998).

The Board of Nursing of the State of Nebraska denied Hazel Scott's application for a professional nursing license. Neb. Rev. Stat. § 71-1,132.29 (Reissue 1971) provided in part that the board could deny a license upon proof that the applicant was guilty of "unprofessional conduct." Nebraska statutes did not define the term, but the board had adopted general standards as to what constituted unprofessional conduct.

We affirmed the denial of Scott's application and cited *Kansas State Board of Healing Arts v. Foote*, 200 Kan. 447, 436 P.2d 828 (1968). The Kansas Supreme Court had answered a similar contention by stating: " 'It would indeed be difficult, not to say impractical, in carrying out the purpose of the act, for the legislature to list each and every specific act or course of conduct which might constitute such unprofessional conduct of a disqualifying nature. . . .' " *Scott*, 196 Neb. at 690-91, 244 N.W.2d at 689.

In *In re Complaint Against Jones*, 255 Neb. 1, 581 N.W.2d 876 (1998), we examined the Nebraska Code of Judicial Conduct in regard to the conduct of a county judge. The penalty for violation of the code was set forth in Neb. Rev. Stat. § 24-722 (Reissue 1995), which provided: "A . . . judge of any court of this state may be reprimanded, disciplined . . . or removed from office for . . . (6) conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The special master concluded that the judge's conduct had violated the code, and the Nebraska Commission on Judicial Qualifications recommended that the judge be removed from office.

The judge petitioned this court to modify or reject the commission's recommendation. Our inquiry was whether the charges were supported by clear and convincing evidence, which canons of the Code of Judicial Conduct had been violated, and which subsections of § 24-722 had been violated. We examined the actions of the judge in light of the Code of Judicial Conduct in order to determine whether such conduct violated § 24-722(6).

Both *Scott* and *In re Complaint Against Jones* support our conclusion that the Council, the Commission, and the district court did not err in relying upon the State Patrol's codes and oath of office to determine whether Hauser's conduct violated § 81-1403(5).

These codes were properly used as a guide to evaluate whether Hauser neglected his duties. Hauser's first assignment of error has no merit.

Sufficiency of Evidence

Hauser claims the district court erred in finding clear and convincing evidence to establish statutory grounds for revoking his law enforcement certificate. All but one of the incidents involving Hauser and his wife occurred at a time when he was not acting in his capacity as a state trooper.

[3] A state trooper is not relieved of compliance with § 81-1403(5) simply because he or she is "off duty." A police officer on "off-duty" status is obligated to preserve the public peace and to protect the lives and property of the public in general. See *State v. Wilen*, 4 Neb. App. 132, 539 N.W.2d 650 (1995), citing 16A Eugene McQuillin et al., The Law of Municipal Corporations § 45.15 (3d ed. 1992). Police officers are considered to be under a duty to respond as police officers 24 hours a day. *State v. Wilen, supra*. It has been widely held, based both on common law and statute, that a police officer is not relieved of his or her obligation to preserve the peace while off duty. *Id*. A police officer is subject to rules that regulate his or her conduct on and off duty, whether in or out of uniform. *Id*. See, *In re Appeal of Bonnett*, 216 Neb. 587, 344 N.W.2d 657 (1984); *Richardson v. City of Omaha*, 214 Neb. 97, 333 N.W.2d 656 (1983). Hauser's conduct both on and off duty was properly considered in determining whether he had violated § 81-1403(5).

Hauser's former wife testified regarding numerous occasions when Hauser had physically and/or mentally abused her. After an argument on February 3, 1998, Hauser held her to the ground by sitting on top of her. When she refused to kiss him, he bit her cheek. Later that day, she went to the home of a police officer, who took photographs of her face and persuaded her to take legal action. The officer testified regarding the incident and to the authenticity of the photographs.

Following an argument, on June 10, 1998, Hauser restrained his spouse by sitting on her. He held her in this position for 35 to 40 minutes and then grabbed her face and mouth with such force

that an area from her chin to her nose was badly bruised. A coworker testified to seeing the bruising the next day at work.

On September 26, 1998, after an argument, Hauser slapped his wife's face repeatedly and grabbed her by the neck, which caused her to collapse. When Hauser's son arrived on the scene, Hauser stated that he thought he had killed her. A 911 call was made, but was later canceled. Two police officers arrived later in the evening, and Hauser told them that he and his wife had argued but that there was no physical contact.

At some point in October 1998, Hauser and his wife got into an argument while he was on duty in his patrol car. He became angry and grabbed one of her hands as if he was trying to break it. He also put his arm around her neck and squeezed it.

After an argument, on November 30, 1998, Hauser grabbed his wife and threw her off the bed. He then sat on top of her. After Hauser got up, she attempted to leave the room, at which time he grabbed her again and refused to let her go.

In December 1998, after another argument, Hauser refused to let his spouse leave the room. He spit in her face, pushed her up against a wall, and used his tongue to smear the spittle around her face. As she tried to leave the room, he slammed her into the doorframe. After she was allowed to leave, he caught up with her and grabbed her inappropriately.

Hauser argues that Neb. Rev. Stat. § 81-2005 (Reissue 1999) was the only statutory authority that set forth the duties of a state trooper. He claims his behavior did not constitute a neglect of any one of these duties or any duty promulgated under the APA. Hauser's reliance on § 81-2005 is misplaced. Section 81-2005 enumerates the powers but not necessarily all of the duties of a state trooper. As we have stated above, the State Patrol's internal policies and oath of office may be used to determine the duties of a trooper.

The State Patrol's code of ethics requires that a trooper "keep [his] private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. [A trooper is to be] [h]onest in thought and deed in both [his] personal and official life." The canons of police ethics, which are incorporated into the State Patrol's code of ethics, state that

> [t]he primary responsibility of the police service, and of the individual officer, is the protection of the people of the United States through the upholding of their laws . . . .
>
> . . . .
>
> . . . Laxity of conduct or manner in private life, expressing either disrespect for the law or seeking to gain special privilege, cannot but reflect upon the police officer and the police service. The community and the service require that the law enforcement officer lead the life of a decent and honorable person.

The State Patrol's code of conduct prescribes that

> [e]mployees shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the Nebraska State Patrol. Conduct unbecoming shall include that which brings the State Patrol into disrepute or reflects discredit upon the employee as a member of the Nebraska State Patrol . . . .

The evidence of Hauser's abuse of his former spouse showed clearly and convincingly that he neglected his duties in violation of § 81-1403(5).

We do not reach the issue of whether Hauser's conduct established emotional incapacity. It is not necessary to prove both neglect of duty and emotional incapacity in order to revoke a law enforcement certificate. The evidence of Hauser's neglect of duty was enough to justify the revocation. One cannot continually engage in a pattern of assaultive behavior toward one's spouse and not be in violation of § 81-1403(5), which justifies the revocation of one's law enforcement certificate.

[4] A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Lein v. Nesbitt, ante* p. 109, 690 N.W.2d 799 (2005). 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 not arbitrary, capricious, or unreasonable. *Id.* 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.* The district court's decision

affirming the revocation of Hauser's law enforcement certificate conformed to the law, was supported by competent evidence, and was not arbitrary, capricious, or unreasonable.

Due Process and Retroactive Application

Hauser's final assignments of error concern the district court's failure to find a procedural due process violation stemming from the Attorney General's participation in the hearing process and the retroactive application of a change in the law.

Hauser claims that his due process rights were violated because the Attorney General acted as a hearing officer during the revocation proceedings. He argues that the Attorney General should have appointed a special assistant attorney general to represent Hauser and another special assistant to act as the hearing officer for the Council. He asserts that this approach would have allowed the Attorney General to fulfill his duty as a voting member of the Commission and preserve the impartiality of the revocation proceedings.

Hauser also claims that the rule requiring certification for employment with the State Patrol was improperly applied retroactively to him. He contends that prior to July 1, 2000, § 81-1401 et seq. (Reissue 1999) did not require a law enforcement certificate as a necessary prerequisite to performing law enforcement duties or maintaining a job as a law enforcement officer. Hauser claims that under the prior legislation, a law enforcement officer could have his certificate revoked but still hold and exercise the powers of his existing law enforcement position.

Pursuant to 2000 Neb. Laws, L.B. 994, § 2, which became effective July 13, 2000, "[a] law enforcement officer shall possess a valid law enforcement officer certificate or diploma, as established by the council, in order to be vested with the authority of this section . . . ." Hauser contends that the amendment was improperly applied because the complaint against him was first processed on September 8, 1999. He claims therefore that he has a constitutional right not to have his employment terminated by a statutory change which if applied retroactively would impair or interfere with his vested rights.

The issues of due process and the alleged improper application of L.B. 994 were not presented to the Council or the Commission. Hauser's petition for review by the district court alleged:

> [T]he actions of the Defendant Council and Defendant Commission and each of them violated and prejudiced the substantial rights of the Plaintiff Hauser because such agency decision is:
>
> (i) In violation of constitutional provisions;
>
> (ii) In excess of the statutory authority or jurisdiction of the agency;
>
> (iii) Made upon unlawful procedure;
>
> (iv) Affected by other error of law;
>
> (v) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review;
>
> (vi) Arbitrary or capricious; or
>
> (vii) In violation of Neb. Rev. Stat. §84-1413 (Reissue 1999).

[5] These general allegations did not establish that the issues in question were presented to and considered by the district court. Thus, the district court did not have the opportunity to analyze the issues or reach a decision regarding them. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Scurlocke v. Hansen*, 268 Neb. 548, 684 N.W.2d 565 (2004). Therefore, we decline to consider Hauser's final assignments of error.

CONCLUSION

For the reasons set forth in this opinion, the judgment of the district court is affirmed.

AFFIRMED.

DOUGLAS COUNTY, NEBRASKA, APPELLEE, V. JOSUE ANAYA AND MARY ANAYA, HUSBAND AND WIFE, AS PARENTS OF ROSA ARIEL ANAYA, A MINOR CHILD, APPELLANTS.

694 N.W.2d 601

Filed March 25, 2005. No. S-03-1446.

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. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Civil Rights: Words and Phrases.** The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.
4. **Words and Phrases.** The exercise of religion involves not only belief and profession but the performance of, or abstention from, physical acts.
5. **Civil Rights: Statutes.** The right of free exercise of religion does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes.
6. ____: ____. A law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.
7. ____: ____. A law is neutral and of general applicability if it does not aim to infringe upon or restrict practices because of their religious motivation and if it does not in a selective manner impose burdens only on conduct motivated by religious belief.
8. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
9. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Amy L. Mattern, of Whitner Law Firm, P.C., L.L.O., for appellants.

Stuart J. Dornan, Douglas County Attorney, Brent Bloom, and Megan Hottman, Senior Certified Law Student, for appellee.

Amy A. Miller for amici curiae American Civil Liberties Union Foundation of Nebraska and Louise and Ray Spiering.

Patrick J. Phipps, of Metcalf, Thompson & Phipps, for amici curiae Children's Healthcare Is a Legal Duty et al.

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

WRIGHT, J.

NATURE OF CASE

The Douglas County District Court ordered Josue Anaya and Mary Anaya to submit their daughter to testing for metabolic diseases as required by Neb. Rev. Stat. § 71-519 (Cum. Supp. 2002).

The Anayas appeal, asserting that § 71-519 violates their rights guaranteed under the 1st and 14th Amendments to the U.S. Constitution and that the issue is moot.

SCOPE OF REVIEW

[1,2] 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. *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id*.

FACTS

Rosa Ariel Anaya was born in the Anayas' home, without a physician present, on July 11, 2003. The birth was reported to the Department of Health and Human Services (DHHS) on July 17.

In August 2003, a DHHS employee received Rosa Anaya's birth certificate, checked DHHS' database, and determined that the testing for metabolic diseases required by § 71-519 had not been performed. A certified letter was sent to the Anayas explaining the statute's requirements. Enclosed with the letter was a brochure detailing the screening process, which included drawing a small amount of blood from the heel of the infant to be tested. The Anayas declined to submit Rosa Anaya for the screening, stating that it was in direct conflict with their sincerely held religious beliefs that life is taken from the body if blood is removed from it and that a person's lifespan may be shortened if blood is drawn.

Douglas County brought an action seeking to compel the Anayas to comply with § 71-519. At a hearing on September 26, 2003, Mary Anaya testified as to the Anayas' religious beliefs.

The Anayas subsequently filed a motion for judicial exemption from prosecution and dismissal of the petition. They alleged that it was impossible for them to comply with § 71-519 because 70 days had passed since the birth was registered and DHHS regulations required that the testing be completed within 48 hours of the registration of the birth if the birth was not attended by a physician. They also claimed the statute violated the 14th Amendment to the U.S. Constitution.

The district court found that the State has a compelling state interest in the screening of infants for metabolic diseases and that the Anayas' religious beliefs did not outweigh the State's compelling interest that "these children can grow and develop to be free of a metabolic disease particularly in light of the minimal invasion of the blood test administration which is merely a pinprick to the child's heel." The court rejected the Anayas' claim that the issue was moot due to Rosa Anaya's age. Although testing procedures are most effective when administered shortly after birth, the court found that it was not too late to administer the test even if Rosa Anaya was 6 months of age or older. The court ordered the Anayas to comply with § 71-519 by submitting Rosa Anaya for metabolic screening forthwith.

ASSIGNMENTS OF ERROR

The Anayas assert that the district court incorrectly held that the State has a compelling interest which outweighs their First Amendment right to free exercise of religion and their fundamental rights as parents. They also assign as error the court's determination that the issue was not moot.

ANALYSIS

CONSTITUTIONAL REVIEW

The Anayas argue that § 71-519 infringes upon their First Amendment right to freely exercise their religion and that the district court erred in concluding that the State had shown a compelling interest which justifies the infringement.

[3,4] "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). The " 'exercise of religion' " involves "not only belief and profession but the performance of (or abstention from) physical acts . . . ." *Smith*, 494 U.S. at 877.

The statute which the Anayas challenged provides:

> (1) All infants born in the State of Nebraska shall be screened for phenylketonuria, primary hypothyroidism, biotinidase deficiency, galactosemia, hemoglobinopathies, medium-chain acyl co-a dehydrogenase (MCAD) deficiency,

> and such other metabolic diseases as [DHHS] may from time to time specify. . . .
>
> (2) . . . If a birth is not attended by a physician and the infant does not have a physician, the person registering the birth shall cause such tests to be performed within the period and in the manner prescribed by [DHHS].

§ 71-519. When Rosa Anaya was born, regulations prescribed by DHHS provided that if a birth was not attended by a physician and "the tests have not been performed within 48 hours of birth as otherwise required by these regulations, the person registering the birth must cause newborn screening tests for metabolic diseases to be performed within 48 hours of registration of the birth." 181 Neb. Admin. Code, ch. 2, § 008 (2002).

The Anayas argue that because they have raised a free exercise of religion claim along with a parental substantive due process claim, they have a hybrid constitutional rights claim, which requires strict scrutiny review. Under a strict scrutiny review, the law must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). The Anayas claim *Smith* held that strict scrutiny is required in cases in which a free exercise claim has been raised along with a claim of violation of another constitutional right.

[5] In *Smith*, the claimants ingested peyote during a religious ceremony and were subsequently dismissed from their employment because Oregon law prohibited use of the drug. The question was whether the state's prohibition was permissible under the Free Exercise Clause. In upholding the Oregon law, the Court stated that it had never held that an individual's religious beliefs excused him from compliance with an otherwise valid law prohibiting conduct that a state is free to regulate. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes . . . .' " *Smith*, 494 U.S. at 879, citing *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (Stevens, J., concurring in judgment).

We do not read *Smith* as supporting the Anayas' claim concerning strict scrutiny. Although *Smith* discussed prior decisions that involved not only the Free Exercise Clause but other constitutional provisions, the Court did not hold that a strict scrutiny review is required simply because more than one constitutional right might be implicated.

[6] In *Hialeah*, the Court again held that to be found constitutional, a neutral law of general applicability does not require demonstration of a compelling governmental interest. "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Hialeah*, 508 U.S. at 531.

Federal courts have also discussed hybrid rights claims. In *Swanson By and Through Swanson v. Guthrie ISD I-L*, 135 F.3d 694 (10th Cir. 1998), the federal court addressed an argument that a school policy violated a home-schooled student's free exercise rights and the parents' right to direct her education. The court stated: "[W]e believe that simply raising such a claim is not a talisman that automatically leads to the application of the compelling-interest test." *Id*. at 699. "[I]t cannot be true that a plaintiff can simply invoke the parental rights doctrine, combine it with a claimed free-exercise right, and thereby force the government to demonstrate the presence of a compelling state interest." *Id*. at 700.

In *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999), the court stated, "[W]e recently held that, to assert a hybrid-rights claim, 'a free exercise plaintiff must make out a "colorable claim" that a companion right has been violated—that is, a "fair probability" or a "likelihood," but not a certitude, of success on the merits.' " The court further stated that "a plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right or a claim of an alleged violation of a non-fundamental or non-existent right." *Id*. at 1208. See, also, *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D.

Ark. 2002) (court found that case did not present hybrid rights theory).

In rejecting the idea of strict scrutiny analysis for hybrid rights claims, the U.S. Court of Appeals for the Sixth Circuit has stated:

> Such an outcome is completely illogical; therefore, at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause.

Kissinger v. Board of Trustees, 5 F.3d 177, 180 (6th Cir. 1993).

We conclude that the Anayas' assertion of a hybrid rights claim does not implicate a strict scrutiny review of § 71-519. A party may not force the government to meet the strict scrutiny standard by merely asserting claims of violations of more than one constitutional right.

The second constitutional rights violation asserted by the Anayas seems to suggest that § 71-519 violates their rights as parents to make decisions concerning the upbringing of their children. They rely upon *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

In *Pierce*, the Court held that a compulsory education law deprived parents of the right to select a school for their children. It held that the Oregon compulsory education statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534-35. The Court concluded that the challenged law served no state interest and therefore had no reasonable relation to any state purpose.

In *Yoder*, the Court held that a state could not compel Amish parents to require their children to attend formal high school and that the compulsory education law violated the 1st and 14th Amendments. The Court noted that no harm to the physical or mental health of the child was inferred but that when the health and safety of a child was involved, different considerations applied.

> To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under

> *Prince* [*v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944),] if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

Yoder, 406 U.S. at 233-34. The Court did not conclude that strict scrutiny was required.

It is true that "the custody, care and nurture of the child reside first in the parents." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944). However, the Court has never held that parental rights to childrearing as guaranteed under the Due Process Clause of the 14th Amendment must be subjected to a strict scrutiny analysis. See *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). "[T]he Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny." *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 533 (1st Cir. 1995). *Pierce* and *Yoder* do not support an inference that parental decisionmaking requires a strict scrutiny analysis.

The question is not whether the Anayas have set forth a hybrid rights claim but whether the law they have challenged is neutral and has general application.

This case is analogous to cases in which courts have upheld the state's right to require immunization of children. In *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002), the court upheld the constitutionality of an immunization statute, finding that the free exercise claim challenged a neutral law of general applicability. The law applied to all school children except those whose health would be endangered by immunization. Because the law was neutral, heightened scrutiny was not required even though compulsory immunization might burden a plaintiff's right to free exercise.

The court stated, "It is well established that the State may enact reasonable regulations to protect the public health and the public safety, and it cannot be questioned that compulsory immunization is a permissible exercise of the State's police power." *Id.* at 954. Society's interest in protecting against the spread of disease takes precedence over parental rights and the right to free exercise of religion. *Id.*

In *Prince*, 321 U.S. at 166-67, the Court held that

> neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and . . . this includes, to some extent, matters of conscience and religious conviction.

[7] A law is neutral and of general applicability "if it does not aim to 'infringe upon or restrict practices because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by religious belief[.]' " *San Jose Christian College v. Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004), quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). Section 71-519 is a neutral law of general applicability. It is generally applicable to all babies born in the state and does not discriminate as to which babies must be tested. Its purpose is not directed at religious practices or beliefs. Pursuant to *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), and its progeny, a neutral law of general applicability need not be supported by a compelling governmental interest even though it may have an incidental effect of burdening religion.

Section 71-519 does not contain a system of particularized exemptions that allow some children to be excused from testing. See *Kissinger v. Board of Trustees*, 5 F.3d 177 (6th Cir. 1993). The statute does not unlawfully burden the Anayas' right to freely exercise their religion, nor does it unlawfully burden their parental rights. Section 71-519 cannot be construed as directly

regulating religious-based conduct. See *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991). There is no evidence that the State had an antireligious purpose in enforcing the law. See *id.*

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. *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

We conclude that the effect of § 71-519 upon the constitutional claims the Anayas have asserted is properly analyzed under a rational basis review. Evidence was presented concerning the effects of the diseases that are tested for under the statute. Early diagnosis allows for prevention of death and disability in children. The State has determined that it is appropriate to test for these diseases soon after a child is born in order to address treatment options. The health and safety of the child are of particular concern, as are the potential social burdens created by children who are not identified and treated.

The State has an interest in the health and welfare of all children born in Nebraska, and the purpose of § 71-519 is to protect such health and welfare. This is a rational basis for the law, and it is constitutional.

MOOTNESS

The Anayas argue that the case is moot because the testing was not performed within 48 hours of Rosa Anaya's birth or within 48 hours after the birth was registered. There is no merit to the Anayas' claim. One cannot refuse to comply with testing required within a particular timeframe and then claim that the case is moot because the time has passed.

Although the value of metabolic screening may decline as the child ages, the test results can prove helpful in preventing death or retardation later in development. The program manager for DHHS' newborn screening program testified that some of the conditions occur rapidly after birth and others occur later in childhood. Early diagnosis allows for prevention of death and disability in newborns and children. If a child is not born in a hospital

and the testing is conducted outside the 48-hour timeframe, some of the benefit of treatment is reduced, but further damage can be prevented. It is not possible to determine if a child has any of these conditions by the appearance of the child.

A medical doctor testified concerning the diseases identified in § 71-519. Phenylketonuria, referred to as "PKU," is an inherited metabolic condition due to a genetic absence of an enzyme. The condition creates an abnormal buildup of amino acid that interferes with the growth of nerve cells in the brain, which is critical in the very first weeks and months of an infant's life. Abnormal chemistry is present and can be diagnosed within hours of birth. Any damage occurs within the first few weeks of life, but clear evidence may not be seen until the second half of the first year. Treatment is a special diet that allows children to develop normally.

Hypothyroidism results in a loss of thyroid function and in newborns causes the brain not to develop, resulting in profound mental retardation and developmental delays. An infant with hypothyroidism would not grow well, and the condition would be obvious within a few weeks of birth.

Galactosemia is a condition due to a missing enzyme. Babies without the enzyme quickly become jaundiced and droopy, and they may have a bloodstream infection that kills them within days.

Biotinidase is an enzyme that helps to conserve a B vitamin. A person who lacks the enzyme can develop acidosis, blindness, mental retardation, seizures, and deafness. Treatment is inexpensive and inoffensive. Signs and symptoms of this disease do not manifest early or at a predictable time. A child who is deficient in biotinidase will probably become symptomatic during the first year, and a child who is partially deficient might become symptomatic during childhood or adolescence.

Hemoglobinopathies can result in diseases including thalassemia and sickle cell disease, which are readily diagnosable and at least partially correctable. Newborns with these diseases are susceptible to bloodstream infections during the first year of life. Symptoms include a low blood count and sometimes an enlarged spleen, which would generally be assessed by a physician.

MCAD, medium chain acyl-CoA dehydrogenase deficiency, is due to the absence of an enzyme that is responsible for burning

body fat. MCAD may appear in the first few days or weeks of life or during a childhood illness with fever and vomiting. It can be seen in school-age children. Remedial measures include educating the parents and the child's physician as to the condition and the risks and giving the child a dietary supplement. An episode of severe flu-like symptoms can result in brain damage.

[8,9] A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004). A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004).

The issue of whether metabolic screening can be required pursuant to state law is not moot. Were we to determine that the issue of testing is moot because testing has not been completed in the case at bar, we would create a loophole allowing parents to avoid compliance with § 71-519.

The testimony of expert witnesses demonstrated that there is value in testing a child even beyond the 48-hour period immediately after birth. Although some of the conditions would have already manifested themselves, others can develop later in life.

In our review of a question of law, this court has an obligation to resolve the question independently of the conclusion reached by the trial court. See *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004). The record demonstrates that even if metabolic screening is completed beyond the first 48 hours of life, it is still important for the health and welfare of the child. Steps can be taken to treat any condition detected. The district court was correct in finding that the issue is not moot.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

AMERITAS INVESTMENT CORP., A NEBRASKA CORPORATION, AND AMERITAS LIFE INSURANCE CORP., A NEBRASKA CORPORATION, APPELLANTS, V. DIANA MCKINNEY, APPELLEE.

694 N.W.2d 191

Filed March 25, 2005. No. S-04-152.

1. **Jurisdiction: Proof.** The party seeking to establish the court's in personam jurisdiction carries the burden of proof, and the burden does not shift to the party challenging jurisdiction.
2. ____: ____. While the plaintiffs bear the ultimate burden of proof, personal jurisdiction need not be proved by a preponderance of the evidence until trial or until the court holds an evidentiary hearing.
3. **Motions to Dismiss: Jurisdiction.** To defeat a motion to dismiss for lack of personal jurisdiction, the nonmoving party need only make a prima facie showing of jurisdiction.
4. **Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** When reviewing an order dismissing a party from a case for lack of personal jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2002), an appellate court examines the question whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.
5. **Jurisdiction: Judgments: Appeal and Error.** An appellate court reviews a lower court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party.
6. **Pleadings: Affidavits: Appeal and Error.** If the lower court does not hold a hearing and instead relies on the pleadings and affidavits, then an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.
7. **Constitutional Law: Jurisdiction: States.** Neb. Rev. Stat. § 25-536 (Reissue 1995) extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.
8. **Constitutional Law: Due Process.** The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations.
9. **Due Process: Jurisdiction.** By requiring that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.
10. **Due Process: Jurisdiction: States.** Generally, an analysis of personal jurisdiction under the Due Process Clause requires a court to determine whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
11. **Due Process: Jurisdiction.** Where stipulated forum selection provisions have been obtained through freely negotiated agreements and are not unreasonable and unjust, their enforcement does not offend due process.

12. **Jurisdiction: States: Contracts: Waiver.** A valid and enforceable choice of forum clause in a contract is sufficient in itself to waive the requirement of minimum contacts and to submit a nonresident to the jurisdiction of the forum state.
13. **Jurisdiction: Contracts.** A minimum contacts analysis is not appropriate in determining the validity of forum selection clauses in commercial contracts.
14. **Due Process: Jurisdiction: Contracts.** Due process is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause.
15. **Due Process: Jurisdiction: States: Contracts.** Where the exercise of personal jurisdiction is based upon a contractual choice of forum clause and is challenged on due process grounds, any forum selection clause that satisfies the Model Uniform Choice of Forum Act, Neb. Rev. Stat. § 25-413 et seq. (Reissue 1995), will also comport with due process, and permit a Nebraska court to exercise jurisdiction under the long-arm statute. If the forum selection clause is not valid under the Model Uniform Choice of Forum Act, however, the inquiry moves to whether the defendant has the necessary minimum contacts with Nebraska, other than the forum selection clause, to satisfy due process.
16. **Courts: Jurisdiction: Contracts.** Where a choice of forum clause is a necessary component of the court's exercise of personal jurisdiction, then the court would have no jurisdiction but for the fact that the parties have consented to its exercise by the choice of forum agreement, and the standards contained in the Model Uniform Choice of Forum Act, Neb. Rev. Stat. § 25-413 et seq. (Reissue 1995), apply.
17. **Jurisdiction: Contracts: Rules of the Supreme Court: Pleadings.** Neb. Rev. Stat. § 25-414 (Reissue 1995) raises a jurisdictional barrier to the enforcement of a contractual choice of forum clause that does not meet the Model Uniform Choice of Forum Act's requirements, making a motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2002) proper.
18. **Jurisdiction: Statutes: Words and Phrases.** The language of Neb. Rev. Stat. § 25-414 (Reissue 1995) was intended to prevent a court from exercising jurisdiction where that exercise would result in injustice or in substantial inconvenience to the parties.
19. **Jurisdiction: States.** The doctrine of forum non conveniens (literally, "an unsuitable court") provides that a state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action, provided that a more appropriate forum is provided to the plaintiff.
20. **Jurisdiction: Words and Phrases.** The doctrine of forum non conveniens refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum.
21. **Courts: Jurisdiction.** A plaintiff's choice of a forum should not be disturbed except for weighty reasons, and only when trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to the plaintiff's convenience, or when the forum is inappropriate because of considerations affecting the court's own administrative and legal problems.
22. **Courts: Jurisdiction: States.** The trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, the ability to

secure attendance of witnesses through compulsory process, and the advantages of having trial in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

23. **Jurisdiction: Proof.** In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his or her home forum will normally outweigh the inconvenience the defendant may have shown.
24. **Jurisdiction.** Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
25. **Appeal and Error.** An issue not presented to or decided by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

David M. Williams for appellants.

Patrick G. Vipond and Stacy L. Morris, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

GERRARD, J.

Diana McKinney, a resident of Virginia, was sued in the district court for Lancaster County by a Nebraska financial services corporation for damages arising out of McKinney's agency relationship with the corporation. The action was dismissed after McKinney challenged the court's personal jurisdiction over her. The question presented in this appeal is whether the choice of forum clauses contained in McKinney's agency contracts provide a prima facie showing that a Nebraska court may exercise personal jurisdiction over McKinney. Because we conclude they do, we reverse the judgment of the district court and remand the cause for further proceedings.

BACKGROUND

The facts relevant to the jurisdictional issue presented in this appeal are largely undisputed. On November 1, 1998, McKinney entered into a "General Agent Contract" with Ameritas Life Insurance Corp. (ALIC), a Nebraska corporation. On December

1, McKinney entered into a "Securities Sales Agreement and Registered Representative Contract Commission Schedule" with Ameritas Investment Corp. (AIC), also a Nebraska corporation. (ALIC and AIC will be referred to collectively as "Ameritas.")

McKinney, a resident of Virginia, had been approached by Ameritas in Virginia about becoming an Ameritas agent. McKinney received and executed the contracts, for her part, in Virginia. The contracts were executed on behalf of Ameritas in Lincoln, Nebraska.

The ALIC contract required McKinney to indemnify ALIC for any disbursements made for claims against McKinney. Each contract also contained a nearly identical forum selection clause: "Any and all suits for the construction, interpretation, validity or enforcement of this Contract shall be instituted and maintained in any court of competent jurisdiction in Lancaster County, State of Nebraska." The contracts provided that they were to "be construed in accordance with the laws of the State of Nebraska."

By virtue of the contracts, McKinney became an independent agent licensed to sell Ameritas financial products. The contracts were to be performed only in the states where McKinney was licensed to sell Ameritas financial products: Virginia, California, Florida, and Maryland. McKinney is not licensed to sell Ameritas financial products in Nebraska, nor has she solicited a Nebraska resident in an attempt to sell Ameritas financial products. McKinney has never owned property in Nebraska, maintained an office in Nebraska, held a bank account in Nebraska, or been to Nebraska for any reason.

McKinney's immediate supervisor at ALIC was a vice president whose office is located in Nebraska. McKinney's supervisor visited her in Virginia on several occasions. The Ameritas policies sold by McKinney were processed in and issued from Nebraska, after McKinney sent the applications for those policies to Ameritas' Nebraska offices. If McKinney needed information on a policy, she would normally have obtained that information from Ameritas' Nebraska offices, and she was issued a personal identification number that allowed her to access policy information retained in Nebraska. All accounting functions pertaining to McKinney's commissions were handled in Lincoln, Nebraska, and McKinney was paid from Ameritas' Lincoln

offices. All the records pertaining to McKinney's business relationship with Ameritas are retained in Nebraska.

In 2002, Ursula White, a resident of Virginia lodged a complaint with Ameritas based on alleged conduct arising out of McKinney's sale of Ameritas financial products in Virginia. Ameritas employees in Nebraska settled the complaint. Ameritas then filed a complaint against McKinney in the district court, seeking $22,886.87 as indemnification for its settlement with White. McKinney filed a motion to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2002), asserting that the court lacked personal jurisdiction over her pursuant to the Nebraska long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 1995), and the Model Uniform Choice of Forum Act (Choice of Forum Act), Neb. Rev. Stat. § 25-413 et seq. (Reissue 1995). The record, for purposes of this motion, consisted of the pleadings, contracts, and affidavits proffered by the parties.

The district court agreed with McKinney, concluding that the case should be dismissed because Nebraska was not a "reasonably convenient place" for trial of the action. See § 25-414. The court found that "[a]lthough the complaint in this case does not go into the details of the dispute, it is clear that the primary evidence will be the testimony of the disgruntled policy holder . . . ." The court found that White "cannot be compelled to attend a trial in Nebraska and it would be much more difficult for a judge or jury to evaluate the credibility of [White's] testimony without seeing her in person." Concluding that the action should be tried in Virginia, the court sustained McKinney's motion to dismiss. Ameritas appeals.

ASSIGNMENTS OF ERROR

Ameritas assigns, consolidated and restated, that the district court erred in (1) finding that § 25-414 was applicable and using the "reasonably convenient place for trial" standard, (2) not using the "gravely difficult and inconvenient" standard, and (3) not finding it had personal jurisdiction over McKinney.

STANDARD OF REVIEW

This court has not previously discussed the standard of review for a motion to dismiss for lack of personal jurisdiction filed

under rule 12(b)(2). Because the new civil rules for notice pleading are modeled after the Federal Rules of Civil Procedure, we look to the federal decisions for guidance. *Kellogg v. Nebraska Dept. of Corr. Servs., ante* p. 40, 690 N.W.2d 574 (2005).

[1-3] The party seeking to establish the court's in personam jurisdiction carries the burden of proof, and the burden does not shift to the party challenging jurisdiction. *Epps v. Stewart Information Services Corp.*, 327 F.3d 642 (8th Cir. 2003). But while the plaintiffs bear the ultimate burden of proof, personal jurisdiction need not be proved by a preponderance of the evidence until trial or until the court holds an evidentiary hearing. *Id.* See, also, *Northrup King v. Compania Productora Semillas*, 51 F.3d 1383 (8th Cir. 1995). To defeat a motion to dismiss for lack of personal jurisdiction, the nonmoving party need only make a prima facie showing of jurisdiction. *Epps v. Stewart Information Services Corp., supra.* See, also, *Northrup King v. Compania Productora Semillas, supra.*

[4-6] When reviewing an order dismissing a party from a case for lack of personal jurisdiction under rule 12(b)(2), an appellate court examines the question whether the nonmoving party has established a prima facie case of personal jurisdiction de novo. See *Stanton v. St. Jude Medical, Inc.*, 340 F.3d 690 (8th Cir. 2003). See, also, *Epps v. Stewart Information Services Corp., supra* (Fed. R. Civ. P. 12(b)(2) motions are reviewed de novo); *Northrup King v. Compania Productora Semillas, supra*. An appellate court reviews a lower court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party. *Stanton v. St. Jude Medical, Inc., supra*. If the lower court does not hold a hearing and instead relies on the pleadings and affidavits, then an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party. *Epps v. Stewart Information Services Corp., supra.*

ANALYSIS

Statutory Framework

[7] This appeal requires us to consider the relationship between the long-arm statute and the Choice of Forum Act. The long-arm statute, as relevant, provides that a Nebraska court may

exercise personal jurisdiction over a person who has "contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States." § 25-536(2). This section extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits. *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., ante* p. 222, 691 N.W.2d 147 (2005). Thus, the question presented by the long-arm statute is, generally, whether the exercise of personal jurisdiction would not offend federal principles of due process. See *id*.

[8,9] The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). By requiring that individuals have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. *Id.*

[10,11] Generally, this analysis requires us to determine whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there. See, e.g., *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003). But that analysis applies "[w]here a forum seeks to assert specific jurisdiction over an out-of-state defendant *who has not consented to suit there . . . .*" (Emphasis supplied.) See *Burger King Corp. v. Rudzewicz*, 471 U.S. at 472. In *Burger King Corp. v. Rudzewicz*, 471 U.S. at 472 n.14, however, the U.S. Supreme Court noted that

> because the personal jurisdiction requirement is a waivable right, there are a "variety of legal arrangements" by which a litigant may give "express or implied consent to the personal jurisdiction of the court." . . . For example, particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction. . . . Where such forum-selection provisions

> have been obtained through "freely negotiated" agreements and are not "unreasonable and unjust," . . . their enforcement does not offend due process.

(Citations omitted.) Absent a showing that "trial in the contractual forum will be so gravely difficult and inconvenient that [the party challenging the clause] will . . . be deprived of his [or her] day in court[,] there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his [or her] bargain." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972).

[12-14] Based on *Burger King Corp. v. Rudzewicz*, the weight of authority holds that a valid and enforceable choice of forum clause in a contract is sufficient in itself to waive the requirement of minimum contacts and to submit the nonresident to the jurisdiction of the forum state. See, e.g., *St. Paul Fire and Marine v. Courtney Enterprises*, 270 F.3d 621 (8th Cir. 2001); *Menorah Ins. Co., Ltd. v. INX Reinsurance Corp.*, 72 F.3d 218 (1st Cir. 1995); *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994); *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286 (7th Cir. 1989); *Eli Lilly and Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir. 1986); *Jacobsen Const. Co., Inc. v. Teton Builders*, 106 P.3d 719 (Utah 2005); *Kennecorp v. Country Club Hosp.*, 66 Ohio. St. 3d 173, 610 N.E.2d 987 (1993); *Vanier v. Ponsoldt*, 251 Kan. 88, 833 P.2d 949 (1992); *CV Holdings, LLC v. Bernard Technologies*, 14 A.D.3d 854, 788 N.Y.S.2d 445 (2005); *Desai Patel Sharma v. Don Bell Industries*, 729 So. 2d 453 (Fla. App. 1999); *Phoenix Leasing, Inc. v. Kosinski*, 47 Conn. App. 650, 707 A.2d 314 (1998); *Voicelink Data v. Datapulse*, 86 Wash. App. 613, 937 P.2d 1158 (1997); *Kohler Co. v. Wixen*, 204 Wis. 2d 327, 555 N.W.2d 640 (Wis. App. 1996). It can hardly be said that a defendant cannot reasonably anticipate being haled into court in a jurisdiction identified by a valid forum selection clause. Thus, a minimum contacts analysis is not appropriate in determining the validity of forum selection clauses in commercial contracts. *Kennecorp v. Country Club Hosp., supra.* Instead, due process is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause. See *St. Paul Fire and Marine v. Courtney Enterprises, supra*.

Under Nebraska law, the enforceability of a forum selection clause is evaluated by the terms of the Choice of Forum Act.

> If the parties have agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state will entertain the action if (a) the court has power under the law of this state to entertain the action; (b) this state is a reasonably convenient place for the trial of the action; (c) the agreement as to the place of the action was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; and (d) the defendant, if within the state, was served as required by law of this state in the case of persons within the state or, if without the state, was served either personally or by certified mail directed to his last-known address.

§ 25-414. This section applies "where the court would have no jurisdiction but for the fact that the parties have consented to its exercise by the choice-of-forum agreement." See Handbook of the National Conference of Commissioners on Uniform State Laws, Model Choice of Forum Act § 2, comment at 220 (1968).

[15] Consequently, where the exercise of personal jurisdiction is based upon a contractual choice of forum clause and is challenged on due process grounds, we must determine whether the choice of forum clause at issue satisfies the requirements of the Choice of Forum Act and the Due Process Clause. But as a practical matter, any forum selection clause which meets the Choice of Forum Act's requirement that Nebraska be a "reasonably convenient place for the trial of the action" will also satisfy the Due Process Clause requirement that trial of the action in Nebraska not be so gravely difficult and inconvenient that the party challenging the clause will be deprived of his or her day in court. See, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). Therefore, any forum selection clause that satisfies the Choice of Forum Act will also comport with due process, and permit a Nebraska court to exercise jurisdiction under the long-arm statute. If the forum selection clause is not valid under the

Choice of Forum Act, however, the inquiry moves to whether the defendant has the necessary minimum contacts with Nebraska, other than the forum selection clause, to satisfy due process. See *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., ante* p. 222, 691 N.W.2d 147 (2005).

[16] Returning to Ameritas' arguments, we find that the foregoing analysis is dispositive of Ameritas' arguments in support of its first two assignments of error that the district court erred in applying the Choice of Forum Act's standards to the present case. Ameritas does not contend that absent the forum selection clauses, McKinney had the necessary minimum contacts with Nebraska to satisfy due process. Instead, Ameritas contends that in addition to the forum selection clauses, McKinney had other contacts with Nebraska that *taken together* would meet due process requirements. Thus, Ameritas claims that because the choice of forum clauses were not the "only" basis for the exercise of jurisdiction, the Choice of Forum Act should not have been applied. But where a choice of forum clause is a necessary component of the court's exercise of personal jurisdiction, it is clear that "the court would have no jurisdiction but for the fact that the parties have consented to its exercise by the choice-of-forum agreement." See Handbook of the National Conference of Commissioners on Uniform State Laws, *supra*, comment at 220. In short, since the court's exercise of jurisdiction in this case is dependent on the validity of the choice of forum clauses, the court did not err in applying the standards contained in the Choice of Forum Act.

[17] We note, although it is not contested by the parties, that McKinney's challenge to the forum selection clauses was properly raised as a rule 12(b)(2) motion. Some state and federal courts have treated challenges to forum selection clauses as raising complaints of improper venue, or failure to state a claim. See, generally, *Voicelink Data v. Datapulse*, 86 Wash. App. 613, 937 P.2d 1158 (1997) (collecting cases). But under Nebraska law, § 25-414 of the Choice of Forum Act, as analyzed above, raises a jurisdictional barrier to the enforcement of a contractual choice of forum clause that does not meet the Choice of Forum Act's requirements, making a rule 12(b)(2) motion proper.

EVALUATION UNDER CHOICE OF FORUM ACT

We now turn to the basis for the district court's dismissal of this action: its conclusion that Nebraska was not a "reasonably convenient place for the trial of the action" within the meaning of § 25-414. Although the Choice of Forum Act was adopted from the Model Choice of Forum Act, see Handbook of the National Conference of Commissioners on Uniform State Laws (1968), that model act was not widely adopted, and was withdrawn in 1975, see Handbook of the National Conference of Commissioners on Uniform State Laws 100 (1975). As a result, there is little case law discussing the requirements of the Choice of Forum Act.

[18] But it is established that the language of § 25-414 was intended to prevent a court from exercising jurisdiction where that exercise "would result in injustice or in substantial inconvenience to the parties." Handbook of the National Conference of Commissioners on Uniform State Laws, Model Choice of Forum Act, prefatory note at 219 (1968). This language, together with the underlying question whether the exercise of jurisdiction is "convenient" for the parties, has sensibly been held to support the use of considerations relevant to the forum non conveniens doctrine to aid in the construction of the statute. See *First Nat. Monetary Corp. v. Chesney*, 514 F. Supp. 649 (E.D. Mich. 1980).

[19,20] The doctrine of forum non conveniens (literally, "an unsuitable court") provides that a state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action, provided that a more appropriate forum is provided to the plaintiff. See, Restatement (Second) of Conflict of Laws § 84 (1971); Black's Law Dictionary 680-81 (8th ed. 2004). It refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum. *Qualley v. Chrysler Credit Corp.*, 191 Neb. 787, 217 N.W.2d 914 (1974).

[21-24] But the plaintiff's choice of a forum should not be disturbed except for "weighty reasons," see Restatement, *supra*, comment *c.* at 251, and only when trial in the chosen forum would establish " ' "oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," ' " or when

the forum is inappropriate " ' "because of considerations affecting the court's own administrative and legal problems," ' " see *American Dredging Co. v. Miller*, 510 U.S. 443, 447-48, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994). The trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process. See *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992). It is also appropriate to consider the advantages of having trial in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. See *American Dredging Co. v. Miller, supra*. But in any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his or her home forum will normally outweigh the inconvenience the defendant may have shown. *Koster v. Lumbermens Mutual Co.*, 330 U.S. 518, 67 S. Ct. 828, 91 L. Ed. 1067 (1947). Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947).

Thus, the question presented in this appeal, considering the applicable standard of review, is whether the facts taken in the light most favorable to Ameritas establish a prima facie showing that enforcement of the forum selection clause in this case would be "reasonably convenient," that is, would not result in serious and substantial inconvenience to McKinney, considering the factors set forth above. We find, on our de novo review of the record, that Ameritas made a prima facie showing of jurisdiction and that the district court erred in granting McKinney's rule 12(b)(2) motion. We note, particularly, that Ameritas' offices are located in Nebraska and that many of the business records that may be pertinent to the trial of this action are also located in Nebraska. Compare *Woodmen of the World Life Ins. Soc. v. Kight*, 246 Neb. 619, 522 N.W.2d 155 (1994). Furthermore, the contracts at issue specify that the laws of Nebraska are to govern construction of the contracts; presumably, a Nebraska court would be in a better position to apply Nebraska law should it be required. Compare *id.*

The district court's conclusion was based mainly on its reasoning that the primary evidence would be the testimony of the complainant, White, who could not be compelled to attend a trial in Nebraska. That may or may not prove to be the case; but at this juncture, on a rule 12(b)(2) motion, it is premature to conclude that the complainant's presumed unavailability in a Nebraska courtroom would produce " ' "oppressiveness and vexation to [the] defendant . . . out of all proportion to plaintiff's convenience." ' " See *American Dredging Co. v. Miller*, 510 U.S. at 447-48. Simply stated, the question is not whether Virginia would be a *better* place for this action to be tried. The question is whether or not Nebraska would be a "reasonably convenient" place for trial of the action or, in other words, whether Nebraska would be a place so substantially inconvenient that we should disregard Ameritas' choice of this forum and the parties' previous agreement that suits arising from these contracts would be tried in Nebraska. See *Epps v. Stewart Information Services Corp.*, 327 F.3d 642 (8th Cir. 2003). The evidence present in the record before us establishes a prima facie case that Nebraska is a reasonably convenient forum.

[25] With respect to the other requirements of the Choice of Forum Act, McKinney does not contend that Nebraska lacks subject matter jurisdiction over the act or that service of process was defective. See § 25-414. McKinney does argue in her appellate brief that the forum selection clauses should be found invalid as contained in contracts of adhesion. However, there is no suggestion in the record that this argument was presented to the trial court. An issue not presented to or decided by the trial court is not appropriate for consideration on appeal. *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004). In any event, there is no evidence in the present record that would tend to show that McKinney's contracts with Ameritas were adhesion contracts.

We conclude that Ameritas' final assignment of error has merit. The district court erred in granting McKinney's rule 12(b)(2) motion to dismiss.

CONCLUSION

While the district court did not err in applying the requirements of the Choice of Forum Act to the forum selection clauses

at issue in the instant case, the court did err in concluding that the requirements of § 25-414 were not satisfied, considering the standards appropriate for ruling on a motion to dismiss pursuant to rule 12(b)(2). The judgment of the district court is therefore reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM C. PETERS, JR., RESPONDENT.

694 N.W.2d 203

Filed March 25, 2005. No. S-04-529.

SUPPLEMENTAL OPINION

Original action. Supplemental opinion: Former opinion modified.

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

PER CURIAM.

This case is before the court on the joint motion filed by William C. Peters, Jr., respondent, and the Office of the Counsel for Discipline of the Nebraska Supreme Court, relator, regarding our opinion reported at *State ex rel. Counsel for Dis. v. Peters, ante* p. 162, 690 N.W.2d 629 (2005). In response to this joint motion, we modify the opinion by withdrawing the section entitled "Conclusion," *id.* at 164, 690 N.W.2d at 631, and replacing it with the following:

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated DR 1-102(A)(1) and (5) and DR 6-101(A)(2) and that respondent should be and hereby is publicly reprimanded. We further order that

respondent be on probation for a period of 1 year, effective January 14, 2005, during which time respondent will not accept any chapter 13 bankruptcy engagements and will complete 15 hours of continuing legal education in the area of bankruptcy law, to be approved by the Counsel for Discipline. Respondent is also 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 10(P) (rev. 2003) and 23(B) (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

JAMES R. SMITH, APPELLANT, V. COLORADO ORGAN RECOVERY SYSTEM, INC., ET AL., APPELLEES.

694 N.W.2d 610

Filed April 1, 2005. No. S-02-767.

1. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
2. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
3. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
4. **Rules of Evidence.** In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
5. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
6. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
7. **Jury Instructions: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law.

8. **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.
9. **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.
10. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
11. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
12. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.
13. **Negligence: Proximate Cause.** 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.
14. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
15. **Expert Witnesses.** When an expert witness' opinion involves scientific or specialized knowledge, Nebraska courts will apply the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
16. **Trial: Courts: Expert Witnesses.** Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology can be applied to the facts in issue. In addition, the trial court must determine if the witness has applied the methodology in a reliable manner.
17. **Pleadings: Appeal and Error.** The overruling of a motion in limine is not reviewable on appeal.
18. **Pretrial Procedure: Evidence: Appeal and Error.** When a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal.
19. **Motions for New Trial: Appeal and Error.** It is not an abuse of discretion to overrule a motion for new trial that is based on errors alleged to have occurred during trial, but to which no timely objection was made.
20. **Appeal and Error.** It is not the function of an appellate court to scour the record looking for unidentified evidentiary errors.
21. **Rules of the Supreme Court: Records: Appeal and Error.** Neb. Ct. R. of Prac. 9D(1)f and g (rev. 2001) clearly requires that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief.

The failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist.

22. **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.
23. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Edward F. Fogarty, of Fogarty, Lund & Gross, and Marc Humphrey, of Humphrey Law Firm, for appellant.

John A. Svoboda, of Gross & Welch, P.C., for appellee Nebraska Organ Retrieval System, Inc.

Michael F. Kinney and Martin V. Klein, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Dr. Everett Spees.

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

GERRARD, J.

BACKGROUND

In 1994, James R. Smith, the plaintiff, was living in Omaha, Nebraska, and awaiting a liver transplant operation. A donor liver became available from a gunshot victim in Denver, Colorado. The donor liver was recovered from the donor at Denver General Hospital by Dr. Everett Spees, medical director for Colorado Organ Recovery System, Inc. (CORS).

When a liver is recovered, it is flushed twice while still in the donor's body, and then again after removal, before it is placed in a preservative solution for transport. There are two different solutions that may be used for flushing and preservation. "Euro-Collins" solution (EC) can be used, but the transplant should then occur within 6 hours. University of Wisconsin solution (UW) was invented after EC and allows for a longer period of preservation prior to transplant.

In this instance, concerned about a shortage of UW, Spees performed the initial flush of the donor liver with EC, and the second

flush was performed with UW. The liver was removed from the donor, flushed again with UW, and placed in UW for transport. These procedures were described in the donor information records that accompanied the liver for transport.

The liver was transported by CORS to a Denver airport and flown to Omaha. The liver was picked up from an Omaha airport by an employee of Nebraska Organ Retrieval System, Inc. (NORS). He transported the liver from the Omaha airport to the University of Nebraska Medical Center (UNMC), where it was transplanted into Smith. Neither the employee nor UNMC reviewed the donor information records prior to the transplant operation.

After a transplant was performed on Smith by Dr. Byers Shaw, the liver failed to function, and Smith was supported by extracorporeal porcine and cadaver livers until another donor liver became available. Smith received a second, functional liver approximately a week later, but allegedly suffered health problems as a result of the first transplant surgery.

Smith sued, inter alia, Spees, CORS, and NORS. Smith alleged that Spees and CORS had been negligent in flushing the liver with EC and in failing to specifically notify NORS that EC had been used. Smith alleged that NORS had been negligent in not reviewing the donor information records and notifying UNMC that EC had been used.

Prior to trial, the district court sustained NORS' motion for summary judgment. The court determined that there was no evidence establishing a duty on the part of NORS to review the donor information records.

The case proceeded to a jury trial on Smith's claims against Spees and CORS. The jury found that Spees and CORS had been negligent; however, the jury also found, pursuant to a special verdict form, that the use of EC was not a proximate cause of Smith's damages. The jury specifically found that the use of EC as an initial in situ flush solution was not a proximate cause of the failure of Smith's donor liver. Pursuant to the jury verdict, the district court entered a judgment for the defendants. Smith appeals.

ASSIGNMENTS OF ERROR

Smith assigns the following errors, as consolidated, reordered, and restated:

(1) The court erred in (a) overruling Smith's pretrial *Daubert* objections to the defendants' expert witnesses; (b) denying Smith's posttrial motion for sanctions and fees, based on the defendants' expert witnesses' use of "junk science," brief for appellant at 38; and (c) excluding testimony regarding proximate cause from Dr. John Dunn, one of Smith's expert witnesses.

(2) The court erred in excluding the following evidence: (a) a CORS staff conference record, made after Smith's transplant, directing employees to warn recipient transplant centers of changes in flush protocol; (b) evidence that CORS waived the $19,000 charge for the donor liver; (c) Shaw's statement to the donor team asking if UNMC was the donor team's "guinea pigs"; (d) a statement of a UNMC surgeon that an EC flush was "remarkably unexpected"; (e) testimony that the failure rate of UNMC liver transplant operations had been reduced to 2 percent at the time of Smith's operation; and (f) corroboration of a statement by Shaw that had he known of the EC flush, he would not have used the liver.

(3) The court erred in (a) refusing to give the jury a multiple-cause instruction relating to other possible causes for failure of the donor liver and (b) submitting a special interrogatory to the jury asking "if EC was a proximate cause" of the liver failure.

(4) The court erred in (a) determining that NORS had no duty to review the donor information records and (b) having concluded that NORS had no duty to review the donor information records, refusing to instruct the jury to that effect.

(5) The court erred in refusing to instruct the jury as a matter of law that (a) the standard of care required Spees and CORS to give actual notice to NORS of the use of EC and (b) proximate cause had been established.

STANDARD OF REVIEW

[1,2] In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001). A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any

competent evidence is presented to the jury upon which it could find for the successful party. *Fales v. Norine*, 263 Neb. 932, 644 N.W.2d 513 (2002).

[3] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

[4-6] In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). Generally, a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id.*

[7,8] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

ANALYSIS

JURISDICTION

[9] We first note Spees' argument that this case should be dismissed for lack of appellate jurisdiction. 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. *Weeder v. Central Comm. College, ante* p. 114, 691 N.W.2d 508 (2005). Spees contends that CORS has been released from this case pursuant to a high-low settlement agreement and that since Spees' alleged negligence occurred within the scope of his employment, he was an agent of CORS, and the release of his principal also released him from liability. Thus, Spees argues that with respect to him, the case is moot and should be dismissed.

[10,11] As a general rule, a moot case is subject to summary dismissal. *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488

(2004). However, dismissal of this entire appeal would be improper, as Smith also takes issue with the court's partial summary judgment in favor of NORS. Moreover, as will be made clear below, the issues presented in Smith's appeal are intertwined, and disposing of his arguments with respect to NORS requires us to first dispose of his arguments with respect to Spees and CORS—their alleged negligence is essential to analyzing the chain of causation in which NORS' negligence was, allegedly, a link. A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *In re Estate of Jeffrey B., supra*. Since we must consider Smith's arguments with respect to Spees and CORS regardless of any settlement agreement, the issues presented by Smith's appeal are not moot.

Proximate Cause

The primary issue in this appeal is causation. The jury specifically found that the negligence of Spees and CORS was not a proximate cause of the injuries and damages to Smith and that the use of EC as an initial in situ flush in this case was not a proximate cause of the failure of the donor liver.

[12,13] A proximate cause is a cause that produces a result in a natural and continuous sequence *and* without which the result would not have occurred. *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004). 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. *Id.*

Stated simply, Smith's theory of proximate cause in this case was that Spees' allegedly negligent use of EC as an initial in situ flush rendered the donor liver unsuitable for transplant, because the initial EC flush resulted in the liver's not being adequately preserved. Smith alleged that the use of EC caused the liver to fail and that CORS' and NORS' subsequent failure to notify the transplant team of the use of EC prevented the transplant team from making an informed decision to reject the tainted liver.

But it is important to note that although Smith alleged several parties were negligent, the natural and continuous sequence of

causation he set out to prove began with the use of EC as an initial in situ flush and that this event was found, by the jury, not to be a proximate cause of the failure of the donor liver. In other words, the jury found that something other than the use of EC caused the liver to fail. Implicit in this finding is that, according to the jury, the donor liver would have failed regardless of the use of EC.

Consequently, our analysis of Smith's assignments of error begins with those arguments which are directed at the jury's finding that the EC flush did not cause the donor liver to fail. In other words, we must first determine if any error on the part of the court undermines the jury's finding. Then, if the jury's special finding on causation was not the result of error, we must determine which of Smith's remaining assignments of error would remain prejudicial, when the effect of the jury's findings on causation is considered.

Expert Testimony

Smith argues that the court erred in overruling his pretrial objections to the defendants' expert witnesses. This argument is pertinent because the jury's findings on proximate cause were based on the expert testimony presented by the defendants.

[14-16] An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 1995) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004). When the opinion involves scientific or specialized knowledge, this court held in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), that we will apply the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Under our recent *Daubert/Schafersman* jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. *Robb v. Robb, supra*. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology can be applied to the facts in issue. *Id*. In addition, the trial court must

determine if the witness has applied the methodology in a reliable manner. *Id.*

In this case, the defendants presented expert testimony from Drs. Steven Strasberg, James Southard, and Goran Klintmalm. Strasberg, a liver surgeon, was a professor of surgery and head of hepatobiliary-pancreatic surgery at Barnes-Jewish Hospital and Washington University. Strasberg had been researching preservation of the liver since 1985; of his approximately 150 peer-reviewed journal publications, 40 dealt with liver transplantation and 35 of those were specifically in the area of preservation injury. Strasberg had done approximately 500 donor liver retrieval operations and performed about 100 liver transplants.

Based on his review of the relevant medical literature, Strasberg testified to a reasonable degree of medical certainty that in his opinion, the use of EC in Smith's transplant did not increase the chance of that particular liver failure. Instead, Strasberg opined to a reasonable degree of medical certainty that Smith's donor liver failed because of three risk factors: (1) pre-preservation injury to the liver resulting from hypoxia, as well as cocaine and alcohol use by the donor; (2) prolonged preservation time; and (3) the length of time between removal of the liver from cold storage and restored circulation of blood.

Southard, who holds a doctorate degree, is the codeveloper and patent holder for UW. Southard was a professor and vice chairman of the department of surgery at the University of Wisconsin. Southard was the author of approximately 220 journal articles, of which 190 to 200 addressed organ preservation—specifically, the mechanisms by which cells and organs are injured by cold and how to develop new preservation methods and solutions. Southard had also authored approximately 30 book chapters on organ preservation. Southard opined, to a reasonable degree of scientific certainty, that the use of EC did not increase the risk of injury to the donor liver in Smith's case and did not cause or contribute to the failure of the donor liver.

Klintmalm was chairman of Baylor transplant sciences, director of the Dallas liver transplant program, and director of transplantation services at Baylor University Medical Center. Klintmalm had authored about 239 articles in peer-reviewed journals, 95 percent of which were focused on transplantation.

Klintmalm was the surgeon for about 40 percent of the 110 to 160 transplants performed annually by Baylor University. Klintmalm was also the author of a controlled study of human livers in which one group was flushed with EC and preserved in UW, and the other group was both flushed and preserved in UW. Klintmalm testified that the study concluded that "[a]ll livers, regardless of preservation or flush, worked equally well." Based on his experience, Klintmalm testified to a reasonable degree of medical certainty that the use of EC in Smith's case had "absolutely no impact on the outcome" and did not contribute to or increase the risk for failure of the liver.

Smith argues that the opinions of Strasberg, Southard, and Klintmalm should have been excluded on *Daubert/Schafersman* grounds. However, the record shows that Smith failed to preserve this argument for appeal. Smith filed a pretrial motion in limine to the defendants' expert witnesses' testimony, based on their deposition testimony, that was overruled by the district court. At trial, however, no foundational objection, based upon *Daubert/Schafersman* or otherwise, was made to the opinions of Strasberg, Southard, or Klintmalm. At the close of the evidence, Smith did make a motion to strike expert testimony, but even then, he sought to strike their testimony specifically with respect to duty and the standard of care, not causation. Finally, Smith's motion for new trial was based, in part, on the court's overruling of Smith's pretrial motion in limine.

[17-19] But the overruling of a motion in limine is not reviewable on appeal. *King v. Crowell Memorial Home*, 261 Neb. 177, 622 N.W.2d 588 (2001). When a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal. *Olson v. Sherrerd*, 266 Neb. 207, 663 N.W.2d 617 (2003). By failing to object during trial to any of the expert opinion testimony now challenged on appeal, Smith waived his *Daubert/Schafersman* argument. Similarly, the court did not abuse its discretion in overruling Smith's motion for new trial; it is not an abuse of discretion to overrule a motion for new trial that is based on errors alleged to have occurred during trial, but to which no timely

objection was made. See *Mooney v. Gordon Memorial Hosp. Dist.*, 268 Neb. 273, 682 N.W.2d 253 (2004).

We also note that in any event, Smith's appellate argument appears to be directed at the credibility of the defense witnesses, and not to any specifically identified flaw in their reasoning or methodology. Simply stated, Smith's brief accuses all three defense experts of lying. While Smith's expert witnesses reached conclusions different from those of Strasberg, Southard, and Klintmalm, Smith's witnesses did not testify that the defense witnesses' methodology was scientifically invalid. In other words, even if preserved for appellate review, Smith's argument is less a *Daubert/Schafersman* claim than an unsubstantiated attack on the credibility of the defense witnesses.

Smith also claims that he should have been awarded sanctions and fees based on the defendants' use of "junk science" from their expert witnesses. Brief for appellant at 38. Obviously, given our disposition of Smith's argument with respect to that testimony, his claim for sanctions and fees is without merit.

Finally, Smith argues that the court abused its discretion in excluding the testimony of Dr. John Dunn with respect to causation. Dunn was a risk management expert and board certified in emergency medicine, but had "[v]ery little" experience in the field of organ transplants. In his deposition, Dunn specifically testified that he was *not* scientifically qualified to offer an expert opinion on the cause of Smith's donor liver failure. Dunn stated that he was not an expert on EC or UW and would not, if he were the judge, allow himself to testify as to whether the use of EC had a deleterious impact on Smith's donor liver. Given these admissions, the court did not abuse its discretion in concluding Dunn was not qualified to testify on causation.

In short, Smith waived any objection to the defendants' expert testimony, and the court did not abuse its discretion in excluding Dunn's expert testimony on the cause of the failure of Smith's donor liver. Smith's *Daubert/Schafersman* arguments do not undermine the jury's special finding on proximate cause.

Evidentiary Rulings

Smith complains of several rulings excluding evidence. It is not entirely clear how each of these rulings bears on the issue of causation, although Smith argues that the evidence he claims was

erroneously excluded would have helped build the "chain of causation" and the exclusion was prejudicial. As we conclude that the court did not err in excluding this evidence, we assume without deciding that Smith's alleged errors would have affected the jury's determination on causation.

Smith first complains of the exclusion of a record of a CORS staff conference, held after the recovery of Smith's donor liver, directing employees to notify transplant centers if different flush solutions were used. This evidence was excluded pursuant to Neb. Rev. Stat. § 27-407 (Reissue 1995), which provides in relevant part:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The court did not err in concluding that the evidence at issue was barred by § 27-407. The direction given to CORS employees is clearly a subsequent remedial measure, and Smith does not argue otherwise. Smith's offer of proof at trial did not establish that the evidence was proffered for any of the permissible purposes set forth in § 27-407. Instead, Smith's appellate brief simply contends that the evidence was *relevant*, which is unresponsive to the objection made and sustained by the court. We find no error in the court's evidentiary ruling.

Smith next asserts the court erred in excluding evidence that CORS offered not to charge NORS and UNMC for the donor liver, that Shaw accused the donor hospital of using UNMC as "guinea pigs," and of corroboration of a statement made by Shaw that had he known of the EC flush, he would not have transplanted Smith's donor liver. This evidence was excluded as hearsay, and Smith does not offer an appellate argument responsive to the court's ruling. Instead, Smith's brief simply argues that the evidence was relevant and that its exclusion was prejudicial. Because Smith does not contest the court's conclusion that the evidence was hearsay, and hearsay is inadmissible, see Neb. Rev.

Stat. § 27-802 (Reissue 1995), Smith has identified no error in the court's rulings.

[20,21] Smith also assigns that the court erred in "excluding UNMC assistant transplant surgeon Dr. [Rakesh] Sindhi's deposition testimony to the effect UW only was all he'd ever seen and this EC flush was remarkably unexpected." However, Smith's brief does not identify where, in the record, this evidence is to be found. It is not the function of an appellate court to scour the record looking for unidentified evidentiary errors. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). Neb. Ct. R. of Prac. 9D(1)f and g (rev. 2001) requires that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief. The failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist. *First Westside Bank v. For-Med, Inc.*, 247 Neb. 641, 529 N.W.2d 66 (1995). We have, however, thoroughly examined the record and are unable to discern to what Smith is referring. Consequently, we are unable to conclude that the court committed prejudicial error.

Finally, Smith claims the court erred in excluding testimony that by 1994, the failure rate for liver transplants at UNMC had been reduced to 2 percent. The evidence was excluded as being beyond the scope of pretrial disclosure. But, as with his other arguments, Smith merely contends that the exclusion of this evidence was prejudicial. He does not explain how the court's ruling was erroneous. Consequently, we find no error.

Multiple-Cause Instruction

Smith argues that the court erred in refusing to give his proposed jury instructions on multiple causes. Obviously, if the jury was not correctly instructed on causation, this would undermine its special finding on that issue. However, we conclude that the proffered instruction was not warranted by the evidence.

Smith's proposed instructions, summarized generally, would have instructed the jury that the defendants' negligence could still be a proximate cause of Smith's damages, even if other risk factors contributed to the failure of the liver. In essence, Smith was requesting a hybrid "substantial factor" type of instruction. Under

certain circumstances, when multiple causes act to produce a single injury or when the active negligence of a third person is also a substantial factor in bringing about the harm, the standard proximate cause instruction may be insufficient. See *Reimer v. Surgical Servs. of the Great Plains*, 258 Neb. 671, 605 N.W.2d 777 (2000). Under such circumstances, an instruction that a defendant's conduct is a cause of an event if it was a substantial factor in bringing it about is appropriate. *Id.* The " 'substantial-factor rule' " was developed primarily for cases in which application of the "but for" rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result. *Id.* at 677, 605 N.W.2d at 781.

[22] However, an instruction based on the "substantial-factor rule" was not warranted in this case. 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. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

In this case, Smith did not contend that in the absence of the initial EC flush, the donor liver would have failed. In fact, Smith contends the opposite. This is simply not a case in which liability could never be established under the standard proximate cause instruction; therefore, a "substantial factor" instruction was unwarranted. Compare *Reimer v. Surgical Servs. of the Great Plains, supra*. Nor did Smith contend that this was a case in which the jury would be unable to establish to what degree the plaintiff's damages were caused by the negligence of the defendants. Compare *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000).

Instead, Smith's theory of the case was that the use of EC caused Smith's donor liver to fail; in fact, Smith's proposed instruction would still have instructed the jury to that effect. But the jury was correctly instructed on proximate causation and that liability would attach if *either* Spees *or* CORS was *a* proximate cause of some damage to Smith. The jury was also properly instructed that

> [w]here the independent negligence [sic] acts or failures to act of more than one person combine to proximately cause the same single indivisible injury and damage, each such act or failure to act is a proximate cause, and each such person and/or corporation may be held responsible for the entire injury and damage. This is true although some may have been more negligent than others.

These instructions on proximate and concurring causation were a correct statement of the law and consistent with the evidence presented at trial. Smith's proposed instructions, including language taken from the "substantial-factor rule," were not warranted by the evidence.

Smith also assigned that the court erred in submitting a special interrogatory to the jury asking "if EC was a proximate cause" of Smith's donor liver failure. Smith did not argue in what way the court abused its discretion by submitting the special interrogatory to the jury or how Smith was prejudiced by the submission of the special interrogatory. Errors that are assigned but not argued are not typically addressed by this court, and we have no basis to do so here. See *Livingston v. Metropolitan Util. Dist., ante* p. 301, 692 N.W.2d 475 (2005).

Effect of Special Finding on Proximate Cause

Smith presents several arguments with respect to the alleged negligence of NORS, and the court's summary judgment in NORS' favor. We conclude, however, that these arguments do not undermine the jury's special finding on causation, and we further conclude that the jury's conclusion that the use of EC was not a proximate cause of the failure of the donor liver is dispositive of Smith's claim against NORS.

As previously stated, 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. *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004). Smith contends that NORS had a duty to review the paperwork accompanying the donor liver and to inform the UNMC transplant team that EC had been used. Smith argues that because Shaw was reported to have said that he would not have used the liver had he known of

the EC flush, "but for" NORS' alleged negligence, Smith's failed transplant would not have occurred.

However, a proximate cause is a cause that produces a result in a natural and continuous sequence *and* without which the result would not have occurred. *Id*. Even if NORS was negligent, and even if Smith's injury would not have occurred "but for" NORS' negligence, this does not establish that NORS' alleged negligence caused Smith's injury in a natural and continuous sequence. At best, NORS would have been a link in the "chain of causation" between the use of EC and the failure of Smith's donor liver.

Smith contends that the absence of NORS at trial allowed the jury to conclude that "the chain of cause broke at its weakest link." Brief for appellant 29. But the jury found that chain of causation never to have been initiated. The jury's special finding was not simply that the use of EC was not a proximate cause of Smith's damages—rather, the jury specifically found that the use of EC *did not cause Smith's donor liver to fail*. In other words, the jury found that even had EC not been used, the result of Smith's transplant surgery would have been the same. Since the jury found that the liver failure was not caused by the use of EC, it would have been impossible for the same jury to find that the liver failure was caused by NORS' failure to warn UNMC of the same use of EC.

Consequently, any error in granting summary judgment for NORS was harmless, because any negligence on NORS' part was not a proximate cause of Smith's damages. Smith was not prejudiced by the "empty chair" at trial, as the jury's special finding on proximate cause was equally applicable to Spees, CORS, and NORS.

Similarly, Smith argues that the jury should have been instructed that Spees and CORS were negligent as a matter of law in failing to ensure that UNMC was notified of the use of EC. Smith's reasoning here is substantially the same as that reasoning he advanced with respect to NORS—he argues that since Shaw would not have used the donor liver had he known of the EC flush, the failure to notify UNMC establishes "but for" causation of Smith's damages. But, as above, if the EC flush did not cause Smith's donor liver to fail, then the failure to notify the

transplant team of the EC flush could not have been a cause of Smith's injuries.

In short, CORS, Spees, and NORS were not the legal cause of Smith's injuries. While it is true that several events preceded the unfortunate failure of Smith's donor liver, the jury determined that the conduct of CORS, Spees, and NORS did not act in a natural and continuous sequence to produce such injuries. That is because, according to the jury, the use of EC simply did not cause Smith's donor liver to fail.

[23] Therefore, we decline to consider Smith's remaining arguments, because even if the court had committed error with respect to NORS', CORS', or Spees' failure to inform UNMC of the use of EC, such error would not be prejudicial and would not affect our disposition of this appeal. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Livingston v. Metropolitan Util. Dist., ante* p. 301, 692 N.W.2d 475 (2005).

CONCLUSION

Smith has not shown that the jury's special finding on proximate cause—that the use of EC was not a proximate cause of the failure of Smith's donor liver—was the result of any error on the part of the court. Since the use of EC was not a proximate cause of Smith's donor liver failure, the actions of the defendants were not a proximate cause of Smith's injuries, and judgment was properly entered for the defendants. The judgment of the district court is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

PIONEER CHEMICAL COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. CITY OF NORTH PLATTE, A MUNICIPAL CORPORATION OF THE STATE OF NEBRASKA, AND UNION PACIFIC RAILROAD COMPANY, APPELLEES.

694 N.W.2d 208

Filed April 1, 2005. No. S-02-854.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Lincoln County, DONALD E. ROWLANDS II, Judge. Judgment of Court of Appeals affirmed.

George G. Vinton for appellant.

Douglas L. Stack for appellee City of North Platte.

Stephen W. Kay, of Kay & Kay, for appellee Union Pacific Railroad Company.

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

PER CURIAM.

Having reviewed the briefs and record and having heard oral arguments, we conclude on further review that the decision of the Nebraska Court of Appeals in *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004), is correct and, accordingly, affirm the decision of the Court of Appeals.

AFFIRMED.

VIRGIL D. ANDERSON, APPELLANT, V. WELLS FARGO FINANCIAL ACCEPTANCE PENNSYLVANIA, INC., DOING BUSINESS AS WELLS FARGO FINANCIAL ACCEPT, APPELLEE.

694 N.W.2d 625

Filed April 1, 2005. No. S-03-882.

1. **Motions to Dismiss: Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** The granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) which is

limited to a facial attack on the pleadings is subject to the same de novo standard of review as a motion brought under rule 12(b)(6).

2. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
3. **Motions to Dismiss: Jurisdiction: Rules of the Supreme Court: Pleadings.** When a motion to dismiss is based on both Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) and (6) (rev. 2003) grounds, the court should consider the rule 12(b)(1) challenge first. If the court determines that it lacks subject matter jurisdiction, the court should dismiss on that basis and should not consider the rule 12(b)(6) grounds. In this context, the court should consider the rule 12(b)(6) grounds only after it has determined that it has subject matter jurisdiction.
4. **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.
5. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor. A complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery. Complaints must nonetheless set forth sufficient information to suggest that there is some recognized theory upon which relief may be granted.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Michael D. McClellan and Michael D. Nelson, of Nelson McClellan, for appellant.

Scott A. Lautenbaugh, of Nolan, Olson, Hansen & Lautenbaugh, L.L.P., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

On April 15, 2003, Virgil D. Anderson, appellant, filed a declaratory judgment action in the district court for Douglas County against one defendant, Wells Fargo Financial Acceptance Pennsylvania, Inc., doing business as Wells Fargo Financial Accept (Wells Fargo), appellee. The complaint alleged that Wells Fargo breached a contract between the parties when it failed to have Anderson's name listed on the certificate of title to a motor vehicle that Anderson bought with another person, Pamela A.

McCoy. In general, Anderson alleged as follows: Anderson and McCoy were each listed as a "Buyer" on a "Retail Installment Contract and Security Agreement" entered into with a Nebraska automobile dealer, Lee Sapp Ford-Mercury (Lee Sapp); the contract was assigned by Lee Sapp to Wells Fargo; McCoy took possession of the vehicle; Anderson's name was not listed on the certificate of title; and upon McCoy's failure to make payments, Anderson had made $4,195.70 in payments at the time the complaint was filed. The complaint also alleged that Wells Fargo had declined to give Anderson adequate assurances that Anderson had an ownership interest in the vehicle. For relief, Anderson variously sought an order, inter alia, suspending his performance under the contract, canceling the contract, and awarding him a judgment in the total amount of payments he had already made under the contract.

On May 22, 2003, Wells Fargo filed a motion to dismiss based on Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003) (lack of subject matter jurisdiction) and rule 12(b)(6) (failure to state claim upon which relief can be granted). On July 2, the district court granted Wells Fargo's motion to dismiss on both rule 12(b)(1) and (6) grounds and dismissed Anderson's action with prejudice. Anderson appealed.

During the pendency of this appeal, on the court's own motion, the parties were directed to further brief the case. In his supplemental brief, Anderson indicated that a separate action had been undertaken against McCoy, and at oral argument, Anderson conceded that he had possession of the vehicle and that his name had been placed on the certificate of title.

We conclude that the district court erred in concluding that it lacked subject matter jurisdiction but that it was correct in concluding that Anderson failed to state a claim upon which relief can be granted. We therefore affirm the granting of the motion to dismiss.

STATEMENT OF FACTS

On April 15, 2003, Anderson filed a complaint in district court seeking declaratory judgment against Wells Fargo. In the complaint, Anderson alleged, inter alia, the following: On August 8, 2002, Anderson entered into a contract with Lee Sapp, a Nebraska

automobile dealer which soon thereafter assigned the contract to Wells Fargo. Anderson and McCoy were each named as a "Buyer" of a motor vehicle on the contract form. McCoy took possession of the vehicle. Anderson was not given a copy of the certificate of title to the vehicle.

According to the complaint, McCoy ceased making payments on the vehicle. Thereafter, Anderson began making payments and had made payments totaling $4,195.70 at the time the complaint was filed. Anderson hired a private investigator to repossess the vehicle. The private investigator learned that Anderson's name was not on the certificate of title and indicated that Anderson had no ability to take possession of the vehicle.

On February 14, 2003, Anderson's attorney sent Wells Fargo a letter requesting adequate assurances that if Anderson paid off the remaining balance on the contract, Anderson would receive an ownership interest in the vehicle. Although Wells Fargo received the letter, Anderson received no response.

Anderson alleged in his complaint that Wells Fargo's failure to have Anderson's name placed on the title was a breach of the contract and various statutes. As relief, Anderson sought, inter alia, orders suspending his performance under the contract, canceling the contract, and awarding him a judgment in the total amount of payments he had already made under the contract.

On May 22, 2003, Wells Fargo filed a motion to dismiss the action for lack of subject matter jurisdiction pursuant to rule 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to rule 12(b)(6). Referring to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995 & Cum. Supp. 2000), Wells Fargo asserted that the district court did not have subject matter jurisdiction because Anderson had an adequate remedy against McCoy and the court's judgment in this action would not terminate that controversy. Wells Fargo also asserted that it had no duty to Anderson and that therefore, Anderson's complaint failed to state a claim upon which relief could be granted.

On July 2, 2003, the district court filed its order sustaining Wells Fargo's motion to dismiss on both rule 12(b)(1) and (6) grounds and dismissing the action with prejudice, with costs taxed to Anderson. In its order, the court stated that

> contrary to the allegations contained in [Anderson's] complaint, [Wells Fargo] does not have a duty to require [Anderson's] co-purchaser to title the car in [Anderson's] name; further this Court lacks jurisdiction over the subject matter of this cause of action because any judgment rendered by this Court will not terminate the controversy between [Anderson] and . . . McCoy per Neb. Rev. Stat. § 25-21,150 and § 25-21,154.

Anderson appeals.

ASSIGNMENTS OF ERROR

Anderson asserts that the district court erred in (1) concluding that it did not have subject matter jurisdiction and (2) concluding that Anderson had failed to state a claim upon which relief could be granted. Anderson also asserts that it was improper for the district court to rule on the merits of his claim under rule 12(b)(6) when it also determined that it did not have subject matter jurisdiction under rule 12(b)(1).

STANDARDS OF REVIEW

[1] As discussed above, this action was filed on April 15, 2003, and thus, we apply the new rules for notice pleading. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004). This court has not previously discussed the standard of review for a motion to dismiss filed under rule 12(b)(1). Because the new rules are modeled after the Federal Rules of Civil Procedure, we look to the federal decisions for guidance. See, similarly, *Kellogg v. Nebraska Dept. of Corr. Servs., ante* p. 40, 690 N.W.2d 574 (2005). We do hereby determine, as do the federal appellate courts, that the granting of a motion to dismiss for lack of subject matter jurisdiction under rule 12(b)(1) which is limited to a facial attack on the pleadings is subject to the same de novo standard of review as a motion brought under rule 12(b)(6). See *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695 (8th Cir. 2003).

[2] A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Weeder v. Central Comm. College, ante* p. 114, 691 N.W.2d 508 (2005).

ANALYSIS

It Is Improper to Consider Motion Based on Rule 12(b)(6) Grounds Where Court Concludes It Lacks Subject Matter Jurisdiction Under Rule 12(b)(1).

We note first that the district court granted Wells Fargo's motion to dismiss both for lack of subject matter jurisdiction under rule 12(b)(1) and for failure to state a claim for relief under rule 12(b)(6). Anderson observes that the district court's order was inconsistent and asserts that the court should not have considered the rule 12(b)(6) grounds when it determined that it lacked subject matter jurisdiction under rule 12(b)(1). We agree with Anderson's analysis and conclude that when a motion to dismiss raises both rule 12(b)(1) and (6) grounds, the court should consider the rule 12(b)(1) grounds first and should then consider the rule 12(b)(6) grounds only if it determines that it has subject matter jurisdiction.

In articulating the proper procedure to be followed relative to a motion asserting both rule 12(b)(1) and (6) grounds, we look to the federal decisions for guidance. *Kellogg v. Nebraska Dept. of Corr. Servs., supra*. Federal courts generally state, and we agree, that when a motion to dismiss is based on both rule 12(b)(1) and (6) grounds, the court should consider the rule 12(b)(1) challenge first. It has been observed that "[w]hen a court is confronted with motions to dismiss under both Rules 12(b)(1) and 12(b)(6), it ordinarily ought to decide the former before broaching the latter. . . . After all, if the court lacks subject matter jurisdiction, assessment of the merits becomes a matter of purely academic interest." *Deniz v. Municipality of Guaynabo*, 285 F.3d 142, 149-50 (1st Cir. 2002). Elsewhere, it has been stated: "When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits." *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001). The Court of Appeals for the Fifth Circuit has said:

> A dismissal under both rule 12(b)(1) and 12(b)(6) has a "fatal inconsistency" and cannot stand. . . . "Federal jurisdiction is not so ambidextrous as to permit a district court to dismiss a suit for want of jurisdiction with one hand and to decide the merits with the other. A federal district court concluding lack

> of jurisdiction should apply its brakes, cease and desist the proceedings, and shun advisory opinions. To do otherwise would be in defiance of its jurisdictional fealty."

Ehm v. National R.R. Passenger Corp., 732 F.2d 1250, 1257 (5th Cir. 1984). More importantly, it has been stated: "If the allegations [of a complaint] do not survive the jurisdictional attack, then there is no jurisdiction even to consider the other claims, much less to entertain a Rule 12(b)(6) motion to dismiss those claims." *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 512 (5th Cir. 1980).

[3] We similarly conclude that when a motion to dismiss is based on both rule 12(b)(1) and (6) grounds, the court should consider the rule 12(b)(1) challenge first. If the court determines that it lacks subject matter jurisdiction, the court should dismiss on that basis and should not consider the rule 12(b)(6) grounds. In the context under discussion, the court should consider the rule 12(b)(6) grounds only after it has determined that it has subject matter jurisdiction.

In the present case, the district court in its order considered the rule 12(b)(6) grounds first and ultimately dismissed on both rule 12(b)(1) and (6) grounds. In reviewing the ruling, we will follow the proper order and will consider the rule 12(b)(1) grounds first.

District Court Possessed Subject Matter Jurisdiction: Dismissal Under Rule 12(b)(1) Was Error.

We first consider whether the district court erred when it concluded that it lacked subject matter jurisdiction and granted the motion to dismiss on rule 12(b)(1) grounds. We conclude that although the court possessed the discretion to refuse to enter a judgment or decree, it did not lack the power to hear the case, and that the court erred as a matter of law when it stated it lacked subject matter jurisdiction.

Anderson titled his complaint a "Declaratory Judgment" action. Section 25-21,150 of the Uniform Declaratory Judgments Act states:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have

> determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Section 25-21,154 states: "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

In its motion to dismiss, Wells Fargo asserted that the district court lacked subject matter jurisdiction because a ruling in this declaratory judgment action would not terminate the controversy between Anderson and McCoy. In its order granting the motion to dismiss, the court agreed with Wells Fargo and concluded with respect to rule 12(b)(1) that it lacked "jurisdiction over the subject matter . . . because any judgment rendered by this Court will not terminate the controversy between [Anderson] and . . . McCoy per Neb. Rev. Stat. § 25-21,150 and § 25-21,154." Although the court did not give further explanation, it is apparent that the court relied on § 25-21,154 in concluding that it lacked subject matter jurisdiction. Such reliance for the proposition that the court lacked subject matter jurisdiction was error as a matter of law.

[4] Subject matter jurisdiction deals with the court's ability to hear a case. We recently stated: "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." *State v. Thomas*, 268 Neb. 570, 584, 685 N.W.2d 69, 82 (2004). Accepting Anderson's allegations in the complaint, as we must, the district court had the power to hear and determine the general class or category of cases to which Anderson's case belonged. Section 25-21,150 gave the district court subject matter jurisdiction over the general class of issues raised in Anderson's complaint, and the district court was possessed of subject matter jurisdiction.

For the sake of completeness, we note that we recently observed that we "have long stated that [§ 25-21,154] indicates discretionary rather than mandatory power [and that] whether to entertain an action for declaratory judgment is within the discretion of the trial court." *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 449, 684 N.W.2d 14, 23 (2004). However,

in the instant case, the district court did not dismiss as a matter of discretion but instead declared that it did not have jurisdiction.

Contrary to the district court's ruling, it did not lack subject matter jurisdiction over Anderson's declaratory judgment action, and we conclude that the district court erred in granting the motion to dismiss on rule 12(b)(1) grounds.

Complaint Failed to State Claim Upon Which Relief Can Be Granted: Dismissal Under Rule 12(b)(6) Was Proper.

As noted above, the district court properly should have considered the motion to dismiss on rule 12(b)(1) grounds first, and had it lacked subject matter jurisdiction, the court should not have considered the rule 12(b)(6) grounds. However, because we have concluded that the district court had subject matter jurisdiction and erred in granting the motion to dismiss on rule 12(b)(1) grounds, we will review the district court's further decision to grant the motion to dismiss on 12(b)(6) grounds. We conclude that because no relief could have been granted based on the allegations in the complaint, the district court was correct in concluding that Anderson failed to state a claim upon which relief could be granted.

[5] We recently stated that complaints should be liberally construed in the plaintiff's favor, and a complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery. *Spear T Ranch v. Knaub, ante* p. 177, 691 N.W.2d 116 (2005). However, federal courts have observed, and we agree, that complaints must nonetheless set forth sufficient information to suggest that there is some recognized theory upon which relief may be granted. *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (D.C. Cir. 1984).

The crux of Anderson's complaint is contained in paragraph 9 wherein he alleges, inter alia, that Wells Fargo's "failure to have [Anderson's] name placed on the title is a breach of the Installment Contract." The "Installment Contract" was attached to the complaint, and we recognize that Anderson is listed as a "Buyer" on the contract. The contract does not contain a provision explicitly requiring the seller to put the buyers' names on the certificate of title, nor is this potential act assigned to the

assignee, Wells Fargo. Anderson has not alleged any recognized theory which would require Wells Fargo to take the actions Anderson seeks, nor have we been directed on appeal to authority upon which relief can be granted. Anderson therefore failed to state a complaint against Wells Fargo upon which relief could be granted, and we conclude that the district court did not err in granting the motion to dismiss on rule 12(b)(6) grounds.

CONCLUSION

We conclude that the district court erred in determining that it lacked subject matter jurisdiction. However, the court did not err in determining that Anderson failed to state a claim upon which relief could be granted. We therefore conclude that the court was correct in granting the motion to dismiss on rule 12(b)(6) grounds. We affirm the order granting Wells Fargo's motion to dismiss with prejudice.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOSEPH H. MCDONALD, APPELLANT.

694 N.W.2d 204

Filed April 1, 2005. No. S-04-516.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing 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.
2. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Stefanie A. Martinez for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

McCormack, J.

NATURE OF CASE

In 1975, Joseph H. McDonald was convicted of first degree murder and sentenced to life imprisonment. The present appeal arises from the district court's denial of McDonald's motion for DNA testing pursuant to the DNA Testing Act (the Act), Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2004). Under the Act, a court shall order testing upon a determination that, among other things, such testing was not effectively available at the time of trial. See § 29-4120(5). Because McDonald has failed to satisfy this requirement, we affirm.

BACKGROUND

The following facts are taken from our opinion in *State v. McDonald*, 195 Neb. 625, 626-29, 240 N.W.2d 8, 9-11 (1976):

> At approximately 3 a.m., on the morning of July 4, 1974, a police officer observed an automobile on fire in a trailer court at 19th and Read Streets in Omaha, Nebraska, and immediately placed a fire alarm. The Omaha fire department arrived some 5 minutes after the alarm was received, broke out all the windows of the car, and extinguished the flames. Following routine procedure, they opened the hood and the trunk of the burned car. The body of Lyle Ford was found in the trunk. There was a wound behind the left ear and streaks of blood on the neck and face.
>
> Two officers of the Omaha police department began an immediate investigation by canvassing the area for witnesses. Several people residing in the trailer court provided information. Three witnesses had seen and heard two boys arguing with a man in the immediate area of the burned car sometime before the fire. One witness said the boys appeared to be trying to get money from the man. One witness said that one of the boys had on a light T-shirt. Another said that one of the boys had on a gold T-shirt and had long blonde hair, and the other boy was of "slighter" stature, possibly younger, and wore dark clothing. Another witness also said one boy had long blonde hair and was wearing a gold T-shirt. The manager of the trailer court advised one of the officers that a younger brother of an occupant of one of the trailers had been involved in another fire recently. The officers then went

to the trailer occupied by the defendant's brother, Tim McDonald, and talked with him. Tim said that Joe McDonald, the defendant, had been at the trailer at about 10:30 p.m. At that time, he had on a gold T-shirt and he had long blonde hair. The police officers also learned from witnesses that the defendant had been with a boy named Robert Johnson earlier in the evening, and that Johnson was of slighter stature and lived in the trailer court. This led the officers to the Johnson trailer. The officers knocked on the door and were admitted by Robert Johnson's mother. The officers asked if the defendant and Robert Johnson were there. She stated that they were in the living room sleeping. She let the officers in and they observed the defendant sleeping on the floor and Johnson sleeping on a couch. The officers awoke the boys and told them they wanted to talk to them. The boys got up and dressed. The defendant, who had long blonde hair, put on a yellow T-shirt and a pair of trousers. The officers noticed what appeared to be blood on the T-shirt and trousers. Johnson's physical appearance and clothing also matched the descriptions given to the officers. The officers then arrested both boys at approximately 6 a.m. and took them to the police station.

The medical evidence was that the victim was still alive at the time of the fire, and that he died from asphyxiation. The doctor also testified that it was possible that the victim could have died from the head wound but the fire intervened and killed him before that happened.

The evidence was conflicting as to the cause of the fire. The prosecution presented evidence tending to show that the fire had been set. The defense introduced evidence tending to show that the fire was accidental and caused by dropping a match or cigarette on the carpet, or by a short in the cigarette lighter.

At the time of the crime, the defendant, Joseph McDonald, was 16 years old, and Robert Johnson was 15 years old. Both of them testified at trial, Johnson as a prosecution witness, and the defendant on his own behalf.

In general outline, the testimony of the two boys substantially agreed. On July 3, 1974, the two boys were part

of a group of girls and boys who spent the evening drinking beer and riding around the city. They returned to the trailer park sometime after midnight. At approximately 1:45 a.m., the girls left in the car in which the group had been riding. At that time the boys were at least partially intoxicated.

The boys saw the victim, Lyle Ford, in his car in the trailer park even before the girls left. He appeared to be drunk and was having trouble lighting a cigarette. After the defendant had an additional beer, he and Johnson had a brief argument with the victim and attempted to get some money from him on the pretext that he had backed into the car of the defendant's brother, but they were unsuccessful.

From this point on the testimony of the two boys, McDonald and Johnson, is in substantial agreement as to what they did together but is sharply divergent and conflicting as to which one suggested or performed certain acts. The boys went to the Johnson trailer, got a shotgun, broke it down, took the shotgun barrel, and went back to the victim's car. The victim was standing behind his car and the trunk was open.

Johnson testified that the defendant hit the victim on the head with the gun barrel, the victim fell into the trunk, and Johnson helped put the rest of the victim's body into the trunk. He testified that the defendant suggested robbing the victim, and that the defendant took the victim's wallet before they closed the trunk lid. He also testified that the defendant deliberately set the car on fire afterward. The defendant testified that Johnson hit the victim and the defendant helped put the victim's body into the trunk. The defendant testified that he did not know Johnson was going to rob the victim until afterward when Johnson gave him $20 from the victim's billfold, and then threw the billfold away. The defendant also testified that Johnson got into the car afterward and used the cigarette lighter to light a cigarette. The defendant did not see Johnson set the car on fire, but testified that he, the defendant, did not set it on fire.

When the boys left the victim's car, they returned to the Johnson trailer, put the shotgun back together, and left it there. They then went to another trailer to get a crowbar

with which to open the trunk, but the woman would not let them in. As they were returning to the Johnson trailer, they could see the victim's car burning. They went into the Johnson trailer, watched the activity around the fire for awhile, and then went to sleep. The shotgun, the victim's wallet, and money taken from defendant's person were all received in evidence.

The jury found the defendant guilty and he was sentenced to life imprisonment.

On November 7, 2003, McDonald filed a motion under the Act seeking DNA testing of exhibits 32 (McDonald's yellow T-shirt) and 33 (his pants) that were received into evidence at his trial. He asserted that DNA testing would reveal that the purported bloodstains on his clothes were actually "red rouge," a metal-polishing substance he used at his place of employment. McDonald also filed a motion for appointment of counsel under the Act.

A hearing was held on the matter on April 2, 2004. No one testified, and only one exhibit was received into evidence: an affidavit from a law clerk in the Douglas County Attorney's office. The law clerk averred that he called the Omaha Police Department's property and records divisions about the shirt and pants and was told that they had been destroyed on an unknown date. Based upon the law clerk's affidavit, the district court overruled McDonald's motions for DNA testing and appointment of counsel. McDonald appeals.

ASSIGNMENTS OF ERROR

In his assignments of error, McDonald claims that (1) the district court erred in overruling his motion for DNA testing and appointment of counsel, (2) exhibits 32 and 33 were destroyed without a court order, (3) his due process rights were violated by the destruction of exhibits 32 and 33, and (4) his due process rights were violated by the suppression of exculpatory evidence by the prosecution.

STANDARD OF REVIEW

[1] A motion for DNA testing 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. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

ANALYSIS

The initial step toward obtaining relief under the Act is for a person in custody to file a motion requesting forensic DNA testing of biological material. See § 29-4120. Forensic DNA testing is available for any biological material that is related to the investigation or prosecution that resulted in the judgment; is in the actual or constructive possession of the state, or others likely to safeguard the integrity of the biological material; and either was not previously subjected to DNA testing or can be retested with more accurate current techniques. See § 29-4120(1). Once these thresholds are met, the court shall order testing upon a determination that such testing was not effectively available at the time of trial, that the biological material has been retained under circumstances likely to safeguard its integrity, and that the testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced. See, § 29-4120(5); *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

We affirm the district court's judgment because McDonald apparently agrees that testing was available at the time of trial to determine whether any stains were blood or a polishing substance. See brief for appellant at 6-7 ("[a]lthough DNA testing was not developed at the time of the trial, testing to determine whether or not the red substance was in fact blood was readily available and considered a common, standard practice"). As mentioned, under § 29-4120(5), the court shall order testing upon a determination that such testing was not effectively available at the time of trial. Because such testing *was* available at the time of his trial, McDonald is not entitled to DNA testing 30 years later.

[2] McDonald also argues on appeal that (1) his due process rights were violated under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), when the State failed to inform him of any test results on the shirt and pants and (2) his due process rights were violated under *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984), and *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), when the State destroyed his shirt and pants. Assuming without deciding that such issues are properly raised in this type of proceeding, the record does not indicate that either

theory was presented to the district court. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *State v. Wester, ante* p. 295, 691 N.W.2d 536 (2005).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
BRIAN A. VERLING, APPELLANT.

694 N.W.2d 632

Filed April 1, 2005. No. S-04-562.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to inferences drawn from those facts by the trial judge.
2. **Constitutional Law: Investigative Stops: Motor Vehicles: Animals.** A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.
3. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
4. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** A law enforcement officer is entitled to conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. Such an investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. The officer may also run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants. The officer may engage in similar routine questioning of passengers in the vehicle to verify information provided by the driver.
5. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** In order to expand the scope of a traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference.
6. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause.

7. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances.
8. **Investigative Stops: Probable Cause.** A finding of reasonable suspicion must be determined on a case-by-case basis.
9. **Investigative Stops: Motor Vehicles: Probable Cause.** When a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively.
10. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, determinations of reasonable suspicion are made de novo, but findings of historical fact to support reasonable suspicion are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.
11. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Although of limited usefulness, nervousness exhibited by a motorist during a traffic stop may be considered along with other factors in determining whether the officer has reasonable suspicion to expand the scope of the detention.
12. **Investigative Stops: Probable Cause.** After determining that there is reasonable suspicion to support a continued detention, a court must then consider whether the detention was reasonable in the context of an investigative stop.
13. **Constitutional Law: Investigative Stops: Probable Cause.** In determining whether an investigative stop supported by reasonable suspicion is otherwise reasonable under the Fourth Amendment, a court considers both the length of the continued detention and the investigative methods employed therein.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Jeff T. Courtney, of Pfeffer & Courtney, for appellant.

Jon Bruning, Attorney General, and Matthew M. Enenbach for appellee.

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

STEPHAN, J.

Brian A. Verling appeals his conviction in the district court for Douglas County on one count of unlawful possession with intent to deliver a controlled substance. The principal issue on appeal is whether Verling's Fourth Amendment rights were violated when law enforcement officers, alerted by a drug detection dog, searched the rented vehicle he had been operating after issuing a warning citation for speeding. We conclude that Verling's constitutional rights were not violated and affirm his conviction.

FACTS

On February 6, 2003, Stephen W. Worley, a "K-9 unit" police officer, stopped a sport utility vehicle eastbound on Interstate 80 near 72d Street in Omaha, Nebraska, after he observed it passing other vehicles and radar indicated the vehicle was speeding. When he approached the vehicle, he observed the driver and a front seat passenger who he subsequently identified as Verling and Matt Klinicki, respectively. Hearing extremely loud music when Verling rolled down his window, Worley found it odd that Klinicki appeared to be sleeping. He also noticed a "very strong orange or citrus odor" emanating from the vehicle. Worley testified that such odor is commonly used as a method of concealing the scent of illegal drugs.

Worley noticed that Verling's hands were shaking as he produced his driver's license and registration documents. Worley took note of the fact that the vehicle had been rented, knowing from experience that persons who transport unlawful drugs commonly use rental vehicles in order to avoid seizure of their personal vehicles. Although the vehicle had been rented in Arizona, Verling had an Illinois driver's license. This information piqued Worley's suspicion because he knew that unlawful drugs were commonly transported from Arizona to points east, including major cities such as Chicago, Illinois.

At Worley's request, Verling accompanied him to Worley's police cruiser where Worley ran a data check on Verling's license. The data check revealed that Verling had no criminal record and that the vehicle was not stolen.

Worley initiated a conversation with Verling while they were seated in the police cruiser. Verling stated that he and Klinicki had flown from Illinois to Phoenix, Arizona, to visit Verling's girl friend, staying at a hotel while in Phoenix, and that they were driving back to Illinois because he disliked air travel. Worley ascertained that the vehicle had been rented on February 3, 2003, and was due to be returned on February 5. During their conversation, Worley noted that Verling was attempting to "steer the conversation" and that he appeared "increasingly nervous" when Worley inquired about the origin and destination of his journey. Verling asked questions about Worley's drug detection dog and whether Worley knew about a "certain strip club" in Iowa. Worley testified

that he was surprised by Verling's question about the strip club and that based upon his experience, individuals engaged in criminal activity commonly attempt to steer conversations with law enforcement officers away from their activities to some other subject.

While Verling remained seated in the police cruiser, Worley returned to the vehicle where he checked its identification number and briefly conversed with Klinicki, who had remained seated in the vehicle. Klinicki told Worley that they had stayed at Verling's girl friend's house while they were in Arizona. He also stated that they were driving back rather than flying because Klinicki was "dead set" against flying. When questioned by Worley, Klinicki stated that he did not know if Verling was afraid of flying. Worley returned to his cruiser and spoke again with Verling, who denied knowledge of whether Klinicki had a fear of air travel. Worley took note of the conflicting information received from Verling and Klinicki regarding where they had stayed in Phoenix and why they were driving back to Illinois. Worley and Verling then exited the cruiser, and Worley issued Verling a warning citation for speeding. As Verling began to walk away, Worley asked him if there was anything illegal in the vehicle and received a negative response. Worley then asked if he could search the vehicle, and Verling responded affirmatively. Worley approached the vehicle and asked Klinicki to step out so that he could perform the search, informing Klinicki that Verling had given consent. Klinicki responded that he felt they really needed to get going and then looked at Verling. At that point, Verling stated that he thought they should get going as well.

While Worley was in his cruiser with Verling, Officer Travis Oetter arrived at the scene as backup. As Worley was talking to Klinicki about getting out of the vehicle so he could perform the search, Oetter shined his flashlight into the back cargo area of the vehicle. Worley then heard Oetter say, "I can see it in there." The trial court allowed this statement over Verling's hearsay objection. Based on their prior experience working together, Worley understood that Oetter was referring to illegal drugs.

At this point, Worley retrieved his drug detection dog from his cruiser. The dog was trained to alert to the odor of controlled substances, including marijuana, cocaine, methamphetamine, and heroin, and was certified to perform this function. After circling

the vehicle on Worley's command, the dog alerted at the rear of the vehicle. Worley then opened the rear cargo area of the vehicle and found two large, black duffelbags. Green plastic wrap was visible through the top mesh of one of the bags. Worley opened the bags and found five large bundles of marijuana, which he seized.

Verling was arrested at the scene and subsequently charged with unlawful possession with intent to deliver a controlled substance, a Class III felony. He filed a motion to suppress all evidence obtained as a result of the search of his vehicle on grounds that it was conducted without consent or probable cause. After a hearing at which the above facts were adduced, the district court denied the motion. Following a stipulated bench trial at which Verling preserved the issues raised in his motion to suppress, the district court found him guilty of the charged offense and sentenced him to probation for a term of 4 years. Verling perfected this timely appeal, which we removed to our docket 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

Verling assigns that the trial court erred in overruling his motion to suppress because (1) there was no concern for officer safety during the traffic stop, (2) there was no need to discover and preserve evidence as the officer issued a warning citation that would not be prosecuted, (3) the search was performed without the necessary probable cause, and (4) the court relied on inadmissible hearsay admitted into evidence over objection.

STANDARD OF REVIEW

[1] When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to inferences drawn from those facts by the trial judge. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

ANALYSIS

During the pendency of this appeal, the U.S. Supreme Court decided *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L.

Ed. 2d 842 (2005), a case involving facts similar in many respects to those presented by this appeal. In *Caballes*, an Illinois state trooper stopped the defendant for speeding. When the trooper radioed the dispatcher to report the stop, a second trooper overheard the transmission and proceeded to the scene with a narcotics detection dog. While the arresting officer was in the process of writing a warning ticket, the second trooper walked his dog around the vehicle. The trooper had no basis for doing so other than the dispatch report that he overheard. The dog alerted at the trunk, and a subsequent search resulted in the seizure of marijuana found inside the trunk. The entire incident lasted less than 10 minutes. The defendant was arrested and convicted of a narcotics offense, but the conviction was reversed by the Illinois Supreme Court, which found error in the denial of the defendant's motion to suppress the evidence seized from the vehicle. *People v. Caballes*, 207 Ill. 2d 504, 802 N.E.2d 202, 280 Ill. Dec. 277 (2003). Relying on its prior decision in *People v. Cox*, 202 Ill. 2d 462, 782 N.E.2d 275, 270 Ill. Dec. 81 (2002), the Illinois Supreme Court held that the police "impermissibly broadened the scope of the traffic stop . . . into a drug investigation because there were no specific and articulable facts to support the use of a canine sniff." *People v. Caballes*, 207 Ill. 2d at 509, 802 N.E.2d at 204, 280 Ill. Dec. at 279.

[2] The U.S. Supreme Court granted certiorari on the question of " '[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.' " *Illinois v. Caballes*, 125 S. Ct. at 837. In answering this question in the negative, the Court first noted that the duration of the stop in *Caballes* was "entirely justified by the traffic offense and the ordinary inquiries incident to such a stop." 125 S. Ct. at 837. It then reasoned that because a dog sniff reveals only the presence of contraband, and no person has a legitimate expectation of privacy in possessing contraband, no intrusion on the driver's privacy expectations occurred. Thus, the Court concluded that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." 125 S. Ct. at 838. The Court distinguished *People v. Cox, supra*, in which a canine

sniff was held impermissible because it occurred "during an unreasonably prolonged traffic stop." *Illinois v. Caballes*, 125 S. Ct. at 837. The Court in *Caballes* noted its assumption that "a similar result would be warranted in this case if the dog sniff had been conducted while respondent was being unlawfully detained." 125 S. Ct. at 837.

[3] As in *Illinois v. Caballes*, the initial stop in this case was lawful because Verling was speeding. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). Moreover, when the dog alerted, the police had probable cause to search the vehicle, especially in light of the other circumstances known to Worley. See, *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983); *U.S. v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994); *State v. Staten*, 233 Neb. 800, 448 N.W.2d 152 (1989). The critical inquiry, therefore, is whether Verling was being lawfully detained at the time of the canine sniff which triggered the events leading to his arrest and conviction.

[4,5] A law enforcement officer is entitled to conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. See, *State v. Lee, supra*; *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). Such an investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. *Id*. The officer may also run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants. See, *State v. Lee, supra*; *State v. Anderson, supra*; *State v. Gutierrez*, 9 Neb. App. 325, 611 N.W.2d 853 (2000). The officer may engage in similar routine questioning of passengers in the vehicle to verify information provided by the driver. *U.S. v. Johnson*, 58 F.3d 356 (8th Cir. 1995). See, also, *State v. Gutierrez, supra*. However, in order to expand the scope of a traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference. *State v. Lee, supra*; *State v. Anderson, supra*. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Here, the original purpose of

the traffic stop was completed when Worley issued the warning citation to Verling. See, *State v. Lee, supra*; *State v. Anderson, supra.* Continuing the detention beyond that point was lawful only if Worley had developed a reasonable, articulable suspicion that Verling was involved in illegal activity beyond that which justified the initial stop. See *id*.

[6-10] Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003); *State v. Anderson, supra*. Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances. *Id*. A finding of reasonable suspicion must be determined on a case-by-case basis. *State v. Lee, supra*; *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991). Even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively. *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989); *State v. Lee, supra*. Determinations of reasonable suspicion are made de novo, but findings of historical fact to support reasonable suspicion are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court. *State v. Lee, supra*; *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003).

The information which Worley developed during the traffic stop supported a reasonable suspicion that Verling was transporting illegal drugs. When he initially approached the stopped vehicle, Worley detected a strong citrus odor from within the vehicle, which he knew to be a method used by persons transporting illegal drugs to mask the scent of their cargo. See *U.S. v. Pollington*, 98 F.3d 341 (8th Cir. 1996), and *U.S. v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994) (recognizing distinctive masking odor as factor giving rise to reasonable suspicion of drug transportation). Verling had an Illinois driver's license, but the vehicle had been rented in Arizona. Worley knew from his law enforcement experience that illegal drugs are regularly transported from southwestern states to cities such as Chicago and that rented vehicles are commonly used for this purpose. Thus, when

Verling and Klinicki gave conflicting accounts as to why they were returning to Chicago over land instead of by air, and where they had stayed while in Arizona, it was reasonable for Worley to suspect that they were transporting illegal drugs. See *U.S. v. Johnson*, 58 F.3d 356 (8th Cir. 1995) (determining inconsistent explanations of reason for trip given by driver and passenger justified expansion of inquiry during traffic stop).

[11] Other facts learned during the traffic stop contributed to this suspicion, although to a lesser extent. At the time of the original stop, Worley noticed that Klinicki was feigning sleep despite loud music playing in the vehicle. Worley also noted that Verling seemed increasingly nervous when questioned about the origin and destination of his travel and that he attempted to steer the conversation away from his own activities, a ploy which Worley had previously encountered in dealing with persons involved in criminal activity. Although of limited usefulness, nervousness exhibited by a motorist during a traffic stop may be considered along with other factors in determining whether the officer has reasonable suspicion to expand the scope of the detention. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

Considering the totality of these circumstances, we conclude that Worley had a reasonable, articulable suspicion that Verling was transporting illegal drugs at the time Worley issued the warning citation for speeding. Accordingly, we need not address Verling's contention that the district court erroneously permitted Worley to testify concerning the statement made by Oetter, the backup officer, after the citation was issued but prior to the canine sniff.

[12,13] After determining that there is reasonable suspicion to support a continued detention, a court must then consider whether the detention was reasonable in the context of an investigative stop. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). We consider both the length of the continued detention and the investigative methods employed therein. See, *U.S. v. Bloomfield, supra*; *State v. Lee, supra*. Here, the canine sniff was initiated 10 to 15 minutes after the initial stop and approximately 1 minute after issuance of the warning citation. The duration of the extended detention was clearly reasonable, and the use of the drug detection dog during the lawful detention did not violate any

constitutionally protected right. See *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005).

We are not persuaded by Verling's argument that *Knowles v. Iowa*, 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998), requires a different result. In *Knowles*, the U.S. Supreme Court held that issuance of a traffic citation could not serve as the basis for a warrantless search of the vehicle under the search incident to arrest exception because no arrest had occurred. The State does not contend that there was a search incident to arrest in this case, but, rather, that probable cause was established by a canine sniff conducted during a lawfully extended detention following the issuance of a traffic citation. *Knowles* is therefore inapplicable.

CONCLUSION

In summary, we conclude that the canine sniff which provided probable cause for the vehicle search occurred during a detention which extended beyond the issuance of the traffic citation but was nevertheless lawful because of Worley's reasonable, articulable suspicion that Verling was transporting illegal drugs. Accordingly, the district court did not err in denying Verling's motion to suppress evidence obtained during the search or in receiving such evidence at trial. Finding no error, we affirm.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. VICTOR F. TERRY, RESPONDENT.

694 N.W.2d 209

Filed April 1, 2005. No. S-04-750.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This matter is before the court on the voluntary surrender of license of respondent, Victor F. Terry, filed in case No. S-04-750.

Respondent was admitted to the practice of law in the State of Nebraska on September 24, 1996. At all times relevant hereto, respondent was engaged in the private practice of law in Omaha, Nebraska.

On March 31, 2004, in case No. S-04-312, this court entered an order temporarily suspending respondent from the practice of law. On June 28, formal charges were filed in this case, S-04-750, by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent. Certain facts giving rise to the temporary suspension in case No. S-04-312 serve as a basis for the formal charges. The formal charges set forth five counts that included charges that respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) and (4) through (6), and Canon 9, DR 9-102(A)(1) and (2) and DR 9-102(B)(3) and (4), as well as his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997). Respondent's alleged misconduct included failing to maintain his business and personal accounts separate from his attorney trust account; failing to promptly pay funds to clients that such clients were entitled to receive; engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and failing to respond to written communications from relator.

On August 13, 2004, respondent filed an answer disputing certain of the allegations contained in the formal charges and raising issues of fact. On November 16, respondent filed an amended answer, which again disputed certain of the allegations in the formal charges and raised issues of fact.

A referee was appointed, and an evidentiary hearing was held on the formal charges. On January 5, 2005, the referee filed his report. In his report, the referee found that respondent engaged in conduct violating DR 1-102(A)(1) and (4) through (6); DR 9-102(A)(1) and (2); DR 9-102(B)(3) and (4); and his oath of office as an attorney. The referee recommended that as a result of respondent's conduct, respondent should be disbarred from the practice of law. On January 18, respondent filed an exception to the referee's recommended sanction.

FACTS

On February 22, 2005, respondent filed with this court a voluntary surrender of license, voluntarily surrendering his license

to practice law in the State of Nebraska. In his voluntary surrender of license, respondent in effect stated that he knowingly did not challenge or contest the truth of the allegations in the formal charges that he violated DR 1-102(A)(1) and (4) through (6); DR 9-102(A)(1) and (2); DR 9-102(B)(3) and (4); and his oath of office as an attorney. In addition to surrendering his license, respondent in effect voluntarily consented to the entry of an order of disbarment and waived all proceedings against him in connection with the entry of an order of disbarment.

On February 22, 2005, relator filed a motion for judgment and, pursuant to Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 23(B) (rev. 2001), sought an order awarding it costs and expenses, in the amount of $794.31, incurred in the prosecution of this case.

ANALYSIS

Neb. Ct. R. of Discipline 15 (rev. 2001) provides in pertinent part:

> (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.

Pursuant to rule 15, we find that respondent has voluntarily surrendered his license to practice law, admitted in writing that he knowingly does not challenge or contest the truth of the formal charges, and waived all proceedings against him in connection therewith. In particular, we find that respondent has not challenged or contested the truth of the allegations that he engaged in conduct that violated DR 1-102(A)(1) and (4) through (6); DR 9-102(A)(1) and (2); DR 9-102(B)(3) and (4); and his oath of office as an attorney and that respondent has consented to the entry of an order of disbarment.

We further find that relator's motion seeking judgment and an award of costs and expenses should be, and hereby is, granted.

CONCLUSION

Upon due consideration of the pleadings in this matter, the court finds that respondent knowingly does not now challenge or contest the truth of the allegations that he engaged in conduct that violated DR 1-102(A)(1) and (4) through (6); DR 9-102(A)(1) and (2); DR 9-102(B)(3) and (4); and his oath of office as an attorney and that his waiver was knowingly made. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby enters judgment and 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. 2004), and upon failure to do so, he shall be subject to punishment for contempt of this court.

Respondent is directed to pay relator's costs and expenses in the amount of $794.31 in accordance with §§ 7-114 and 7-115 and Neb. Ct. R. of Discipline 10(P) (rev. 2003) and 23(B) within 60 days from the date of this opinion.

JUDGMENT OF DISBARMENT.

PHOUMY KAM, APPELLEE,
v. IBP, INC., APPELLANT.

694 N.W.2d 658

Filed April 8, 2005. No. S-03-481.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and INBODY, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed.

Riko E. Bishop and Joseph F. Bachmann, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., and Bruce M. Smith for appellant.

Rod Rehm, of Rehm, Bennett & Moore, P.C., L.L.O., for appellee.

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

PER CURIAM.

Having reviewed the briefs and record and having heard oral arguments, we conclude on further review that the decision of the Nebraska Court of Appeals in *Kam v. IBP, inc.*, 12 Neb. App. 855, 686 N.W.2d 631 (2004), is correct and accordingly affirm the decision of the Court of Appeals.

AFFIRMED.

DEWAYNE HANCHERA, APPELLANT, V. BOARD OF ADJUSTMENT, RED WILLOW COUNTY, NEBRASKA, APPELLEE.

694 N.W.2d 641

Filed April 8, 2005. No. S-03-1175.

1. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; 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. **Zoning: Evidence: Appeal and Error.** A district court may disturb a decision of a board of adjustment if the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. In deciding whether a board's decision is supported by the evidence, the district court shall consider any additional evidence it receives.
3. **Zoning: Courts: Appeal and Error.** In appeals involving a decision of a board of adjustment, an appellate court reviews the decision of the district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of a board of adjustment, the district court abused its discretion or made an error of law.
4. **Appeal and Error.** Where competent evidence supports a district court's factual findings, an appellate court will not substitute its factual findings for those of the district court.
5. **Jurisdiction: Pleadings.** The failure to verify a petition is not a defect that defeats the jurisdiction of a court.
6. **Zoning: Ordinances: Licenses and Permits.** A new zoning ordinance will not have retroactive effect where a landowner, in good faith reliance on existing zoning, has substantially changed position either by causing substantial construction to be made or by incurring substantial expenses related to construction, or both.
7. **Ordinances: Proof: Time.** The burden is upon the landowner asserting a right of nonconforming use to prove that his use existed prior to the effective date of the ordinance.
8. **Ordinances: Words and Phrases.** "Good faith," as used in nonconforming-use cases, means without knowledge of the pendency of a restrictive ordinance.

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

Steven M. Virgil and Amy Svoboda for appellant.

David A. Jarecke, of Crosby Guenzel, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

DeWayne Hanchera filed a complaint with the Red Willow County Board of Commissioners (Board of Commissioners) concerning Furnas County Farms' undertaking of the erection and operation of confined animal feeding facilities at two locations—commonly known as the Kircher and Geihsler properties. The Board of Commissioners referred the matter to the Red Willow County zoning administrator (Zoning Administrator). On October 31, 2001, the Zoning Administrator filed a memorandum with the Board of Commissioners containing her findings. She found that on the two listed properties,

> both properties had structure prior to October 16, 2001. Concrete was delivered to one property on October 13, 2001 and the other on October 15, 2001. Because of this factor, which I might add has been found to legally be considered substantial construction, both properties fall outside of the Zoning Regulations enacted on October 16, 2001.

Hanchera appealed the decision of the Zoning Administrator to the Red Willow County Board of Adjustment (Board of Adjustment). On February 19, 2002, the Board of Adjustment affirmed the decision of the Zoning Administrator. Hanchera then appealed the Board of Adjustment's decision to the Red Willow County District Court pursuant to Neb. Rev. Stat. § 23-168.04 (Reissue 1997). On September 15, 2003, the district court found that the evidence established that substantial construction to the facilities had begun prior to October 16, 2001. The court found that "the February 19, 2002 determination by the Board of Adjustment of Red Willow County that substantial construction had commenced prior to October 16, 2001 is supported by competent evidence." The court further found that the

decision of the Board of Adjustment was not illegal, arbitrary, or capricious, and the court "wholly and in total affirm[ed] the decision" of the Board of Adjustment.

BACKGROUND

In 2001, Red Willow County was in the process of developing a comprehensive zoning plan and accompanying regulations, which would restrict the construction of confined animal feeding operations. Furnas County Farms was attempting to build a confined animal feeding operation in Red Willow County. Furnas County Farms was aware of the county's development of the comprehensive zoning plan and regulations through public advertisement and participation in public hearings and meetings relating to the regulations.

On September 24, 2001, the Red Willow County Planning Commission held a public meeting at which it reviewed final changes made to the Red Willow County zoning regulations. A motion was made to accept the comprehensive plan and zoning regulations as amended and to recommend their acceptance to the Board of Commissioners.

On September 25, 2001, the Board of Commissioners held a public hearing to consider the adoption of the comprehensive plan and zoning regulations. At that hearing, the Board of Commissioners was advised by a consultant hired by Red Willow County that the comprehensive plan and zoning regulations needed to be published and set forth in a final document incorporating the most recent changes. The consultant recommended that in order to provide sufficient time for publication and time to establish a zoning administrator's office, the effective date of the adoption of the comprehensive plan and zoning regulations should be postponed until October 16. A motion was made to include language in the comprehensive plan and zoning regulations identifying October 16 as the effective date for both regulations. This motion was seconded and passed.

Also on September 25, 2001, the Board of Commissioners passed resolutions Nos. 753 and 754. Resolution No. 753 provides in relevant part that a public hearing was held on September 25 regarding the comprehensive plan and that the comprehensive plan was thereby adopted by Red Willow County. Resolution No. 753 further provides that the resolution will take effect and be in

force from and after the publication of the resolution in book form and by reference in the official Red Willow County newspaper. Resolution No. 754 provides in relevant part that a public hearing was held on September 25 regarding the zoning regulations and that the zoning regulations were thereby adopted by Red Willow County. Resolution No. 754 further provides that the resolution will take effect and be in force from and after the publication of the resolution in book form and by reference in the official Red Willow County newspaper.

Publication for both resolutions took place on October 9, 2001. The front page of the zoning regulations reflects that the zoning regulations were adopted on September 25 and became effective on October 16. The zoning regulations themselves, however, make no reference to an effective date of October 16. Rather, article 14, § 1404, of the zoning regulations provides that the zoning regulations "shall take effect and be in force from and after its passage and publication according to law."

The record reflects that with respect to the Kircher property, Furnas County Farms expended $660 between August 1 and 6, 2001, for easements and a Department of Environmental Quality application fee, $10,844.66 on October 13 for concrete, and $23 on October 15 for an electrical inspection application. The record also reflects that with respect to the Geihsler property, $660 was expended on August 1 for easements and a Department of Environmental Quality application fee, $4,000 was expended on October 5 for a downpayment for the purchase price of the land, $115.25 was expended on October 15 for an electrical inspection application, and $653.10 was expended on October 15 for concrete. In addition, Furnas County Farms made two downpayments to Sand Livestock Systems, Inc., in the amount of $93,553 each on September 30. The purpose of these downpayments is not apparent from the record. The record also reflects that Furnas County Farms did not enter into purchase agreements to purchase the Kircher and Geihsler properties until October 4 and did not become record owners of those properties until December.

ASSIGNMENTS OF ERROR

Hanchera assigns, restated, that (1) the district court erred as a matter of law in finding that the zoning regulations were effective

as of October 16, 2001, and not September 25, 2001, and (2) the record before the district court did not contain evidence showing that a nonconforming use existed prior to the effective date of the zoning regulations becoming effective.

STANDARD OF REVIEW

[1] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; 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. *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004); *Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004).

[2] A district court may disturb the decision of a board of adjustment if the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. In deciding whether a board's decision is supported by the evidence, the district court shall consider any additional evidence it receives. *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992).

[3,4] In appeals involving a decision of a board of adjustment, an appellate court reviews the decision of the district court, and irrespective of whether the district court took additional evidence, the appellate court is to decide if, in reviewing a decision of a board of adjustment, the district court abused its discretion or made an error of law. *Id.* Where competent evidence supports the district court's factual findings, the appellate court will not substitute its factual findings for those of the district court. *Id.*

ANALYSIS

STANDING

The Board of Adjustment argues that Hanchera does not have standing to bring the present action because his second amended petition, the operative petition, was not duly verified as required by § 23-168.04. Therefore, before embarking on our analysis of Hanchera's appeal, we must determine whether Hanchera's failure to verify his second amended petition deprives this court of jurisdiction. We conclude that it does not.

[5] Section 23-168.04 provides in relevant part that "[a]ny person or persons, jointly or severally, aggrieved by any decision of

the board of adjustment . . . may present to the district court for the county a petition, duly verified, setting forth that such decision is illegal, in whole or in part, and specifying the grounds of the illegality." We have previously held that verification " 'is a purely procedural direction which is formal but does not go to the essence of the law with regard to requirements for jurisdiction of courts.' " *In re Interest of L.D. et al.*, 224 Neb. 249, 259, 398 N.W.2d 91, 98 (1986). The failure to verify a petition is not a defect that defeats the jurisdiction of a court. *Hiatt v. Menendez*, 157 Neb. 914, 62 N.W.2d 123 (1954). Thus, we conclude that Hanchera's failure to verify his second amended petition does not deprive this court of jurisdiction.

Whether Furnas County Farms Acquired a Vested Interest in a Nonconforming Use

Hanchera contends in his second assignment of error that the record does not support a finding that Furnas County Farms established a nonconforming use in the properties prior to the effective date of the Red Willow County zoning regulations. We agree.

[6,7] A new zoning ordinance will not have retroactive effect where a landowner, in good faith reliance on existing zoning, has substantially changed position either by causing substantial construction to be made or by incurring substantial expenses related to construction, or both. *Whitehead Oil Co. v. City of Lincoln*, 234 Neb. 527, 451 N.W.2d 702 (1990). See *Thayer v. Town of Tilton*, 861 A.2d 800 (N.H. 2004). The burden is upon the landowner asserting a right of nonconforming use to prove that his use existed prior to the effective date of the ordinance. *City of Syracuse v. Farmers Elevator, Inc.*, 182 Neb 783, 157 N.W.2d 394 (1968); 1 Kenneth H. Young, Anderson's American Law of Zoning § 6.10 (4th ed. 1996).

[8] While we have not previously had occasion to determine when good faith is lacking in a landowner's attempt at establishing a vested interest in a nonconforming use, other courts have done so. " 'Good faith,' as it is used in the nonconforming-use cases . . . means without knowledge of the pendency of a restrictive ordinance." 1 Young, *supra*, § 6.34 at 595. In *Town of Hillsborough v. Smith*, 276 N.C. 48, 56, 170 S.E.2d 904, 910 (1969), the North Carolina Supreme Court stated:

> "[G]ood faith" . . . is not present when the landowner, with knowledge that the adoption of a zoning ordinance is imminent and that, if adopted, it will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him.

A number of courts have refused to find the existence of a nonconforming use where construction was commenced without good faith, in the sense that it was commenced with knowledge of the pendency of an ordinance which prohibited such construction. For example, in *Biggs v. Town of Sandwich*, 124 N.H. 421, 470 A.2d 928 (1984), the court held that good faith was lacking where the landowners were apprised of the proposed zoning changes prior to the initial construction.

In *City of Tucson v. Arizona Mortuary*, 34 Ariz. 495, 272 P. 923 (1928), the court rejected the contention that a vested right had been obtained where, prior to the completion of any material amount of construction, the landowner had been advised that a restrictive ordinance was pending. The court reasoned that the landowner "may not now be heard to set up any loss to it which arose from its actions *after* it had knowledge that the ordinance was being considered." (Emphasis in original.) *Id.* at 511, 272 P. at 929.

In *Tim Thompson, Inc. v. Village of Hinsdale*, 247 Ill. App. 3d 863, 617 N.E.2d 1227, 187 Ill. Dec. 506 (1993), the court refused to find that a vested interest in the continuation of a prior zoning classification had been established where there was constructive notice of the proposed comprehensive zoning code and the majority of construction expenditures followed further notice and the enactment of the zoning code. See, also, *1350 Lake Shore Associates v. Mazur-Berg*, 339 Ill. App. 3d 618, 791 N.E.2d 60, 274 Ill. Dec. 264 (2003) (holding that property owner could not be said to have relied in good faith on probability that zoning certificate or building permit would be issued pursuant to current zoning once property owner was aware that amendatory zoning ordinance was to be introduced).

CONCLUSION

The record in the instant case reveals that Furnas County Farms was aware that Red Willow County was in the process of developing regulations which would hinder, if not prohibit, its confined animal feeding operations. Furnas County Farms was also aware that such regulations had been adopted by the Board of Commissioners on September 25, 2001, but were not considered effective until October 16. It is obvious from the actions and statements of Furnas County Farms and its representatives that its construction activities, all of which took place after the passage of the zoning regulations on September 25, were an attempt to circumvent the applicability of the regulations. Under these facts, we cannot say that Furnas County Farms' actions were in good faith. We therefore find that Furnas County Farms did not obtain vested interests in either the Kircher or Geihsler properties and that the properties are subject to the Red Willow County zoning regulations. Accordingly, we reverse the decision of the district court and remand the cause with directions to the district court to remand the cause to the Board of Adjustment to reverse its decision.

Because we find that Furnas County Farms did not obtain a vested interest in the properties because it lacked good faith, we need not decide Hanchera's remaining assignment of error, specifically, whether the district court erred in finding the effective date of the zoning regulations was October 16, 2001. See *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003) (stating that appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., participating on briefs.

ALLIED MUTUAL INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE, V. CITY OF LINCOLN, APPELLEE AND CROSS-APPELLANT, AND GENESIS INSURANCE COMPANY, APPELLEE AND CROSS-APPELLEE.

694 N.W.2d 832

Filed April 8, 2005. No. S-03-1414.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. **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. **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. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **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.
6. **Summary Judgment: Motions for New Trial: Time: Appeal and Error.** A motion purportedly seeking a new trial is not a proper motion to file after a motion for summary judgment is sustained and does not toll the time for filing a notice of appeal.
7. **Pleadings: Judgments.** A postjudgment motion must be reviewed based on the relief sought by the motion, not based upon the title of the motion. When the statutory basis for a motion challenging a judgment on the merits is unclear, the motion may be treated as a motion to alter or amend the judgment.
8. ____: ____. A motion for reconsideration is treated as a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002).
9. **Pleadings: Judgments: Time: Appeal and Error.** In cases involving a motion to alter or amend the judgment, a critical factor is whether the motion was filed within 10 days of the final order, because a timely motion under Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002) tolls the time for filing a notice of appeal.

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

Thomas B. Wood, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellant.

Dana W. Roper, Lincoln City Attorney, and Ernest R. Peo for appellee City of Lincoln.

Robert T. Grimit and Andrew K. Smith, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Genesis Insurance Company.

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

MCCORMACK, J.

NATURE OF CASE

Allied Mutual Insurance Company (Allied), an insurer for the City of Lincoln, filed a declaratory judgment action to construe and determine the validity of insurance contracts written by Allied and Genesis Insurance Company (Genesis) as insurers for the city. The city filed a cross-petition in the action and sought declaratory judgment that the Allied policy and the public entity policy issued by Genesis extended coverage for the city's liability. The claims against the city were based upon an automobile accident that occurred in March 1998, wherein Sarah Cockson was injured and Laura Cockson was killed when the car in which they were passengers collided with another automobile driven by Jeffrey Ireland. At the time of the accident, the automobile operated by Ireland was being pursued by an officer with the Lincoln Police Department. All parties moved for summary judgment. The district court entered summary judgment in favor of Genesis and denied summary judgment for Allied and the city. Allied appeals, and the city cross-appeals.

BACKGROUND

In 1999, Sarah Cockson, in her individual capacity, and Robert Cockson, as personal representative of the estate of Laura Cockson, filed a claim against the city under Neb. Rev. Stat. § 13-911 (Reissue 1997) of the Political Subdivisions Tort Claims Act, alleging that the accident was proximately caused by the actions of the police officer during the vehicular pursuit.

In 2000, a settlement agreement was reached between the city and the Cocksons. The city then demanded that Allied and Genesis indemnify it pursuant to the insurance policies issued by each insurer to the city. Allied had issued the city a business automobile policy for September 1, 1997, through September 1, 1998, and Genesis had issued the city a public entity policy for

that same time period. Genesis denied that its policy provided coverage for the city's liability. Genesis claimed that its policy provided automobile hazard coverage only for those losses emanating out of the StarTran public transportation system. Allied did not concede that its policy provided coverage, but loaned the city $306,682 to use as a partial payment to satisfy the settlement. The receipt for Allied's loan provides that the city will repay amounts loaned by Allied in the event that a court finds that the Allied policy did not provide coverage for the injuries sustained by the Cocksons as a result of the accident.

Allied's policy provides, in relevant part:

> SECTION II - LIABILITY COVERAGE
>
> A. 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".
>
> . . . .
>
> B. EXCLUSIONS
>
> This insurance does not apply to any of the following:
>
> 1. EXPECTED OR INTENDED INJURY
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the "insured".

Endorsement No. 11 of the Genesis policy contains the following limitation: "Coverage provided by this policy within the automobile hazard, including no-fault (personal injury protection), uninsured motorists and underinsured motorists coverages, is limited to only those autos owned, operated, used, maintained or repaired, including loading or unloading, by StarTran."

All parties filed motions for summary judgment. On May 30, 2002, the district court sustained Genesis' motion, but denied Allied's motion. The district court did not address the city's motion at that time. In its order, the district court found that under endorsement No. 11 of the Genesis policy, the policy clearly provides coverage for automobile hazards, but the coverage is limited to those automobiles owned, operated, used, maintained, or repaired by StarTran. Since the claim against the city arose out of the use of a motor vehicle by the Lincoln Police

Department, the exclusionary provision of the policy applied, and the court granted Genesis' motion for summary judgment. With regard to Allied's motion for summary judgment, the court stated that Allied contends that the coverage does not apply because the Cocksons' injuries did not arise out of the operation, ownership, and maintenance of an insured vehicle (the police car) because the collision was between the Cocksons' vehicle and another vehicle. Allied further claimed that the officer's continuance of the pursuit was an intentional act. The court found that the officer did act intentionally in continuing the chase and engaging his vehicle's lights and siren, but whether his actions amounted to expected or intended bodily injury or property damage from the standpoint of the insured, as required by Allied's policy exclusion, remained a genuine issue of material fact. The court, therefore, denied Allied's motion for summary judgment. The district court's order did not expressly direct the entry of final judgment as to any of the parties and did not expressly determine that there was no just reason for delay of an appeal.

Allied and the city filed notices of appeal on June 28 and July 1, 2002, respectively. Thereafter, on October 24, the city filed with the Nebraska Court of Appeals a motion to dismiss Allied's appeal for lack of jurisdiction. The city alleged that the district court's May 30 order was not a final judgment because it did not adjudicate the rights and liabilities of all the parties and the order did not direct the entry of final judgment pursuant to Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2000). Citing *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000), the Court of Appeals sustained the city's motion to dismiss. See *Allied Mut. Ins. Co. v. City of Lincoln*, 11 Neb. App. xxviii (No. A-02-747, Jan. 2, 2003). In *Scottsdale Ins. Co.*, we addressed whether a city's insurers were required to indemnify the city for a judgment entered against it in a motorist's personal injury action for injuries the motorist sustained when the car in which she was riding was struck by a car that was being pursued by a city police officer. We held that an order granting one insurer's motion for summary judgment and denying another insurer's motion for summary judgment in the declaratory judgment action was not a final, appealable order, requiring dismissal of the city's appeal and one insurer's cross-appeal where the order did not adjudicate rights

and liabilities of the parties to the action and the order made no express determinations. An exception to this rule exists, however, when multiple parties are involved in a claim. In such cases, a court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties upon an express determination that there is no just reason for delay and upon an express direction for the entry of summary judgment. See § 25-1315. In its May 30 order, the district court did not expressly direct the entry of final judgment, nor did the court make a determination that there was no just reason for delay.

On March 25, 2003, following the dismissal of Allied's appeal by the Court of Appeals, Genesis filed a motion with the district court requesting that the court find the judgment entered on May 30, 2002, to be final pursuant to § 25-1315(1). The district court sustained Genesis' motion and, on August 14, 2003, entered an order directing that the May 30, 2002, judgment be entered as a final judgment as to Allied and as to the city's claims against Genesis. The district court also denied the city's motion for summary judgment in a separate order entered on that date. On August 25, 2003, Allied filed a motion for a new trial. Allied's motion was denied by the district court on November 13, and Allied filed its notice of appeal within 30 days of the district court's order. The city cross-appeals.

ASSIGNMENTS OF ERROR

Allied assigns seven errors, all of which can be consolidated into the following two restated errors: The district court erred by (1) determining that endorsement No. 11 of the Genesis insurance policy was an exclusion of coverage entitling Genesis to summary judgment and (2) failing to grant summary judgment in favor of Allied and finding that the motor vehicle pursuit by the Lincoln Police Department was not an intentional act and that the injuries were not intended or expected. The city, as cross-appellant, assigns two errors: The district court erred in (1) not determining that the police officer's action in apprehending Ireland, rather than the vehicular pursuit, constituted the efficient proximate cause of the injuries suffered by the Cocksons and (2) determining that endorsement No. 11 of the Genesis policy limited coverage for automobile hazards to StarTran vehicles.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

[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. *Chief Indus. v. Great Northern Ins. Co.*, 268 Neb. 450, 683 N.W.2d 374 (2004); *Hall v. Auto-Owners Ins. Co.*, 265 Neb. 716, 658 N.W.2d 711 (2003).

ANALYSIS

JURISDICTION

[4,5] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (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. *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004). Whether we have jurisdiction over the present appeal depends upon whether the district court's May 30, 2002, order or August 14, 2003, order is the final order.

Confusion arises over whether the May 30, 2002, order was the final order, because the district court, in its August 14, 2003, order, directed that its May 30 order "is and should be entered as a final judgment as to the claims of [Allied] and the City of Lincoln against Genesis." Genesis contends that the district court's August 14 order merely recognized that a final order had been entered on May 30, 2002, and that no reason existed for further delay of an appeal on that order. Under Genesis' logic, the

May 30 order was the final order; consequently, Allied's current appeal is untimely because it failed to commence an appeal within 30 days of the entry of that order. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004). We disagree with Genesis and find instead that the district court's August 14, 2003, order was the final, appealable order.

In *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999), we addressed a situation similar to the one presented in the instant case. In *Moore*, we had to determine whether an August 1998 order was the final order despite that order's declaration that a July 1998 order was the final order. We found that despite the fact that the district court had utilized its August order to label its July order as the final order, the July order was not final. At the time the July order was entered, it was not a final, appealable order. The August order, on the other hand, was the final order—it had the effect of dismissing the action. With regard to the August order's reference to the July order, we read the reference as incorporating the reasoning of the earlier order into the final order entered in August 1998.

In the present case, the May 30, 2002, order did not make the express findings required by § 25-1315. As a result, that order is not a final, appealable order, as was determined by the Court of Appeals. As we did in *State ex rel. Stenberg v. Moore, supra*, we find that the August 14, 2003, order was the final order, even though it purported to designate the May 30, 2002, order as the final order. It was the August 14, 2003, order that made the express determinations required by § 25-1315 that judgment in favor of Genesis was final and that no just reason for delay existed. Thus it was that order which had the effect of making the final determination of Genesis' rights and obligations in this action. As to the district court's reference to the May 30, 2002, order, we conclude, as we did in *State ex rel. Stenberg v. Moore, supra*, that the August 14, 2003, order merely incorporated the reasoning of the previous order.

[6,7] Because the August 14, 2003, order was the final order, Allied had 30 days to appeal that order, unless a proper motion was filed which tolled the appeal time. See § 25-1912(1). Following the district court's August 14 order, Allied filed a document entitled "Motion for New Trial" which purportedly sought

a new trial. As our recent jurisprudence makes clear, a motion purportedly seeking a new trial is not a proper motion to file after a motion for summary judgment is sustained and does not toll the time for filing a notice of appeal. See *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004). However, a postjudgment motion must be reviewed based on the relief sought by the motion, not based upon the title of the motion. When the statutory basis for a motion challenging a judgment on the merits is unclear, the motion may be treated as a motion to alter or amend the judgment. *Id.*

[8,9] Allied's motion asked the district court to grant a new trial based upon an irregularity in the proceedings of the court, an insufficiency of evidence, and an error of law. This motion is similar to a motion for reconsideration, which is treated as a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002). *Woodhouse Ford v. Laflan, supra*. In cases involving a motion to alter or amend the judgment, a critical factor is whether the motion was filed within 10 days of the final order, because a timely motion under § 25-1329 tolls the time for filing a notice of appeal. *Woodhouse Ford v. Laflan, supra.* Allied's motion was timely filed; therefore, we have jurisdiction over this appeal.

Summary Judgment in Favor of Genesis

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. *Woodhouse Ford v. Laflan, supra*.

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 trial court. *Chief Indus. v. Great Northern Ins. Co.*, 268 Neb. 450, 683 N.W.2d 374 (2004); *Hall v. Auto-Owners Ins. Co.*, 265 Neb. 716, 658 N.W.2d 711 (2003).

Under the public entity insurance policy provided by Genesis, Genesis agreed to indemnify the city for losses the city was obligated to pay as a result of bodily injury, personal injury, advertising injury, or property damage covered by the policy. The

coverage afforded by the Genesis policy was limited by endorsement No. 11, which states that "[c]overage provided by this policy within the automobile hazard, including no-fault (personal injury protection), uninsured motorists and underinsured motorists coverages, is limited to only those autos owned, operated, used, maintained or repaired, including loading or unloading, by StarTran." Automobile hazard is defined in section IV of the Genesis policy as "liability arising out of the ownership, use (including maintenance or repair), loading or unloading of any auto."

We conclude that the city's liability arose out of the use of the city's police vehicle. Because it is clear from endorsement No. 11 that the Genesis insurance policy does not afford coverage for liability arising out of the use of city police vehicles, we conclude that the district court properly granted Genesis' motion for summary judgment.

Allied's Motion for Summary Judgment

Allied also contends on appeal as its second assignment of error that the district court erred in denying its motion for summary judgment. In its August 14, 2003, order, the district court made an express finding that judgment was final as to the claims of Allied and the city against Genesis. The court did not make an express determination that judgment was final as to any claims against Allied. Consequently, there is no final order under § 25-1315, and as a result, we do not have jurisdiction to address the denial of Allied's motion for summary judgment.

CONCLUSION

For the reasons stated above, the judgment of the district court is affirmed.

Affirmed.

Hendry, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOHN I. SUTTON, RESPONDENT.

694 N.W.2d 647

Filed April 8, 2005. No. S-04-649.

1. **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 of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
2. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.
3. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires consideration of any aggravating or mitigating factors.
4. ____. An attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline is viewed as an important matter and as a threat to the credibility of attorney disciplinary proceedings.
5. ____. Responding to disciplinary complaints in an untimely manner and ignoring requests for information from the Counsel for Discipline of the Nebraska Supreme Court indicate a disrespect for our disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

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

PER CURIAM.

INTRODUCTION

On May 27, 2004, formal charges were filed by the State of Nebraska on behalf of the Counsel for Discipline of the Nebraska Supreme Court, as relator, against the respondent, John I. Sutton, who was admitted to the practice of law in the State of Nebraska on September 12, 1979, and who is currently suspended from the practice of law. See *State ex rel. Counsel for Dis. v. Sutton*, 268 Neb. 485, 684 N.W.2d 23 (2004) (*Sutton I*). After Sutton failed to file an answer to the formal charges in the present case, we

sustained the relator's motion for judgment on the pleadings and must now determine the appropriate sanction.

STATEMENT OF FACTS

The formal charges state that Sutton practiced law in Omaha, Nebraska. In July 2002, Ross Stroud retained Sutton to represent him in a dissolution of marriage case and protection order violation case. On February 13, 2004, Stroud filed a grievance against Sutton with the Counsel for Discipline, alleging that Sutton neglected his cases. On February 17, the Counsel for Discipline mailed a notice of the grievance to Sutton by certified mail and instructed him to respond in writing within 15 working days. Sutton failed to file a written response within the time permitted. Although a second letter was sent in April 2004, again directing Sutton to file a response to Stroud's grievance, Sutton has yet to file a response.

Formal charges were filed against Sutton on May 27, 2004, alleging that his conduct violated his oath of office as an attorney and Canon 1, DR 1-102(A)(1) and (5), and Canon 6, DR 6-101(A)(3), of the Code of Professional Responsibility. Sutton was personally served with the charges on June 7, and the sheriff's return of service was filed on June 10. Sutton failed to file an answer or otherwise plead in this matter.

Accordingly, the Counsel for Discipline filed a motion for judgment on the pleadings on July 9, 2004. We granted the motion on September 15, and thus, the sole issue before us is the appropriate sanction.

ANALYSIS

Neb. Ct. R. of Discipline 9(E) (rev. 2001) states, in relevant part:

> Upon receipt of notice of a Grievance from the Counsel for Discipline, the member against whom the Grievance is directed shall prepare and submit to the Counsel for Discipline, in writing, within fifteen working days of receipt of such notice, an appropriate response to the Grievance, or a response stating that the member refuses to answer substantively and explicitly asserting constitutional or other grounds therefor.

Further, Neb. Ct. R. of Discipline 3(B) (rev. 2001) provides:

> Acts or omissions by a member, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility as adopted by the Court, the oath, or the provisions of these rules, shall be grounds for discipline whether the act or omission occurred in the course of an attorney-client relationship or otherwise.

[1,2] 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 of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Widtfeldt, ante* p. 289, 691 N.W.2d 531 (2005). Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case. *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004).

[3] The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors. *State ex rel. Special Counsel for Dis. v. Fellman*, 267 Neb. 838, 678 N.W.2d 491 (2004). We are, unfortunately, presented with a very sparse record in the present case. Because Sutton neither responded to the Counsel for Discipline regarding Stroud's grievance nor filed a pleading in this matter, we have no basis for considering any factors that mitigate in favor of Sutton. By the same token, we do not have a record that informs us of the nature and extent of Sutton's neglect toward Stroud as we consider the imposition of a sanction.

We do know that Sutton was suspended from the practice of law on July 30, 2004, for a period of 1 year, followed by probation for a period of 2 years during which Sutton was to be supervised by another attorney and continue treatment as directed by his physicians, psychiatrists, and substance abuse counselor. See *Sutton I*. The suspension resulted from behavior that occurred between March and November 2002 when Sutton (1) neglected legal matters for a client, (2) failed to deposit client funds into his attorney trust account, (3) failed to return unearned funds to the

client, and (4) practiced law while his license was temporarily suspended for nonpayment of bar association dues. See *id*. The referee determined that during this period of time in 2002, Sutton abused prescription medications and was suffering from depression and certain other medical conditions. We also note that Sutton has received a prior private reprimand for conduct similar to that which occurred in each of these cases.

[4,5] We consider an attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline as an important matter and as a threat to the credibility of attorney disciplinary proceedings. See *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000). Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from the Counsel for Discipline of the Nebraska Supreme Court indicate a disrespect for our disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice. See *id*.

Ordinarily, cumulative acts of attorney misconduct and repeated disregard of requests for information from the Counsel for Discipline will appropriately lead to disbarment—and, in fact, may ultimately end in disbarment for Sutton. However, given the lack of information that we have regarding (1) the nature and extent of the present misconduct and (2) Sutton's present or future fitness to practice law, in light of Sutton's previously asserted mental and physical health problems that existed during the present allegation of neglect, we are not firmly convinced that disbarment at this time is necessary in order to protect the public or maintain the reputation of the bar as a whole. Instead, we believe that an indefinite suspension is more appropriate at this juncture and will serve as adequate protection for the public. Should Sutton apply for reinstatement in the future, he will need to fully answer for the current charges of neglect and failing to respond to the Counsel for Discipline, and demonstrate a present and future fitness to practice law subject to the conditions set forth in *Sutton I*.

CONCLUSION

We previously granted the relator's motion for judgment on the pleadings, finding by clear and convincing evidence that Sutton

violated DR 1-102(A)(1) and (5), DR 6-101(A)(3), and his oath of office as an attorney. It is the judgment of this court that Sutton should be and is hereby suspended from the practice of law indefinitely, effective immediately. Should Sutton apply for reinstatement, he will be required to fully answer for the current charges of neglect and failing to respond to the Counsel for Discipline, and demonstrate a present and future fitness to practice law subject to the terms and conditions outlined above. Sutton shall comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, Sutton 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 10(P) (rev. 2003) and 23(B) (rev. 2001).

JUDGMENT OF SUSPENSION.

McCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
VYTAS A. JONUSAS, APPELLANT.

694 N.W.2d 651

Filed April 8, 2005. No. S-04-762.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **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.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Lawrence G. Whelan for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

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

WRIGHT, J.

NATURE OF CASE

Vytas A. Jonusas was charged with theft by deception, in violation of Neb. Rev. Stat. § 28-512 (Reissue 1995). The Douglas County District Court convicted Jonusas of theft by unlawful taking or disposition pursuant to Neb. Rev. Stat. § 28-511(1) (Reissue 1995), and he appealed.

SCOPE OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Pathod, ante* p. 155, 690 N.W.2d 784 (2005).

[2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Delgado, ante* p. 141, 690 N.W.2d 787 (2005).

FACTS

In early 1999, Michael Young and his wife became interested in purchasing a bar and grill in Elkhorn, Nebraska. Jonusas, who worked for Pinnacle Business Brokerage (Pinnacle), acted as the broker for the deal between the Youngs and the owner of the bar and grill. After certain negotiations, the Youngs wrote a check to Pinnacle for $5,000 as a downpayment. It was Michael Young's understanding that the money was to be held in escrow.

On June 1, 1999, the parties signed a purchase agreement stating that the purchase price was to be $70,000. The Youngs wrote Pinnacle a check for an additional $45,000 and agreed to sign a note on the remaining $20,000. The Youngs' payment of $50,000 was to be held in escrow by Pinnacle because the agreement was contingent upon the Youngs obtaining a liquor license. It was

agreed that the $50,000 would be returned in the event that their application was not approved.

The Youngs' liquor license application was prepared by an employee of Pinnacle's, who contacted Michael Young and asked him various questions, including whether he or his wife had any felony convictions. Michael Young responded that they did not. Jonusas accompanied the Youngs to Lincoln when they filed their application, and on the return trip, Michael Young mentioned that his wife could not drive. It then came to light that the Youngs had previous convictions for driving while under the influence. Jonusas told the Youngs they needed to report this information on their liquor license application. The Youngs sent in an amendment to their application, but the application was denied. They appealed this decision and were again denied. The Youngs never received a liquor license.

In October 1999, Michael Young requested the return of the $50,000. Jonusas ignored this request. Michael Young contacted Jonusas again in December and demanded the return of the money. Jonusas stated that he could not return it without a release from the seller or a court order. Following a court order directing the return of the money, Jonusas agreed to its return. In July 2000, Michael Young again spoke with Jonusas about the return of the money. During this conversation, Jonusas revealed that he had invested the money and lost it all. At the time of trial, the $50,000 had not been returned to the Youngs.

Jonusas was charged by information with theft by deception pursuant to § 28-512. He pleaded not guilty, and a bench trial was held.

A detective from the Omaha Police Department, who had been assigned to investigate the matter, testified that Jonusas claimed that the Youngs had lied to him and that he believed they had forfeited the $50,000 by trying to "cheat him." Jonusas admitted that he kept the money and never put it into an escrow account.

During the State's closing argument, the question arose whether it would be proper for the district court to find Jonusas guilty of theft by unlawful taking or disposition rather than theft by deception. In his closing argument, Jonusas' counsel argued that such a finding would be improper.

The district court found Jonusas guilty, stating:

> [T]he Court just found you guilty . . . under [§] 28-511, Subsection 1, which is theft by unlawful conduct. Basically, what that statutes [sic] says is, if you take property of someone with the intent to withhold it then you're guilty of this, and what I found was . . . that you were to keep $50,000 in an escrow for this bar. That you did not follow the escrow agreement, but rather you put it at risk investing it. And as a result, by putting it at risk and also not returning that property to the lawful owner, you are guilty of theft by unlawful conduct.

While the court referred to § 28-511(1) as describing "theft by unlawful conduct," the statute actually refers to theft by unlawful taking or disposition.

At sentencing, the district court stated that Jonusas had been found guilty of "theft by deception." Jonusas' counsel did not object to the court's statement, and Jonusas was sentenced to 60 months' probation. At the conclusion of the probation, Jonusas was to serve 180 days in prison, unless the prison term was waived by the court. He was also ordered to pay restitution.

ASSIGNMENTS OF ERROR

Jonusas argues that the district court erred in (1) failing to clearly state the crime of which he was convicted, (2) violating his constitutional right to a fair trial, (3) finding sufficient evidence to support a conviction of theft by deception, (4) finding sufficient evidence to support a conviction of theft by unlawful taking or disposition, and (5) overruling his motion for directed verdict.

ANALYSIS

Consolidation of Theft Offenses

Jonusas claims the district court erred in failing to clearly set forth the crime of which he was convicted. It is undisputed that Jonusas was charged with theft by deception, but at the conclusion of the trial, the court found Jonusas guilty of violating § 28-511(1), theft by unlawful taking or disposition.

[3] The issue presented is whether a defendant may be charged with theft by one manner and subsequently convicted of theft by another manner. This is a question of law, which we analyze independently of the determination made by the trial court. When

dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

Neb. Rev. Stat. § 28-510 (Reissue 1995) provides:

> Conduct denominated theft in [§§] 28-509 to 28-518 constitutes a single offense embracing the separated offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under [§§] 28-509 to 28-518, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the court to [e]nsure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

Section 28-510 mirrors A.L.I., Model Penal Code and Commentaries § 223.1(1) (1980). The purpose of Model Penal Code § 223.1 is described in comment 1 at 133:

> The purpose of consolidation, therefore, is not to avoid the need to confront substantive difficulties in the definition of theft offenses. The appropriate objective is to avoid procedural problems. . . . The real problem arises from a defendant's claim that he did not misappropriate the property by the means alleged but in fact misappropriated the property by some other means and from the combination of such a claim with the procedural rule that a defendant who is charged with one offense cannot be convicted by proving another.

Section 28-510 has created a single offense of "theft" which may be committed by the violation of any one of the following sections. See, also, Model Penal Code and Commentaries, *supra*, comment 2(c). Neb. Rev. Stat. § 28-509 (Reissue 1995) defines the terms used in conjunction with the offense of theft. Neb. Rev. Stat. §§ 28-511 to 28-517 (Reissue 1995 & Cum. Supp. 2004) each set forth a different manner by which theft may be committed. Neb. Rev. Stat. § 28-518 (Reissue 1995) describes the grading of theft crimes. The consolidation statute, § 28-510, provides that the offense of theft may be supported by evidence that it was

committed via any manner described in §§ 28-509 to 28-517 regardless of the manner by which the information alleges the theft occurred. The defendant is thus foreclosed from defending on the basis that his conduct supported one type of theft but that he was charged with another. See Model Penal Code and Commentaries, *supra*.

Jonusas asserts that his being charged with theft by deception and being convicted of theft by unlawful taking or disposition was a violation of his due process rights. He claims he was not given notice that he was being tried for theft by unlawful taking or disposition when he was charged with theft by deception. We conclude that this argument is without merit.

A plain reading of § 28-510 reveals that the State may charge a defendant with theft by deception but obtain a conviction of theft by unlawful taking or disposition. The phrase "any manner that would be theft under [§§] 28-509 to 28-518" includes a conviction of theft by unlawful taking or disposition. See § 28-510.

In effect, § 28-510 has subsumed various forms of unlawful acquisitive behavior into a single offense of theft which may be committed by taking part in any one of several activities described in §§ 28-509 to 28-517. The unifying concept in all these crimes is that each involves the involuntary transfer of property. In each case, the actor appropriates the property of the victim without his or her consent or with a consent that was obtained by fraud or coercion. See Model Penal Code and Commentaries, *supra*, comment 2.

Prejudice by Lack of Fair Notice or by Surprise

In his assignments of error, Jonusas asserts he was prejudiced by lack of fair notice or by surprise. At Jonusas' trial, the first mention of the crime of theft by unlawful taking or disposition occurred during the State's closing argument. Jonusas' counsel was questioned by the district court regarding the possibility of a conviction of theft by unlawful taking or disposition. During this questioning, defense counsel could have requested the appropriate relief based on the circumstances presented if he believed that Jonusas was prejudiced by this possibility. The court has power to ensure a fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise. See § 28-510.

We conclude that Jonusas has not shown that he was prejudiced or surprised by the court's inquiry regarding a conviction of theft by unlawful taking or disposition. We also conclude that § 28-510 placed Jonusas on notice that he could be convicted of theft in any manner described under §§ 28-509 to 28-517 and that he could have formulated his defense strategy accordingly.

The Supreme Court of New Jersey considered similar issues when it addressed the consolidation of theft offenses in *State v. Talley*, 94 N.J. 385, 466 A.2d 78 (1983). The defendant was indicted for armed robbery and was convicted of theft by deception. Prior to the enactment of New Jersey's consolidation statute, a defendant charged with one theft offense could not be convicted of another. The New Jersey Legislature consolidated all theft offenses under N.J. Stat. Ann. § 2C:20-2(a) (West 1995), which provided: " 'A charge of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the indictment . . . .' " (Emphasis omitted.) 94 N.J. at 390, 466 A.2d at 80. The court noted that what unified the theft offenses was the involuntary transfer of property without consent. It concluded that if the defendant was faced with the possibility of a conviction for theft other than as charged, the defendant could not successfully attack the statute because the law prescribed certain protections that remedied any notice problems. The trial court had the power to provide a continuance or other appropriate relief to ensure a fair trial.

The evidence relating to the manner by which Jonusas acquired the Youngs' money established an activity that § 28-511(1) defines as theft. Section 28-510 gives adequate notice to one accused of theft that he may be charged with one manner of theft and convicted of theft by a different manner. There was no evidence indicating that Jonusas was prejudiced by lack of fair notice or by surprise. Every criminal defendant, regardless of education or experience, is presumed to know the law. See *State v. Veiman*, 249 Neb. 875, 546 N.W.2d 785 (1996).

Sufficiency of Evidence Regarding Theft by Deception

Jonusas argues that the district court erred in finding sufficient evidence to support a conviction for theft by deception. Jonusas

was not convicted of theft by deception but was convicted of theft by unlawful taking or disposition pursuant to § 28-511(1). Therefore, we do not consider the sufficiency of the evidence to support a conviction of theft by deception.

Sufficiency of Evidence Regarding Theft by Unlawful Taking or Disposition

Jonusas claims the district court erred in finding sufficient evidence to support a conviction for theft by unlawful taking or disposition. 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. Delgado, ante* p. 141, 690 N.W.2d 787 (2005).

Section 28-511(1) states: "A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." The purchase agreement provided that if the Youngs failed to obtain a liquor license, the money placed in escrow was to be returned to them. Jonusas admitted that he never placed the money in escrow and, instead, lost it through an investment.

Jonusas argues that he was lawfully in possession of the Youngs' money and that he did not intend to deprive them of it. He contends that he believed the Youngs had breached the purchase agreement and, as such, forfeited their rights to the deposit. This claim has no merit. Nowhere in the agreement did it state that Jonusas was entitled to the money in the event that the Youngs breached the agreement. In no event did the money ever belong to Jonusas, and his alleged reason for taking the money does not exonerate him.

The properly admitted evidence, viewed and construed most favorably to the State, was sufficient to support Jonusas' conviction. Jonusas was to place the Youngs' money in escrow. Jonusas was not entitled to take control of the money for personal investment. His failure to place the money in escrow and his subsequent loss of the funds clearly established his intent to deprive the Youngs of their property.

Motion for Directed Verdict

Jonusas alleges that the district court erred in overruling his motion for directed verdict. After the State had presented its evidence and following the presentation of all the evidence, Jonusas moved to dismiss all counts against him. He argued in both instances that the State had failed to present a prima facie case.

[4] There is no indication that Jonusas ever moved for a directed verdict; however, a motion to dismiss for failure to prove a prima facie case should be treated as a motion for a directed verdict. See *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994). 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. *Scurlocke v. Hansen*, 268 Neb. 548, 684 N.W.2d 565 (2004).

The evidence was clearly sufficient to support Jonusas' conviction pursuant to § 28-511(1). Therefore, the district court did not err in overruling his motion to dismiss.

Sentence

The district court sentenced Jonusas for the offense of theft by deception after it had convicted him of theft by unlawful taking or disposition. Neither party has raised this issue on appeal, and we decline to find plain error. Section 28-518 prescribes that in either case, Jonusas was to be sentenced for a Class III felony because the amount taken was over $1,500.

CONCLUSION

Jonusas' assignments of error are without merit, and the judgment of the district court is affirmed.

Affirmed.

IN RE INTEREST OF HEATHER R. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. CHAD K. AND MICHELLE K., APPELLANTS.

694 N.W.2d 659

Filed April 8, 2005. No. S-04-767.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Due Process.** Parents are entitled to due process in adjudication proceedings.
3. **Constitutional Law: Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.
4. **Parental Rights.** The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase.
5. **Effectiveness of Counsel: Conflict of Interest: Proof.** A party asserting a conflict of interest based on joint representation must demonstrate that his or her lawyer actively represented conflicting interests and that the actual conflict of interest adversely affected the lawyer's performance.
6. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), the State must prove the allegations of the petition by a preponderance of the evidence.

Appeal from the County Court for Cass County: JOHN F. STEINHEIDER, Judge. Affirmed.

Matthew K. Kosmicki for appellants.

Steven D. Sunde, Deputy Cass County Attorney, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Chad K. and Michelle K. appeal the June 22, 2004, order of the county court for Cass County, sitting as a juvenile court, adjudicating Heather R., Chad "C.J." K. (C.J.), and Andrea K. to be juveniles as described in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). Chad and Michelle assert that they were denied effective assistance of counsel, that their due process rights were violated because their joint representation by court-appointed counsel posed a conflict of interest, and that there was insufficient evidence to support the court's order. We determine that an ineffective assistance of counsel claim was not available in these juvenile adjudication proceedings in which counsel was appointed pursuant to statute and that appointment was not required under the federal Constitution. Further, because Chad and Michelle were afforded due process and the evidence is sufficient to support the court's order, we affirm the order of adjudication.

STATEMENT OF FACTS

On May 13, 2004, Heather reported to a counselor at her middle school that on May 11 her stepfather, Chad, had hit her with a belt, leaving visible marks on her buttocks. Heather told the counselor that the reason Chad hit her was because she had let a dog out and that when she told Chad she did not know how long the dog had been out, he told her he should hit her for that too. Heather also told the counselor that Chad had hit her on the shoulder on March 25.

The counselor reported the incident to the Department of Health and Human Services. Investigator David Heidbrink of the Nebraska State Patrol, investigated the incident. On May 14, Heather's injuries were examined by a pediatrician, Dr. Laura Wilwerding. After Dr. Wilwerding's examination of Heather and Heidbrink's investigation, Heather and her brother, C.J., and their sister, Andrea, were taken into emergency protective custody for the Department of Health and Human Services to arrange temporary foster care placement.

On May 18, 2004, the State filed a petition for adjudication in the juvenile court. The State alleged that Heather, born November 11, 1991; C.J., born December 20, 1994; and Andrea, born

February 1, 1998, came within the meaning of § 43-247(3)(a) because they lacked proper parental care by reason of the fault or habits of their parents; their parents neglected or refused to provide proper or necessary care for their health, morals, or well-being; or they were in a situation dangerous to life or limb or injurious to their health or morals.

The allegations in the petition were extensive and included allegations as to each child and each parent, not repeated here. The specifics of the May 11, 2004, incident were alleged in the petition, including further details in which C.J. stated that Heather was screaming and crying after the "latest beating." Other incidents were alleged, including one episode in which Chad is alleged to have hit Heather across the face or head with his hand and cracked her on the head with his knuckles. The allegations included a report by Dr. Wilwerding who observed "linear type bruises on Heather's buttocks consistent with being beaten with a belt."

A hearing on the petition was held June 22, 2004. At the hearing, the children were represented by a guardian ad litem and Chad and Michelle were jointly represented by court-appointed counsel.

Heather testified at the hearing that on May 11, 2004, Chad hit her on the buttocks six times with his belt because she had let the dog out. She felt pain after he hit her, and the pain did not stop until the following weekend. Heather testified that C.J. had observed the incident and that she had observed Chad hitting C.J. with a belt several times in the recent past. She recalled witnessing an incident in February in which C.J. had broken a blade off a fan and Chad had hit C.J. with the blade, causing C.J. to have bruises on his upper thighs and back. Heather testified that Michelle saw Chad hitting C.J. and did nothing to stop it and that Michelle had been present at other times when Heather had been hit and had done nothing to stop it. Heather testified that Michelle had also hit both her and C.J. with a belt on more than one occasion. Heather testified regarding other incidents in which Chad had been angry with her and had pulled her hair and hit her on the head. Heather also described a common punishment used by Chad known as "riding the Harley" in which she or C.J. would be required to remain in a squatting position with their arms raised forward for an extended period of time. She testified that once

they had been required to hold the position for 3 hours. Heather stated that she had witnessed Chad hitting Andrea with a belt in the past when Andrea was "[a]bout five."

Heidbrink testified at the hearing regarding his investigation in which he was assisted by a Department of Health and Human Services caseworker. Heidbrink and the caseworker interviewed Heather and elicited the same information Heather had reported to her counselor. Heidbrink observed bruises on Heather's buttocks that she said were caused by her being hit by Chad on May 11, 2004. Photographs in evidence show the bruises.

Heidbrink interviewed Chad and Michelle individually on May 14, 2004. Both admitted to having hit the children with a belt. Chad admitted to having hit C.J. with a fan blade, and he admitted to hitting Heather on May 11 but said that he had not intended to bruise her. Michelle stated that she had not witnessed the incident on May 11 and that she may have been sleeping upstairs at the time.

Dr. Wilwerding testified regarding her examination of Heather's injuries on May 14, 2004. Dr. Wilwerding observed multiple bruises on Heather's buttocks, and Heather told her the bruises were caused when her stepfather hit her six times with a belt. Heather told her she was hit about once a month. Dr. Wilwerding testified that her examination indicated that the bruising had occurred on approximately May 11; that the injuries were consistent with having been struck by a belt; and that in her medical opinion, the cause of the injuries was "[p]hysical beating." She also testified that a significant impact and a large amount of force were required for bruising to occur on the buttocks.

Chad and Michelle called witnesses on their behalf. A former babysitter for the children testified that she had known the family since 2000 and that she had not observed Chad and Michelle being angry with or yelling at the children, nor had she observed the children being fearful of them. Chad's father testified that he had not observed Chad or Michelle being violent toward their children and that he had observed them using only verbal discipline with the children.

Although Chad did not testify at the hearing, Michelle testified on her own behalf. She did not deny that she and Chad had hit the children on the buttocks, but she testified that they were

never hit elsewhere on their bodies. Michelle testified that there had been an ongoing problem with Heather's letting the dog out and forgetting that the dog was still out. Michelle recounted other discipline problems they had had with Heather. Michelle testified that she and Chad first dealt with discipline problems by talking to the children and that they used other forms of discipline, such as grounding the children, before they would resort to physical discipline. Michelle testified that she had never disagreed with Chad's physical discipline but that she was not aware that the children had ever sustained bruises as a result. Michelle admitted that she had observed Chad hit C.J. with a fan blade, but she said the discipline was not "hard" and was only on the buttocks. Michelle disputed some of Heather's testimony regarding other incidents in which Heather had been physically disciplined.

Following the hearing, the court on June 22, 2004, found that the State had proved its allegations by a preponderance of the evidence, and the court therefore entered an order adjudicating the children to be within the meaning of § 43-247(3)(a). The court took jurisdiction over the children and ordered that out-of-home placement be continued, that a case plan and court report be prepared, and that a disposition hearing be scheduled. Chad and Michelle appeal the June 22 order of adjudication.

ASSIGNMENTS OF ERROR

Chad and Michelle assert that (1) they received ineffective assistance of counsel or that their due process rights were violated because counsel failed to retain a pediatrician to give a second medical opinion, (2) their due process rights were violated because their court-appointed counsel had a conflict of interest as a result of representing them jointly, and (3) the evidence was insufficient to support the court's decision.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004).

ANALYSIS

No Ineffective Assistance of Counsel Claim in This Juvenile Adjudication Where Counsel Was Appointed Pursuant to Statute and Appointment Not Required Under Federal Constitution.

Chad and Michelle argue that because counsel failed to obtain and present testimony consisting of a second medical opinion regarding Heather's injuries, they were provided ineffective assistance of counsel, or, in the alternative, their due process rights were violated. Following our review of the record, we conclude that ineffective assistance of counsel is not an available claim in this juvenile adjudication proceeding in which counsel was appointed pursuant to statute and where counsel was not required under the federal Constitution.

We recently stated in a case involving termination of parental rights that "juvenile proceedings are civil rather than criminal in nature" and that "an individual has no constitutional right to effective assistance of counsel in a civil proceeding." *In re Interest of Joshua R. et al.*, 265 Neb. 374, 381, 657 N.W.2d 209, 214 (2003). See, also, *In re Interest of Azia B.*, 10 Neb. App. 124, 626 N.W.2d 602 (2001). In *In re Interest of Joshua R. et al.*, our rationale stemmed from the fact that the right to counsel and the corresponding right to effective counsel derived from the Sixth Amendment are limited to "criminal prosecutions." We further observed that "a statutory right to the appointment of counsel does not give rise to an ineffective assistance of counsel claim in a civil postconviction case," 265 Neb. at 382, 657 N.W.2d at 215, and we reasoned that a similar result was indicated in juvenile proceedings. Our rationale for this reasoning was the fact that appointment of counsel in a civil case where such appointment is not required by the federal Constitution need not be accompanied by a corresponding entitlement to effective counsel. See *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (stating that because there is no constitutional right to counsel in postconviction proceedings, there is no claim of ineffective assistance of counsel). Although the instant case involves an adjudication, we note that the U.S. Supreme Court has held that while the federal Constitution does not require that counsel be appointed for parents in every parental rights termination

proceeding, due process might require appointment of counsel in certain parental rights termination proceedings. *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). In *Lassiter*, the Court held that the determination of whether due process requires appointed counsel should be made in the first instance by the trial court, subject to appellate review, and that such determination should be based on a balancing of the parent's interests, the state's interests, and the risk that a parent will be erroneously deprived of his or her child because the parent is not represented by counsel. We have previously applied *Lassiter* and concluded that due process did not require that a parent be represented by counsel at a temporary detention hearing. *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991).

Leaving aside the fact that this juvenile case involves an adjudication rather than a parental rights termination, as in *Lassiter*, we note that in this case, counsel was appointed for Chad and Michelle based on statute and not on the basis of constitutional imperative, and we do not believe that appointment of counsel was required under the federal Constitution. See, Neb. Rev. Stat. § 43-279.01(1)(b) (Reissue 2004); *In re Interest of N.M. and J.M.*, 240 Neb. 690, 697, 484 N.W.2d 77, 82 (1992). We therefore analyze Chad and Michelle's claims regarding performance of counsel under principles applicable to the statutory right to counsel rather than under a federal constitutional right to counsel. See *In re Welfare of G.L.H.*, 614 N.W.2d 718 (Minn. 2000) (noting distinction between constitutional right to counsel and statutory right to counsel in juvenile proceedings).

[2,3] Although we did not find entitlement to an ineffective assistance of counsel claim in *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003), we nevertheless noted that due process is required in cases involving termination of parental rights. *Id*. We have also acknowledged that parents are entitled to due process in adjudication proceedings. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). In that case, we stated that in the context of both adjudication and termination hearings,

> " '[p]rocedural due process includes notice to the person whose right is affected by the proceeding; reasonable

> opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.' "

267 Neb. at 247-48, 674 N.W.2d at 457 (quoting *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 158, 655 N.W.2d 672, 681 (2003)). The fundamental fairness concept of the Due Process Clause of the 14th Amendment informs our assessment of the protections which are appropriate in juvenile matters. See *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

As is evident from the claims on appeal in this case, as a practical matter, due process claims challenging the adequacy of representation by counsel in juvenile cases commonly encompass assertions that in a criminal case might be characterized as "ineffective assistance of counsel" claims. Although the record does not require appointment of counsel on federal constitutional grounds, Chad and Michelle were entitled to due process, and we therefore review the following assignments of error in light of due process requirements.

Absence of Second Medical Opinion Did Not Violate Due Process.

[4] Because the due process to which a party is entitled is derived from the context in which the claim arises, we note that the present case involves adjudication rather than termination proceedings. We have noted, "The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase." *In re Interest of Brian B. et al.*, 268 Neb. 870, 878, 689 N.W.2d 184, 191 (2004). We therefore review the due process afforded to Chad and Michelle in light of the understanding that the purpose of these adjudication proceedings was to protect the interests of the children rather than to ultimately determine Chad and Michelle's parental rights.

Following our review of the adjudication proceedings herein, we conclude that Chad and Michelle were not denied due process. They were given proper notice and a hearing and were represented

by counsel. With respect to their specific argument regarding a second medical opinion, we determine from our review of the proceedings that Chad and Michelle were given a reasonable opportunity to refute and defend against the medical testimony and to confront and cross-examine Dr. Wilwerding, the State's witness, and that in fact, they did present evidence with respect to the issues in the case. Furthermore, we note that there is nothing in the record before us that would suggest that a second medical opinion could be obtained that would likely refute the testimony of Dr. Wilwerding, engender doubt in the accuracy of the photographs depicting Heather's injuries, or otherwise affect the outcome of these proceedings. We therefore reject Chad and Michelle's claim that their due process rights were violated because of counsel's purported failure to obtain and present a second opinion.

Joint Representation Did Not Violate Due Process.

Chad and Michelle further assert that their due process rights were violated because they were represented by the same court-appointed counsel and that such counsel had a conflict of interest arising from such joint representation. We conclude that the joint representation in these proceedings did not violate the due process rights of either Chad or Michelle.

[5] We note that in the context of criminal cases, we have stated that a party asserting a conflict of interest based on joint representation of codefendants "must demonstrate that his or her lawyer actively represented conflicting interests and that the actual conflict of interest adversely affected the lawyer's performance." *State v. Marchese*, 245 Neb. 975, 978, 515 N.W.2d 670, 673 (1994). We use this standard as guidance in our determination of whether counsel's joint representation in this case violated either Chad's or Michelle's due process rights.

Chad and Michelle focus their arguments on the purported detriment the joint representation had on Michelle's interests. They assert that Michelle was not as culpable as Chad under the allegations of the petition because she did not participate in and was not aware of the incident on May 11, 2004. They argue that separate representation would have better served Michelle's interests by highlighting how her behavior differed from that of Chad and that joint representation forced counsel to focus on Chad's interests and lose sight of Michelle's "defense."

We note, however, that the allegations in the petition encompassed more than the May 11, 2004, incident and were not limited to Chad's behavior. In addition to the allegations made against Chad individually, the State alleged that "[b]oth parents admitted to using a belt as a form of punishment on their children." The State also alleged that "Heather told Dr. Wilwerding that her Mom is aware of the way her stepfather is disciplining her and her siblings. She stated that she would not go talk to her Mom about it because she would just go tell Dad and he will get even more mad." The allegations in the petition implicated the behavior of both Chad and Michelle, and their behavior allegedly bore similarities.

Our review of these adjudication proceedings shows that Michelle's individual interests were adequately represented by counsel. Counsel called Michelle to testify in her own behalf and asked questions which allowed Michelle to present her perspective on the issues in this case. Michelle testified that she was not present and was not aware of the May 11 incident until after Heather reported it. Michelle also disputed aspects of Heather's testimony and detailed her version of how discipline was handled within the family. Michelle admitted that she hit the children with a belt and did not intervene when Chad did so. Because Michelle was able and did present her version of events at the hearing, we reject the argument that counsel focused on Chad to Michelle's detriment.

Chad and Michelle have not demonstrated that an actual conflict of interest existed or that any such conflict adversely affected their joint counsel's performance on behalf of either parent. Joint representation did not deprive either party of a reasonable opportunity to refute and defend against the charges and accusations, to confront and cross-examine adverse witnesses, or to present evidence on the charges and accusations. We therefore conclude that joint representation did not violate Chad's and Michelle's due process rights.

Order of Adjudication Was Supported by Sufficient Evidence.

Finally, Chad and Michelle assert that the evidence was not sufficient to support the court's adjudication order. We conclude

that there was sufficient evidence to support the court's order of adjudication.

In its petition, the State alleged in general that Heather, C.J., and Andrea are children

> who lack proper parental care by reason of the fault or habits of their parent(s), guardian(s), or custodian(s); whose parent(s), guardian(s), or custodian(s) neglect or refuse to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juveniles; or who are in a situation or engage in an occupation dangerous to life or limb or injurious to the health or morals of such juveniles.

Each of these general allegations is one of the factors described in § 43-247(3)(a).

The petition was very detailed in its allegations. The State made specific allegations regarding the May 11, 2004, incident wherein Chad hit Heather with the belt, the incident in which Chad hit C.J. with the fan blade, both Chad's and Michelle's past use of a belt to punish the children, and Michelle's awareness of and failure to stop Chad's use of physical discipline.

[6] At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003); *In re Interest of T.M.B. et al.*, 241 Neb. 828, 491 N.W.2d 58 (1992). See § 43-279.01(3). At the adjudication hearing, the State presented evidence to support the allegations in the petition. As we discussed above in the "Statement of Facts," the State presented testimony by Heather, Heidbrink, and Dr. Wilwerding, and photographs showing Heather's injuries were admitted in evidence. Chad and Michelle presented opposing testimony.

Although Michelle disputed some of Heather's testimony regarding certain incidents, the county court apparently accepted Heather's testimony, and we give weight to the fact that the court observed the witnesses and accepted Heather's version of the facts over Michelle's version. When the evidence is in conflict in a juvenile case, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one

version of the facts over the other. *In re Interest of Jac'Quez N., supra*; *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003).

Having reviewed the evidence presented at the hearing, we conclude that the State provided sufficient evidence to prove the allegations of the petition by a preponderance of the evidence. We therefore reject Chad and Michelle's final assignment of error.

CONCLUSION

In this case, appointment of counsel was not required on federal constitutional grounds and no ineffective assistance of counsel claim is available with respect to these juvenile adjudication proceedings in which counsel was appointed pursuant to statute. However, Chad and Michelle were entitled to due process in these juvenile adjudication proceedings. We conclude that Chad and Michelle were accorded fundamental fairness and that their due process rights were not violated in these proceedings. We further conclude that there was sufficient evidence to support the adjudication of all three children. We therefore affirm the adjudication order of the county court.

AFFIRMED.

DOUGLAS COUNTY SCHOOL DISTRICT 0001, ALSO KNOWN AS OMAHA PUBLIC SCHOOLS, ET AL., APPELLEES, V. MICHAEL O. JOHANNS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NEBRASKA, ET AL., APPELLEES, AND LANCASTER COUNTY SCHOOL DISTRICT 0001, ALSO KNOWN AS LINCOLN PUBLIC SCHOOLS, ET AL., APPELLANTS.

694 N.W.2d 668

Filed April 15, 2005. No. S-04-874.

1. **Interventions.** Whether a party has the right to intervene in a proceeding is a question of law.
2. **Parties: Jurisdiction: Waiver.** The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which could be affected by the judgment.
3. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter 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. **Public Officers and Employees: Pleadings.** When public officers are engaged in litigation to protect public rights, and their pleadings and procedure maintain the public interest, no private person is entitled to intervene.
6. **Parties: Presumptions.** Under the parens patriae doctrine, when a state is a party to a suit involving a matter of sovereign interest, it is presumed to represent the interests of all its citizens.
7. **Parties: Presumptions: Proof.** To overcome the presumption that the government is adequately representing all of its citizens, the applicant must show that its interest is different from the state's interest and that the state will fail to represent the applicant's interest.
8. **Parties: Interventions.** State representation is adequate if (1) no collusion is shown between the representative and an opposing party, (2) the represented interest is not adverse to the proposed intervenor, and (3) the representative has been diligently prosecuting the litigation.
9. **Interventions: Statutes.** The intervention statutes are to be liberally construed.
10. **Interventions.** The interest required as a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Cum. Supp. 2004) is a direct and legal interest—an interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
11. ____. An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right.
12. **Interventions: Pleadings.** A person seeking to intervene must allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

James B. Gessford, Gregory H. Perry, and Joshua J. Schauer, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellants Lancaster County School District 0001 et al.

David M. Pedersen, Jill Robb Ackerman, Elizabeth Eynon-Kokrda, and Kenneth W. Hartman, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., for appellees Douglas County School District 0001 et al.

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

CONNOLLY, J.

Lancaster County School District 0001, also known as Lincoln Public Schools, and other parties (collectively LPS) appeal a

district court's order that denied it the right to intervene. In the underlying action, Douglas County School District 0001, also known as Omaha Public Schools, and other parties (collectively OPS) challenged the constitutionality of the state school funding statutes. In arguing it has a right to intervene, LPS contends that it has a direct legal interest in the action because if the school funding system is enjoined, it may lose funding. We determine that (1) the parens patriae doctrine prevents LPS' intervening as defendants because its interest is adequately represented by the State and (2) LPS cannot intervene as plaintiffs because its interest is speculative. Because we determine that LPS is not entitled to intervene as a matter of right, we affirm.

BACKGROUND

OPS filed this action against Michael O. Johanns, in his official capacity as Governor, and other public officers (collectively the State). It seeks a declaratory judgment that the Nebraska statutory school funding system is unconstitutional under special legislation and the equal protection and due process clauses of the Nebraska Constitution. The lengthy operative complaint sought to enjoin the State from further implementing the funding system and an award of attorney fees.

The allegations in the complaint focused on the school funding system's failure to provide the resources necessary to adequately educate students in ethnically and economically diverse settings of Douglas County School District 0001. The school district alleged that it is the largest in Nebraska, that its student body is economically diverse, and that it has the largest racially and ethnically diverse student body in Nebraska. The allegations included statistics that set out the number of students in programs such as students who qualify for free lunches, the percentage of students for whom English is their second language, and the number of students in special education. The school district alleged that federal mandates required it to meet standards to educate these students, and it provided detailed allegations of those standards. The complaint alleged that the school district's students failed in meeting academic standards and that it could not properly educate the students without additional funding. The complaint sets out the details of the funding system. It alleged that the

State was on notice of the school district's student body characteristics, that the school funding system failed to provide the students with the opportunity to obtain the free education guaranteed to them under the Nebraska Constitution, and that the funding system denied them an equal opportunity to meet legally set academic standards.

OPS' complaint further alleged that the school funding system was unconstitutional on its face and as applied. It asked the court to declare the funding system void and to enjoin the State from further executing or implementing the system.

LPS moved to intervene as both defendants and plaintiffs. Lancaster County School District 0001 alleged that it is the second largest school district in Nebraska, that its students share many of the characteristics of Douglas County School District 0001, and that it is required to comply with the same academic standards. In the complaint, the school district alleged nothing about the specific number of economically, racially, or ethnically diverse students it serves, or how it could or could not meet the students' needs. LPS alleged that it sought to intervene as defendants so it could resist the claim that the funding system was unconstitutional. It also sought to intervene as plaintiffs, stating:

> [LPS] allege[s] in support thereof that in the event relief is afforded [to OPS, it is] joining [OPS] in claiming what is sought by the Complaint, or by uniting with the [State] in resisting the claim of [OPS], or by demanding anything adversely to both [OPS and the State].
>
> . . . .
>
> [I]n the event Nebraska's school funding system or the state aid formula is held to be unconstitutional or otherwise unlawful . . . the causation of such must be determined, and that to the extent Nebraska's school funding system or the state aid formula is determined to be the cause, that [LPS joins OPS] in claiming what is sought by the Complaint . . . .

LPS further alleges that it "will be subject to harm from any loss of funding and such loss of funding will cause the funding system or the state aid formula to be unconstitutional or otherwise unlawful as to [LPS]."

The State did not object to the motion to intervene. OPS moved to dismiss or strike the complaint in intervention. The district court found that (1) LPS failed to allege facts showing that it had a direct and immediate interest in the action; (2) if the funding system were declared unconstitutional, LPS could participate in the legislative process when the Legislature acted to restructure the system; and (3) even if LPS had a direct interest, because the State, as defendants, consisted of public officers engaged in litigation to protect public rights, no private person was entitled to intervene. The court overruled the motion to intervene and dismissed the intervention complaint. LPS appeals.

ASSIGNMENTS OF ERROR

LPS assigns, rephrased, that the district court erred by denying its motion to intervene, dismissing its complaint, and failing to find that it was a necessary party.

STANDARD OF REVIEW

[1-3] Whether a party has the right to intervene in a proceeding is a question of law. *In re Change of Name of Davenport*, 263 Neb. 614, 641 N.W.2d 379 (2002). The presence of necessary parties to a suit is a jurisdictional matter and cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest which could be affected by the judgment. *Spear T Ranch v. Knaub, ante* p. 177, 691 N.W.2d 116 (2005). A jurisdictional question which does not involve a factual dispute is a matter of law. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Dworak v. Farmers Ins. Exch., ante* p. 386, 693 N.W.2d 522 (2005).

ANALYSIS

LPS contends that it has a direct legal interest in the action and therefore a right to intervene. OPS argues, however, that the State is adequately defending the constitutionality of the school funding system and that LPS has failed to plead a direct legal interest in the matter.

Intervention in Nebraska is controlled by statute, which provides:

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

Neb. Rev. Stat. § 25-328 (Cum. Supp. 2004).

LPS Has Failed to Show Right to Intervene as Defendants

In its chameleon-like pleading, LPS alleges that it has a direct legal interest in defending the constitutionality of the school funding statutes and that if the funding statutes are unconstitutional, it seeks the same relief that OPS might receive. In seeking to intervene as defendants, it argues that the OPS action could enjoin school funding and harm LPS. OPS, however, argues that the State is adequately representing any LPS interest regarding the statutes' constitutionality.

[5,6] We have long held that "'"[w]hen public officers are engaged in litigation to protect public rights, and their pleadings and procedure maintain the public interest, no private person is entitled to intervene."'" *Best & Co., Inc. v. City of Omaha*, 149 Neb. 868, 877, 33 N.W.2d 150, 156 (1948). Accord *Smithberger v. Banning*, 130 Neb. 354, 265 N.W. 10 (1936). We have applied the same principle as other jurisdictions which routinely hold that under the parens patriae doctrine, when a state is a party to a suit involving a matter of sovereign interest, it is presumed to represent the interests of all its citizens. See, e.g., *Maine v. Director, U.S. Fish and Wildlife Service*, 262 F.3d 13 (1st Cir. 2001); *United States v. Hooker Chemicals & Plastics*, 749 F.2d 968 (2d Cir. 1984); *Commonwealth of Pa. v. Rizzo*, 530 F.2d 501 (3d Cir. 1976); *New Mexico Right to Choose/NARAL v. Johnson*, 126

N.M. 788, 975 P.2d 841 (1998). See, also, *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982) (discussing presumption in dicta). The concept of parens patriae refers to when "a governmental entity presents itself as a trustee, guardian, or representative of all citizens." 6 James Wm. Moore, Moore's Federal Practice § 24.03[4][a] at 24-49 (3d ed. 2004). Discussing the parens patriae doctrine, the U.S. Supreme Court has explained:

> The "*parens patriae*" doctrine . . . is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." . . . The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

New Jersey v. New York, 345 U.S. 369, 372-73, 73 S. Ct. 689, 97 L. Ed. 1081 (1953), quoting *Kentucky v. Indiana*, 281 U.S. 163, 50 S. Ct. 275, 74 L. Ed. 784 (1930).

[7,8] To overcome the presumption that the government is adequately representing all of its citizens, the applicant must show that its interest is different from the state's interest and that the state will fail to represent the applicant's interest. See, e.g., *Hooker Chemicals & Plastics, supra*. In addition, a difference in tactics does not create inadequate representation. *Director, U.S. Fish and Wildlife Service, supra*; *Chiglo v. City of Preston*, 104 F.3d 185 (8th Cir. 1997); *New Mexico Right to Choose/NARAL, supra*. Courts generally hold that state representation is adequate if (1) no collusion is shown between the representative and an opposing party, (2) the represented interest is not adverse to the proposed intervenor, and (3) the representative has been diligently prosecuting the litigation. See, e.g., *Delaware Valley Citizens' Council v. Com. of Pa.*, 674 F.2d 970 (3d Cir. 1982); *Wade, supra*. The presumption applies equally to individual citizens and political subdivisions. *Hooker Chemicals & Plastics, supra*.

In applying the parens patriae doctrine, courts have held that in cases where a party sought to intervene as defendants to defend the constitutionality of a statute, the state adequately represented the applicant's interests and denied intervention as a matter of

right. *Horton v. Meskill*, 187 Conn. 187, 445 A.2d 579 (1982). See, *New Mexico Right to Choose/NARAL, supra*; *Ass'n of Rural and Small Schools v. Casey*, 531 Pa. 439, 613 A.2d 1198 (1992).

LPS argues that we overruled the parens patriae doctrine in *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001). We disagree. In *Ruzicka*, we stated in dicta that under § 25-328, a party who is adequately represented by another party may intervene. But *Ruzicka* did not involve a governmental party and thus did not involve the parens patriae doctrine. *Ruzicka* did not overrule our previous cases applying the doctrine.

Here, LPS seeks first to intervene as defendants to defend the constitutionality of the school funding system. So, LPS' position is identical to that of the State, and we presume under the parens patriae doctrine that the State adequately represents that interest. LPS has not alleged that the State has failed to perform its duties in defending the litigation, nor has it alleged any malfeasance or collusion. Therefore, LPS has failed to allege facts showing that it may intervene as defendants. The district court correctly denied intervention.

LPS Has Failed to Show Right to Intervene as Plaintiffs

If it cannot intervene as defendants, LPS argues that it should be allowed to intervene as plaintiffs if the school funding system is declared unconstitutional. It argues that it will lose funding if the statutes are unconstitutional and that it has a direct interest in the action. OPS, however, argues that LPS did not properly plead a direct legal interest and that any interest LPS has is speculative.

[9-12] The intervention statutes are to be liberally construed. *In re Change of Name of Davenport*, 263 Neb. 614, 641 N.W.2d 379 (2002). But the interest required as a prerequisite to intervention under § 25-328 is a direct and legal interest—an interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002); *Ruzicka, supra*. An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right. *In re Change of Name of Davenport, supra*. Therefore, a person seeking to intervene must

allege facts showing that he or she possesses the requisite legal interest in the subject matter of the action. *Id.*; *Ruzicka, supra*. We have defined an "interest in the matter in litigation" as "the subject matter of the action, 'the thing in controversy.' " *Kirchner v. Gast*, 169 Neb. 404, 411, 413, 100 N.W.2d 65, 72, 73 (1959).

The Maryland Court of Appeals considered a similar case in which a school district sought to intervene as a plaintiff. See *Montgomery County v. Bradford*, 345 Md. 175, 691 A.2d 1281 (1997). In *Bradford*, the plaintiff sought a declaratory judgment that students in Baltimore were deprived of their right to at least a minimum quality of education required in the state constitution. Montgomery County sought to intervene, contending in a detailed petition that if the funding statutes were found unconstitutional, it would result in a diminution of resources to other districts in the state, including Montgomery County. Montgomery County argued that it had a strong interest in the lawsuit and that it had a fundamental interest to participate in defining the constitutional parameters of an adequate education in Maryland that would not harm Montgomery County. The plaintiffs opposed intervention, arguing that Montgomery County did not have a direct legal interest in the litigation. The trial court denied intervention, finding that whether the Montgomery County students were receiving an appropriate education was not an issue in the suit and that any future loss of funds was speculative.

Montgomery County appealed, presenting the same primary arguments as LPS: (1) that it had an interest in preserving state funding and (2) that should the funding scheme be found unconstitutional, it had an interest in the remedies that the court might fashion. The Maryland Court of Appeals affirmed. The court determined that Montgomery County's concerns were speculative because they were premised on future events that might not occur and that any decreased funding would not automatically follow. The court stated:

> [T]he County's concerns are indirect, remote, and speculative; they do not focus directly on the "transaction" involved in these cases, viz, whether the plaintiffs' actions, directed, as they are, *solely* to the constitutional adequacy of the education provided to children in the Baltimore City public schools, implicates Montgomery County's legal interest in

> any way which would give it a right to intervene in these cases under [the state intervention rule]. Were it otherwise, according to the plaintiffs, and that was all that was needed to establish a right to intervene, then any applicants' generalized interest in participating in the formulation of a constitutional standard, to which the person may be subjected, could intervene as a party from which an interpretation of a constitutional provision might emerge.

Id. at 199, 691 A.2d at 1293.

Likewise, the Connecticut Supreme Court denied intervention as a matter of right in a similar case. *Horton v. Meskill*, 187 Conn. 187, 445 A.2d 579 (1982). Discussing whether the intervenors had a direct interest when the action concerned students in a different district, the court noted that a person or political subdivision does not have a sufficient interest to create a right to intervene merely because an impending judgment might have some effect on the intervenor. *Id*.

Here, without providing individualized details, LPS pled only the following allegations of a direct legal interest:

> [I]n the event Nebraska's school funding system or the state aid formula is held to be unconstitutional or otherwise unlawful . . . the causation of such must be determined, and that to the extent Nebraska's school funding system or the state aid formula is determined to be the cause, that Intervenors . . . join [OPS] in claiming what is sought by the Complaint . . . .
>
> [LPS] will be subject to harm from any loss of funding and such loss of funding will cause the funding system or the state aid formula to be unconstitutional or otherwise unlawful as to [LPS].

Like *Montgomery County v. Bradford*, 345 Md. 175, 691 A.2d 1281 (1997), and *Horton, supra*, we hold that this speculative allegation is insufficient to state a direct legal right that would allow intervention. LPS has not alleged details to show how it would lose funding, or how much. Further, whether any funding would be lost is speculative because it is dependent on a ruling finding the funding scheme unconstitutional.

Moreover, actions by the State that would act to decrease funding—actions such as legislative redrafting or budgeting—would

fall outside of the trial court's control. For example, as the trial court has already noted, if it enjoined operation of the school funding statutes, it could not dictate to the state Legislature how and in what amount it should fund the schools. Instead, the court could find only that the current system was unconstitutional. The Legislature would then be required to resolve the issue through different budgeting, redrafting of statutes, and tax increases or by applying other unknown solutions. LPS would be free to participate in that process, which is outside of judicial control. Accordingly, we determine that the interest LPS alleges is indirect, remote, and conjectural and thus is not enough to establish intervention as a matter of right.

LPS as Necessary Party

LPS contends that it is a necessary party to the action. Neb. Rev. Stat. § 25-323 (Cum. Supp. 2004) provides in part:

> The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

We have determined that LPS does not have a direct legal interest. The court can determine the action without LPS' presence. Accordingly, we determine that LPS is not a necessary party to the suit.

CONCLUSION

We determine that LPS was not entitled to intervene as a matter of right and that the parens patriae doctrine applies. We further determine that LPS is not a necessary party to the action. Accordingly, we affirm.

Affirmed.

AMANDA MADLOCK, APPELLANT, V. SQUARE D COMPANY, APPELLEE.

695 N.W.2d 412

Filed April 22, 2005. No. S-04-758.

1. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
2. **Workers' Compensation.** When a worker sustains a scheduled member injury and a whole body injury in the same accident, the Nebraska Workers' Compensation Act does not prohibit the court from considering the impact of both injuries in assessing the loss of earning capacity. In making such an assessment, the court must determine whether the scheduled member injury adversely affects the worker such that loss of earning capacity cannot be fairly and accurately assessed without considering the impact of the scheduled member injury upon the worker's employability. If the loss of earning capacity cannot be fairly and accurately assessed without such consideration, then the court is permitted to do so.
3. ____. When a whole body injury is the result of a scheduled member injury, the member injury should be considered in the assessment of whole body impairment. Under such circumstances, the trial court should not enter a separate award for the member injury in addition to the award for loss of earning capacity. To allow both awards creates an impermissible double recovery.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Timothy S. Dowd, of Dowd, Dowd & Howard, for appellant.

Brenda S. Spilker and Tracy L. Stoehr, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Amanda Madlock appeals from the judgment of a Workers' Compensation Court review panel that reversed, in part, an award entered by the trial court. The review panel found that because Madlock's foot injury (a scheduled member injury) was taken into consideration in determining her loss of earning capacity, the trial court's award of separate benefits for the member injury constituted an impermissible double recovery of benefits.

SCOPE OF REVIEW

[1] With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000).

FACTS

On September 7, 1999, while employed by the Square D Company (Square D), Madlock was carrying a 60- to 70-pound box of circuit breakers, when the handles on the box broke and the box landed on her right foot. The parties stipulated that Madlock's injury resulted from an accident arising out of and in the course of her employment; that she suffered an injury to her right foot resulting in a permanent partial impairment of 22 percent; that she was earning an average weekly wage of $694.08 at the time of the accident; and that all benefits owed to her as a result of the foot injury, including disability and medical benefits, had been paid by Square D. The parties disagreed concerning whether back problems Madlock experienced were causally related to the accident. Madlock claimed that her gait was altered because of the foot injury, resulting in a low-back condition.

Dr. John McClellan of the Nebraska Spine Center opined that Madlock had persistent lumbar back pain caused by the residual effects of the injury to her right foot. Dr. Denise Vosik stated that the residual effects of the foot injury resulted in an injury to the body as a whole and that the chronic and recurrent sacroiliac dysfunction experienced by Madlock was caused, or at least significantly aggravated, by the work accident.

Square D offered the report of Dr. Christopher Anderson, which report stated that it was "medically possible that [Madlock's] right foot injury may have caused some secondary gait deviations, which altered the . . . biomechanics through her back, yet not to a severe degree that would cause multilevel lumbar degenerative disc disease and annular tears." Anderson opined that those conditions were "more than likely" preexistent to the foot injury, noting that Madlock was hospitalized in April 1986 for similar low-back pain.

In determining Madlock's loss of earning capacity, the trial court considered the impact of the member injury and concluded that a fair and accurate assessment of Madlock's loss of earning

capacity could not be made absent the inclusion of the limitations flowing from the member injury. The trial court noted: "The impact and adverse effect of the scheduled injury upon the plaintiff's whole body injury is evident as one considers the fact that even the medical experts could not segregate the two."

The trial court found that the medical evidence documented the existence of an altered gait due to the right foot injury, that Madlock had met and carried her burden of proof on the issue of causation, and that Madlock had suffered a 10-percent loss of earning capacity. The trial court awarded her $46.26 per week for each week from and after the date of the accident for the statutorily mandated period of entitlement less those weeks during which she received or was entitled to temporary total and temporary partial disability benefits.

The trial court next addressed whether a separate award or recovery for the member injury was permitted and whether Square D was entitled to a credit or offset against the loss of earning capacity award for the moneys already paid for the member injury. The trial court reasoned that

> [w]hile it would be unjust to permit a claimant a "double recovery," there are always exceptions that must be accommodated. Such is the circumstance presented in this case. The plaintiff has two distinct injuries (foot and low back). While one resulted from the other, they are, nonetheless, distinct to the extent that they present an impairment to plaintiff not only in combination but individually.

The trial court found that the member injury continued to operate as an independent source of restriction and limitation, noting that " '[w]hile sitting to do her work, [Madlock] noticed that the swelling would become worse and as a result,' " she would have to elevate her leg. The trial court stated:

> The apparent tendency of the plaintiff's foot to swell and become painful and thus interfere with ambulation clearly is a condition unrelated to the subsequent back injury and exists solely because of the member injury itself. To totally blend or integrate that member loss into the body as a whole injury is to ignore the reality of plaintiff's full loss.
>
> . . . The court is sufficiently satisfied that plaintiff's foot impairment is significant enough to not only add to plaintiff's

> overall loss of earning capacity but to create impairment for plaintiff independently and in addition to that loss.

The award entered by the trial court included $462.72 per week for 24 1/7 weeks for temporary total disability due to the member injury; $4,248.65 for varying periods of temporary partial disability; $462.72 for 47.3 weeks for a 22-percent permanent impairment to Madlock's right foot; $462.72 per week for 8 weeks for temporary total disability due to the low-back injury; and $46.27 per week for a 10-percent loss of earning capacity for a period of 238 5/7 weeks.

Square D sought review by a three-judge panel, asserting that the trial court erred in awarding benefits for a 22-percent permanent partial impairment of the right foot in addition to awarding benefits for a 10-percent loss of earning capacity, because the impact of the member injury was already considered in calculating the loss of earning capacity award.

The review panel affirmed the trial court's order except that it reversed the finding that Madlock was entitled to benefits for a member injury in addition to benefits for a loss of earning capacity when the member impairment was considered in assessing the loss of earning capacity. The review panel concluded that Madlock had sustained a member injury which ultimately led to a back injury and that the back injury was an extraordinary or unusual result which entitled her to an award for loss of earning capacity. The review panel determined that the trial court had properly considered the impact of the member injury in awarding loss of earning capacity, but that it was error to award weekly benefits for a 22-percent member impairment. It concluded that this award resulted in a double recovery for the member injury, in that Madlock would receive both scheduled member benefits and an increase in loss of earning capacity. The review panel reversed that portion of the award providing Madlock with benefits for a member injury in addition to a loss of earning capacity. Madlock appeals.

ASSIGNMENT OF ERROR

Madlock asserts that the three-judge review panel erred in reversing that portion of the trial court's award of benefits for a 22-percent permanent partial impairment of the right foot.

ANALYSIS

The issue is whether a worker may recover benefits for both a scheduled member injury and a whole body injury resulting in loss of earning capacity when the member injury was taken into consideration in determining the loss of earning capacity. The issue presents a question of law rather than one of fact. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000).

In this case, the review panel stated:

> We believe [the trial court's] award of scheduled member benefits after specifically including the limitations imposed upon the plaintiff by her member injury in assessing loss of earning capacity to be in error. . . . In this instance, the plaintiff sustained a member injury which ultimately lead [sic] to a back injury, an extraordinary or unusual result, entitling her to an award for loss of earning capacity. We believe that [the trial court] properly considered the impact of the member injury in making his award of loss of earning capacity, but find that it was error for him to award in addition the weekly indemnity benefits for a 22 percent member impairment. Such result leads to a double recovery of benefits for the member injury. Not only does the plaintiff receive an increase in loss of earning capacity but then also receives the scheduled member benefits as well.

The panel reversed that portion of the award which provided Madlock $462.72 per week for 47.3 weeks for a 22-percent permanent impairment to her right foot.

Neb. Rev. Stat. § 48-121 (Reissue 2004) provides for compensation for three categories of job-related disabilities: (1) total disability, (2) partial disability, and (3) "schedule" injuries to specific parts of the body. See *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003), citing *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977). In *Zavala*, we discussed whether a scheduled member injury should be considered in addition to a whole body injury in calculating loss of earning capacity when both injuries resulted from the same accident. We noted that § 48-121 does not specify how compensation is to be

established when a worker suffers both a scheduled member injury and a whole body injury as a result of a single accident.

[2] We stated:

> [W]hen a worker sustains a scheduled member injury and a whole body injury in the same accident, the [Nebraska Workers' Compensation] Act does not prohibit the court from considering the impact of both injuries in assessing the loss of earning capacity. In making such an assessment, the court must determine whether the scheduled member injury adversely affects the worker such that loss of earning capacity cannot be fairly and accurately assessed without considering the impact of the scheduled member injury upon the worker's employability. If the loss of earning capacity cannot be fairly and accurately assessed without such consideration, then the court is permitted to do so.

Zavala, 265 Neb. at 199, 655 N.W.2d at 702.

In *Jeffers*, 198 Neb. at 384, 253 N.W.2d at 33, we noted the three categories of job-related disabilities identified in § 48-121 and stated: "[L]osses in bodily function, so far as subdivisions (1) and (2) are concerned, are important only insofar as they relate to earning capacity and employability." For claims which fall under subdivision (3), loss of earning capacity is not material. *Jeffers, supra*. The Legislature intended to establish the amount of benefits for loss of specific members under subdivision (3) without regard to the extent of any subsequent disability. *Id*. However, the Legislature has never indicated whether a worker may receive compensation for both a scheduled member injury and a whole body injury when the member injury was considered in assessing the whole body injury and subsequent loss of earning capacity.

It is not disputed that Madlock's back injury was an unusual or extraordinary condition that developed following the scheduled member injury. However, Square D claims that Madlock should be entitled to compensation for lost earning capacity based on the whole body injury only and not given an additional award based on permanent partial impairment of the right foot.

The issue presented in the case at bar has been considered in other jurisdictions. Obviously, the result in each case depended upon the workers' compensation law involved and the particular facts and circumstances of the case. In *Providence Washington*

Ins. Co. v. Grant, 693 P.2d 872 (Alaska 1985), the employee fell from a ladder, injuring his back, knee, ankle, and ribs. Following an award of $74.79 per week, the employee petitioned for a redetermination, arguing that he was entitled to separate awards for his back, knee, and foot injuries. The workers' compensation board agreed. On appeal to the Alaska Supreme Court, the employer argued that the approach taken by the board constituted a double recovery because the employee was awarded compensation for the scheduled disabilities of his knee and foot separately and his loss of earning capacity resulting from the scheduled injuries was incorporated into the award for his back injury. The employer argued that the employee should not receive both awards under such circumstances.

The court stated:

> We recognize that this approach could result in a double recovery if the loss of earning capacity resulting from the scheduled injuries were used to determine the employee's compensation for an unscheduled disability. To avoid this, when awarding the claimant for an unscheduled injury, the board must attempt to separate the loss of earning capacity resulting from scheduled disabilities from the loss of earning capacity resulting from the unscheduled injury.

Id. at 876.

The court determined that the board could compensate for the back injury based upon the total loss of earning capacity only if the loss of earning capacity resulting from the foot and knee injuries could not be severed from the loss of earning capacity resulting from the back injury. In such a situation, the employee would be entitled to an award based on his total loss of earning capacity resulting from the fall plus an award for his scheduled injuries.

In *Farrens Tree Surgeons v. Winkles*, 334 So. 2d 569, 572 (Fla. 1976), the court noted the rule of law enunciated by the then Florida Industrial Relations Commission in *Grao v. Fountainebleau Hotel*, I.R.C. Order 2-2543 (Mar. 11, 1974), *cert. denied* 300 So. 2d 900 (Fla. 1974):

> " 'When there are *two distinct injuries*, one to a scheduled member and one to the body as a whole, even if both are incurred during the same accident, they may both be compensated for separately as long as the injury to the body

> as a whole is not *the result of the injury to the scheduled member*. . . . [I]n determining the loss of wage earning capacity, *all* injuries, including scheduled injuries, must be considered. . . .' "

(Emphasis in original.)

The Judge of Industrial Claims was directed to determine three amounts: the "scheduled recovery," the separate anatomical injury to the body as a whole, and loss of wage earning capacity. The award was to be the greater of the total of the scheduled injury plus the anatomical whole body injury not resulting from the scheduled injury, or the loss of wage earning capacity taking into consideration all of the injuries. *Farrens Tree Surgeons, supra*.

In *Miller v. Lauridsen Foods, Inc.*, 525 N.W.2d 417, 420 (Iowa 1994), the court held: "If an employee suffers both an injury to a scheduled member and also to part of the body not included in the schedule, then the resulting injury is compensated on the basis of an unscheduled injury." See, also, *Honeywell v. Allen Drilling Co.*, 506 N.W.2d 434 (Iowa 1993); *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12 (Iowa 1993).

The court in *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 336 (Tenn. 1996), stated: "It is the rule in Tennessee that where an injury is to more than one member, one of which is scheduled and the other of which is not scheduled, benefits are allowable on the basis of percentage of the body as a whole." See, also, *Continental Ins. Companies v. Pruitt*, 541 S.W.2d 594 (Tenn. 1976).

In the case at bar, the whole body injury cannot be separated from the scheduled member injury. Both arose from the same accident. If Madlock had not injured her foot, she would not have sustained a back injury that was compensable under Nebraska's workers' compensation statutes. Under these circumstances, the trial court was required to, and did, consider the scheduled member injury in awarding benefits because Madlock's loss of earning capacity could not be fairly and accurately assessed without such consideration.

Madlock's scheduled member injury was an essential factor in determination of the award for loss of earning capacity. By also awarding separate benefits for the member injury, the trial court allowed Madlock a greater recovery than that to which she was entitled. Thus, the review panel correctly determined that the trial

court had erred in awarding Madlock additional benefits for the scheduled member injury.

[3] We therefore hold that when a whole body injury is the result of a scheduled member injury, the member injury should be considered in the assessment of whole body impairment. Under such circumstances, the trial court should not enter a separate award for the member injury in addition to the award for loss of earning capacity. To allow both awards creates an impermissible double recovery.

CONCLUSION

The judgment of the review panel is affirmed.

AFFIRMED.

McCORMACK, J., not participating.

RANDY DAVIS, APPELLANT, V. GOODYEAR TIRE & RUBBER COMPANY AND LIBERTY MUTUAL INSURANCE CORP., APPELLEES.

696 N.W.2d 142

Filed April 22, 2005. No. S-04-861.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation.** A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court.
3. **Workers' Compensation: Appeal and Error.** Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
4. **Workers' Compensation.** Pursuant to Neb. Rev. Stat. § 48-121(2) (Reissue 2004), benefits are measured not by loss of bodily function, but by reduction in or loss of earning power or employability.
5. **Workers' Compensation: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Reissue 2004), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.

6. **Workers' Compensation.** The mere fact that after an injury, the employee receives, or is offered, his or her former wages, or a larger sum, does not necessarily preclude recovery of compensation under the workers' compensation statutes.
7. ____. The fact that an employee is still employed and still paid the same or better does not, of itself, mean he or she has not experienced some loss of earning capacity.
8. ____. If an employee, after a work-related injury, receives wages equal to or greater than the wages received before the injury, the wages may be considered in the determination whether an employee has sustained a loss of earning capacity.
9. ____. If, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his or her earning power has not been impaired.
10. **Workers' Compensation: Appeal and Error.** Neb. Rev. Stat. § 48-185 (Reissue 2004) precludes an appellate court's substitution of its view of the facts for that of the Workers' Compensation Court if the record contains sufficient evidence to substantiate the factual conclusions reached by the Workers' Compensation Court.
11. **Workers' Compensation.** An employee's actual wages, after injury, are pertinent to a determination of the degree to which the employee's earning power has been impaired.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Dallas D. Jones and Tracy L. Stoehr, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

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

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

GERRARD, J.

NATURE OF CASE

The plaintiff, Randy Davis, was injured as a result of an accident arising out of and in the course of his employment with Goodyear Tire & Rubber Company (Goodyear). Davis was able to continue working at Goodyear, but with physical restrictions, and he filed a petition for workers' compensation benefits. At trial, the parties stipulated to the compensability of the injury and submitted the amount of Davis' damages to the single judge. The court-appointed vocational rehabilitation specialist had opined that Davis had suffered a 25- to 30-percent loss of earning power if he was able to continue working at Goodyear, but a 60- to 70-percent loss of earning power if Davis lost his job. Based on

this opinion, the single judge concluded that Davis had suffered a 27.5-percent loss of earning power and awarded benefits accordingly. The issue presented is whether the single judge erred in basing his determination of Davis' loss of earning power on Davis' continued employment with Goodyear.

BACKGROUND

On October 31, 2000, Davis was employed by Goodyear as a shop mechanic and suffered an injury to his lower back while trying to lift one end of a heavy machine. This was apparently an aggravation of a preexisting low-back condition, and the parties stipulated that this event was compensable. Davis subsequently suffered a scheduled member injury in an unrelated incident that is not relevant to this appeal.

The October 31, 2000, accident and injury were found by the single judge to result in a 10-percent permanent impairment to the body as a whole. The single judge found that Davis had suffered permanent physical restrictions: never lifting greater than 50 pounds; not lifting more than 20 pounds repetitively; and avoiding prolonged bending, stooping, squatting, or kneeling. The single judge noted Davis' testimony that he was abiding by these restrictions. The judge also noted the testimony of the engineering manager for the Lincoln, Nebraska, plant where Davis was employed that Davis' performance had been effective and that there was no reason to believe Davis would be laid off.

Davis was found to have reached maximum medical improvement on September 22, 2001. Steven Kuhn, the court-appointed vocational rehabilitation specialist, evaluated Davis' loss of earning power, concluding as follows:

> Davis's ability to perform work for Goodyear Tire and Rubber has been impacted by his work related injury and the subsequent physical restrictions and limitations. Prior to his injury . . . Davis was able to preform [sic] the full range of job duties associated with various Maintenance Mechanic positions. He is now limited in the type of the positions he preforms [sic] and to the number of hours he works.
>
> While maintaining his employment at Goodyear Tire and Rubber . . . Davis has a loss of access to employment of 60 percent and a minimal loss of wage earning ability. However

> if he were to leave Goodyear Tire and Rubber for any reason and attempt to obtain employment in the general labor market his loss of access to employment would be 35 to 40 percent. His loss of access to employment will decreased [sic] the type of positions he is able to preform [sic] limiting him to lower skilled positions that typically pay less.
>
> It is the opinion of this Rehabilitation Consultant based upon my education, training and work experience within a reasonable degree of vocational certainty that . . . Davis does have a loss of earning capacity due to his work related injury of October 31, 2000.
>
> If . . . Davis is able to maintain his position with Goodyear Tire and Rubber his loss of earning capacity would be 25 to 30 percent.
>
> If . . . Davis was unable to maintain his position at Goodyear Tire and Rubber [and] were to acquire other alternative employment based upon transferable skills his loss of earning capacity would be 60 to 70 percent.
>
> If . . . Davis were able to take advantage of vocational services to increase his skills his loss of earning capacity would be 40 to 50 percent.

The single judge concluded that Davis' loss of earning power was 27.5 percent. The single judge first found that the later opinion of a 40- to 50-percent loss of earning power was speculative at best, and the single judge rejected that opinion, because Davis was not entitled to vocational rehabilitation at the time of the award. The single judge also rejected Kuhn's opinion regarding Davis' loss of earning power should he be unable to retain his employment at Goodyear. The single judge noted the "uncontradicted testimony in this case" that based upon Davis' seniority, it was not probable that he would lose his job. The single judge stated that "[t]he focus is not solely on plaintiff's present job at Goodyear, but his present job is part of the entire set of jobs available to him in the Lincoln, Nebraska job market." The single judge concluded that

> the pertinent analysis in cases of this type, is whether plaintiff is in possession of real, long term bona fide employment, which constitutes part of the entire marketplace of jobs (in

> this case, the Lincoln, Nebraska area) which plaintiff could perform given his particular physical restrictions, acquired skill, and present training. With respect to whether a particular job at hand should be excluded from the relevant job market, the question is, whether the particular job which plaintiff has is of the type which constitutes "make work," "artificial," or an "odd-lot" type of employment. If so, the job should be excluded from the marketplace of jobs to be used in the analysis. Clearly, in this case, there is no evidence of such, and the job which plaintiff is actually performing as modified, must be considered as a part of the analysis leading to a determination of plaintiff's loss of earning power. In that regard, I find that . . . Kuhn's opinion that plaintiff has suffered a loss of earning power of between 25 and 30 percent is not the result of a specific focus or overemphasis placed upon any one job and is a valid analysis containing no speculative criteria.
>
> Based upon the testimony, exhibits, and reports identified above, it is this Courts [sic] own independent finding that within the range provided by . . . Kuhn, plaintiff has suffered a 27.5 percent loss of earning power as a result of the accident and injury of October 31, 2000.

Based on that finding, the single judge awarded Davis the sum of $159.03 per week for 296 1/7 weeks of permanent partial disability measured as a 27.5-percent loss of earning power resulting from the October 31, 2000, accident. Davis appealed, but the review panel of the Workers' Compensation Court affirmed the award entered by the single judge. Davis timely appeals to this court.

ASSIGNMENTS OF ERROR

Davis assigns that the single judge erred in finding that Davis sustained only a 27.5-percent loss of earning power resulting from the accident and injury of October 31, 2000, and (2) finding that " 'Kuhn's opinion that plaintiff has suffered a loss of earning power of between 25 and 30 percent is not the result of a specific focus or overemphasis placed upon any one job and is a valid analysis containing no speculative criteria.' "

STANDARD OF REVIEW

[1-3] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Zoucha v. Touch of Class Lounge, ante* p. 89, 690 N.W.2d 610 (2005). A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court. *Swoboda v. Volkman Plumbing, ante* p. 20, 690 N.W.2d 166 (2004). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Estate of Coe v. Willmes Trucking*, 268 Neb. 880, 689 N.W.2d 318 (2004).

ANALYSIS

[4,5] Before addressing Davis' specific arguments, we review the basic principles underlying our analysis of the issues presented. Davis was awarded permanent partial disability benefits pursuant to Neb. Rev. Stat. § 48-121(2) (Reissue 2004), under which benefits are measured not by loss of bodily function, but by reduction in or loss of earning power or employability. See *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). Earning power, as used in § 48-121(2), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted. *Swoboda v. Volkman Plumbing, supra*.

[6,7] Thus, the mere fact that after an injury, the employee receives, or is offered, his or her former wages, or a larger sum, does not necessarily preclude recovery of compensation under the workers' compensation statutes. *Schmid v. Nebraska Intergov. Risk Mgt. Assn.*, 239 Neb. 412, 476 N.W.2d 243 (1991). The fact that an employee is still employed and still paid

the same or better does not, of itself, mean he or she has not experienced some loss of earning capacity. *Underwood v. Eilers Machine & Welding*, 6 Neb. App. 631, 575 N.W.2d 878 (1998).

[8,9] Instead, if an employee, after a work-related injury, receives wages equal to or greater than the wages received before the injury, the wages may be considered in the determination whether an employee has sustained a loss of earning capacity. *Schmid v. Nebraska Intergov. Risk Mgt. Assn., supra*; *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). If, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his or her earning power has not been impaired. *Akins v. Happy Hour, Inc.*, 209 Neb. 236, 306 N.W.2d 914 (1981); *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980); *Underwood v. Eilers Machine & Welding, supra*.

With those principles in mind, we turn to the specific arguments made in Davis' appeal. Davis' primary argument is that the single judge's determination was erroneous because it was a function of overemphasis on Davis' employment with Goodyear.

But the single judge, before making a determination of Davis' loss of earning power, set forth a complete and well-reasoned explanation of the legal principles recited above. This single judge explained that while Davis' earning power was to be determined by reference to the general labor market, "it must include the actual job taken and considered as a part of the job mix available in the relevant labor market - the general job market in which the injured worker lives and works." In other words, the single judge clearly applied the correct legal standards to his determination on this issue. Read in this context, the single judge's "independent finding that . . . plaintiff has suffered a 27.5 percent loss of earning power" was the single judge's factual finding of Davis' employability in the general Lincoln, Nebraska, labor market.

[10] Consequently, Davis' argument that the single judge overemphasized Davis' employment with Goodyear is, effectively, an argument that the single judge weighed Kuhn's opinion incorrectly in making a factual finding of Davis' loss of earning power. But our standard of review for factual findings of the Workers' Compensation Court is very deferential. Section 48-185 precludes an appellate court's substitution of its view of the facts for that of

the Workers' Compensation Court if the record contains sufficient evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999). The single judge's factual finding is supported by Kuhn's opinion and the evidence presented at trial regarding Davis' ability to continue working at Goodyear. The single judge's finding is supported by sufficient evidence and is not clearly wrong.

[11] Davis also argues that Kuhn's opinion, itself, placed too much emphasis on Davis' employment with Goodyear. But the law is clear that if, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his or her earning power has not been impaired. *Akins v. Happy Hour, Inc., supra*; *Sidel v. Travelers Ins. Co., supra*. Stated more generally, an employee's actual wages, after injury, are pertinent to a determination of the degree to which the employee's earning power has been impaired. While the relevant inquiry includes the employee's ability to obtain employment generally, see *Swoboda v. Volkman Plumbing, ante* p. 20, 690 N.W.2d 166 (2004), in conducting that inquiry, neither the single judge nor the vocational rehabilitation specialist should be expected to disregard the job that the employee actually has.

Davis contends that Kuhn's opinion was speculative and unreliable in that the figures relied upon by the single judge were contingent upon Davis' retaining his job with Goodyear. But, under the circumstances, any opinion regarding Davis' loss of earning power would be contingent upon Davis either retaining or losing his employment with Goodyear. A certain degree of contemplation regarding future events is inherent in any determination of an employee's employability; it is the province of the trier of fact to evaluate the evidence and make a reasonably certain finding of the employee's loss of earning power. Here, the single judge relied upon competent evidence supporting his conclusions that Davis was unlikely to lose his job at Goodyear and that when that job was considered as part of the overall labor market, Davis had suffered a 27.5-percent loss of earning power. See *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002) (affirming loss of earning capacity determination for temporary

partial disability benefits based on rehabilitation specialist's conclusion that employee would keep employment, but be unable to work overtime).

Finally, Davis argues that the "beneficent purposes" of the Nebraska Workers' Compensation Act required the Workers' Compensation Court to award Davis the higher estimation of his loss of earning capacity. Brief for appellant at 22. We have consistently held that the Nebraska Workers' Compensation Act should be broadly construed to accomplish the beneficent purposes of the act. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

But that is a principle of statutory interpretation, requiring us to give statutory language a liberal construction to carry out the spirit of the act. See *id*. This is not a case of statutory interpretation; rather, it is a case of a disputed factual finding. Davis contends that where there is a risk that the Workers' Compensation Court's factual findings may prove incorrect, the beneficent purposes of the act require that risk to be placed on the employer. Davis is effectively arguing that where the evidence could support alternative factual findings, the Workers' Compensation Court should be required to make the finding most favorable to the employee. That is not the law. See *Smith v. Ruan Transport, Inc.*, 190 Neb. 509, 209 N.W.2d 146 (1973).

CONCLUSION

We find no merit to Davis' assignments of error. The judgment of the Workers' Compensation Court is supported by competent evidence and is affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

GERHOLD CONCRETE COMPANY, INC., A DIVISION OF LYMAN-RICHEY CORPORATION, APPELLEE AND CROSS-APPELLANT, V. ST. PAUL FIRE AND MARINE INSURANCE COMPANY, APPELLANT AND CROSS-APPELLEE, AND FIRST DAKOTA ENTERPRISES, INC., APPELLEE AND CROSS-APPELLEE.

695 N.W.2d 665

Filed April 28, 2005. No. S-03-1064.

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, when an issue should be decided as a matter of law.
2. **Contracts.** Whether a contract exists is a question of fact.
3. **Prejudgment Interest: Appeal and Error.** Whether prejudgment interest should be awarded is reviewed de novo on appeal.
4. **Mechanics' Liens: Bonds: Contractors and Subcontractors.** Neb. Rev. Stat. § 52-118 (Reissue 1998) provides protection to materialmen and laborers in the construction or repair of public construction projects when the provisions of the general mechanic's lien laws do not apply.
5. **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.
6. **Contracts: Parties: Intent.** To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.
7. ____: ____: ____. The question whether the parties intended to contract is a factual one, not a legal one, and, except in the clearest cases, the question is for the finder of fact to resolve.
8. **Contracts.** An "agreement to agree" is not enforceable in Nebraska.
9. **Contracts: Parties.** A contract is not subject to the objection that it is indefinite if the parties can tell when it has been performed, and it is enough if, when that time arrives, there is in existence some standard by which performance can be tested.
10. ____: ____. A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties themselves as to all the details of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances.
11. **Prejudgment Interest: Claims.** A plaintiff can recover prejudgment interest only when the claim is liquidated, that is, when no reasonable controversy exists to either the plaintiff's right to recover or the amount.
12. **Claims.** A two-prong inquiry is required to determine whether a claim is liquidated. A dispute must not exist either to the amount due or to the plaintiff's right to recover.

13. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
14. **Rules of Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Mark D. Fitzgerald, of Fitzgerald, Vetter & Temple, for appellant.

William T. Oakes, Michael J. Leahy, and Andrew C. McElmeel, of Stinson, Morrison & Hecker, L.L.P., for appellee Gerhold Concrete Company, Inc.

Mark D. Fitzgerald, of Fitzgerald, Vetter & Temple, for appellee First Dakota Enterprises, Inc.

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

CONNOLLY, J.

St. Paul Fire and Marine Insurance Company (St. Paul) provided a payment bond for First Dakota Enterprises, Inc. (First Dakota), a general contractor for a public construction project. Gerhold Concrete Company, Inc. (Gerhold), supplied concrete to CMS, Inc., First Dakota's subcontractor. CMS failed to pay Gerhold for the concrete, and Gerhold sued First Dakota on a contract theory and St. Paul on the performance bond.

The district court dismissed First Dakota from the suit but determined that a jury could find that Gerhold could recover against St. Paul on the bond. A jury returned a verdict for Gerhold. St. Paul appeals the district court's denial of its motion for a directed verdict. St. Paul claims that Neb. Rev. Stat. § 52-118.01 (Reissue 1998) required Gerhold to give 4 months' written notice to First Dakota before it could proceed against the bond, that Gerhold failed to give notice, and thus, Gerhold's claim must fail.

Under § 52-118.01, for Gerhold to recover on the performance bond, it must give written notice to the contractor within 4 months from the date of the last materials supplied, unless it had a contractual relationship, express or implied, with the contractor. Gerhold acknowledges that it did not give written notice to First Dakota. This appeal requires us to determine whether there was a contractual relationship, express or implied, that excused Gerhold from providing written notice to First Dakota.

Resolving every controverted fact in Gerhold's favor and giving it the benefit of every reasonable inference, we determine that the jury could find that First Dakota told Gerhold that it would pay for concrete supplied to CMS. Thus, the jury could conclude that a contract, and hence, a contractual relationship, existed, and the district court properly overruled the motion for a directed verdict. Likewise, we determine that the court erred when it granted First Dakota's motion to dismiss because there was evidence from which a jury could determine that a contract was formed. Accordingly, we affirm in part, and in part reverse and remand for a new trial against First Dakota.

BACKGROUND

This appeal arises from a public construction project to build a veterans home in Norfolk, Nebraska. First Dakota obtained discounted prices from Gerhold when it bid on the project. According to Gerhold, it offered those prices only if it were the sole concrete supplier for the project. First Dakota was awarded the project as general contractor. Some time later, Steve Johnson, who was Gerhold's plant manager, spoke with Wayne July, the project manager for First Dakota. According to Johnson, July confirmed that First Dakota would use Gerhold as its concrete supplier. July admitted that he committed to using Gerhold "to a certain extent," but did not commit to having Gerhold as the exclusive supplier.

First Dakota subcontracted the concrete work to CMS and specified that CMS should use Gerhold as the supplier. Gerhold agreed to bill CMS for the concrete. Through May, June, and part of July 1999, First Dakota paid CMS, but CMS failed to pay Gerhold.

According to Johnson, he met with July and informed him that CMS failed to pay the invoices for May through July 1999,

which amounted to about $100,000, and that Gerhold would stop supplying concrete if it did not receive payment. The record contains the following colloquy between Gerhold's attorney and Johnson:

> Q. What was . . . July's response to learning that First Dakota might lose its concrete supplier?
>
> A. . . . July was, of course, concerned. And he told me, he says, you don't want to do that. . . .
>
> I said, what about the CMS account, that past-due account? And Wayne July said, you keep that concrete coming, and First Dakota, don't worry about it, First Dakota will take care of it.
>
> . . . .
>
> Q. What did you say when . . . July said that First Dakota would take care of the unpaid invoices, just keep the concrete coming?
>
> A. I agreed we would keep the concrete coming.

Johnson later stated again that July agreed to take care of unpaid invoices if Gerhold continued to supply concrete. July denied that Gerhold ever notified him that it would stop supplying concrete if it were not paid or that he agreed to pay for unpaid invoices. He stated that had Gerhold quit delivering concrete, he would have obtained a new supplier. First Dakota paid all further invoices directly to Gerhold but did not pay for the previous, unpaid invoices for May through July.

Gerhold filed suit against First Dakota for breach of contract and against St. Paul on the bond seeking payment for the unpaid May through July 1999 invoices. After Johnson's testimony, St. Paul and First Dakota moved for a directed verdict. They argued that First Dakota did not enter into a contract for payment and that there was no contractual relationship, express or implied, for Gerhold to recover payment for past invoices. The court granted First Dakota's motion for directed verdict, stating that the evidence failed to show the formation of a contract for payment of the unpaid invoices; specifically, the court determined that Gerhold failed to show the terms of any oral contract to pay. The court then reviewed § 52-118.01, and it concluded there was evidence that a general contractual relationship existed between Gerhold and First Dakota based on the agreement that Gerhold

would provide concrete at specified prices and that First Dakota would exclusively use Gerhold's concrete. Because of that contractual relationship, the court determined a jury could find that § 52-118.01 relieved Gerhold from the notice requirement and denied St. Paul's motion for a directed verdict.

The jury returned a verdict for $91,582.28, and the district court denied Gerhold's request for prejudgment interest, finding that the amount of recovery was in controversy. Gerhold had initially sought $111,137.34, but later stipulated that the amount should be reduced by $16,473.06. St. Paul appeals, and Gerhold cross-appeals. We granted St. Paul's petition to bypass.

ASSIGNMENTS OF ERROR

St. Paul assigns that the district court erred by (1) failing to grant its motion for a directed verdict and to dismiss the action against it, (2) failing to allow evidence that Gerhold previously acknowledged receipt of a payment that was greater than it would admit at trial, and (3) refusing to permit cross-examination of a witness about a prior inconsistent statement in answers to interrogatories.

On cross-appeal, Gerhold assigns, rephrased, that the district court erred by (1) sustaining the motion for directed verdict for First Dakota and (2) denying an award of prejudgment interest.

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, when an issue should be decided as a matter of law. *Livingston v. Metropolitan Util. Dist., ante* p. 301, 692 N.W.2d 475 (2005).

[2] Whether a contract exists is a question of fact. See *Viking Broadcasting Corp. v. Snell Publishing Co.*, 243 Neb. 92, 497 N.W.2d 383 (1993).

[3] Whether prejudgment interest should be awarded is reviewed de novo on appeal. See *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999).

ANALYSIS

St. Paul argues that Gerhold cannot recover on the bond because it failed to give notice as required by § 52-118.01. Gerhold argues,

however, that it had a direct or implied contractual relationship with First Dakota that would relieve it from the notice requirements and allow it to recover under the bond.

[4] Neb. Rev. Stat. § 52-118 (Reissue 1998) requires a bond for certain public building projects. It provides protection to materialmen and laborers in the construction or repair of public construction projects when the provisions of the general mechanic's lien laws do not apply. See *Dukane Corp. v. Sides Constr. Co.*, 208 Neb. 227, 302 N.W.2d 721 (1981).

Section 52-118.01 provided in part:

> Every person who has furnished labor or material in the prosecution of the work provided for in the contract set out in subsection (1) of section 52-118, in respect of which a bond is furnished under such section, and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or her or material was furnished or supplied by him or her for which such claim is made shall have the right to sue on such bond for the amount or the balance thereof unpaid at the time of the institution of such suit and to prosecute the action to final execution and judgment for the sum or sums justly due him or her. *Any person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such bond shall have a right of action upon the bond upon giving written notice to the contractor* within four months from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

(Emphasis supplied.) Section 52-118.01 relieves suppliers from giving notice if they have a contractual relationship, express or implied, with the contractor. Here, the issue is whether Gerhold had a contractual relationship with First Dakota that would exempt it from giving notice under § 52-118.01. Gerhold argues that any contractual relationship is sufficient, even if it is not related to payment or would not provide notice to the contractor

of unpaid subcontractor bills. St. Paul, however, argues that the contractual relationship must be a specific contract to pay for supplies and that there was no such contract between Gerhold and First Dakota.

Courts that have considered the kind of contractual relationship that would obviate the notice requirement normally do so in the context of the federal Miller Act. The purpose and language of § 52-118.01 are the same as in the Miller Act. The notice language of the Miller Act mirrors § 52-118.01. See 40 U.S.C.A. § 3133(b) (West 2005) (formerly 40 U.S.C.A. § 270b (2000)). Thus, we find the federal cases relevant.

Some appellate courts addressing the issue have held that a contractual relationship between a supplier and a general contractor for something other than payment for materials is not sufficient to obviate the Miller Act's notice requirements. *United States v. Hesselden Construction Co.*, 404 F.2d 774 (10th Cir. 1968); *United States v. Van de Riet*, 316 F.2d 912 (4th Cir. 1963); *United States v. Praught*, 270 F.2d 235 (1st Cir. 1959). As a result, courts have held that the contractual relationship that precludes the notice requirement must relate to a direct promise or contract to pay for materials. For example, some courts have held that a contract under which a contractor agreed to issue checks payable jointly to both the subcontractor and supplier failed to establish a direct contractual relationship, express or implied, that would obviate the statutory notice requirements. See, *United States v. Hesselden Construction Co., supra*; *Dial Block Co. v. Mastro Masonry*, 374 N.J. Super. 13, 23, 863 A.2d 373, 379 (2004) (comparing state statute with language referring only to " 'direct contract' " to broader language of Miller Act). In contrast, when a general contractor orally agreed to pay not only for future supplies but for previous, unpaid shipments, the supplier was exempt from notice requirements under the Miller Act. *American Cas. Co. of Reading, Pa. v. Southern Mat. Co.*, 261 F.2d 197 (4th Cir. 1958).

The Georgia Court of Appeals has formulated a slightly different approach. Interpreting a statute with language identical to § 52-118.01, the court determined that it would look to the course of contractual dealings between the contractor and supplier to determine whether there was an express or implied contractual

relationship. *Huddleston Concrete Co. v. Safeco Ins. Co. &c.*, 186 Ga. App. 531, 368 S.E.2d 117 (1988). The court recognized that in the course of dealing between the contractor and the supplier, circumstances could arise when the contractor would have actual or constructive notice of a claim despite the absence of a direct contract or promise of payment. The court held that when a contractor orally promised to pay a supplier for unpaid shipments out of retainage when the project was complete, a contractual relationship existed, express or implied, that obviated the statute's notice requirement. *Id.*

[5] We determine that under either formulation of the rule, Gerhold presented evidence of a contractual relationship that would exempt it from the notice requirement of § 52-118.01. In reviewing a trial court's ruling on a motion for directed verdict, we treat the motion as an admission of the truth of all competent evidence submitted on behalf of Gerhold. Gerhold 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. See *Livingston v. Metropolitan Util. Dist., ante* p. 301, 692 N.W.2d 475 (2005).

Here, resolving every controverted fact in Gerhold's favor and giving Gerhold the benefit of every reasonable inference, Gerhold presented evidence that First Dakota orally agreed to "take care of" the unpaid invoices if Gerhold continued to supply concrete. First Dakota, however, denied that it agreed to pay the past invoices. Although the record presents conflicting evidence that First Dakota agreed to pay for the May through July 1999 invoices, a jury could reasonably find that First Dakota had actual notice of the unpaid invoices and orally contracted to pay them. Because Gerhold presented evidence that would allow a jury to find an express or implied contractual relationship between Gerhold and First Dakota, the district court did not err when it overruled St. Paul's motion. Accordingly, we affirm the court's overruling the motion for a directed verdict.

CROSS-APPEAL

Dismissal of Contract Against First Dakota

On cross-appeal, Gerhold argues that the district court erred when it dismissed Gerhold's contract claim against First Dakota.

First Dakota contends that a contract was not formed as a matter of law and that all that was formed was an "agreement to agree." Reply brief for appellee First Dakota at 19.

[6,7] To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). The question whether the parties intended to contract is a factual one, not a legal one, and, except in the clearest cases, the question is for the finder of fact to resolve. *Viking Broadcasting Corp. v. Snell Publishing Co.*, 243 Neb. 92, 497 N.W.2d 383 (1993).

[8-10] First Dakota correctly argues that an "agreement to agree" is not enforceable in Nebraska. See *Nebraska Nutrients v. Shepherd, supra*. But a contract is not indefinite if the parties can tell when it has been performed, and it is enough if, when that time arrives, there is in existence some standard by which performance can be tested. *Id*. A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties themselves as to all the details of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances. *Id*.

Here, Gerhold presented evidence that a representative of First Dakota, in direct response to an inquiry about the May through July 1999 invoices, said "you keep that concrete coming, and First Dakota, don't worry about it, First Dakota will take care of it." In addition, evidence showed that Gerhold then agreed to continue providing concrete. Unlike circumstances when the parties agreed to finalize contract terms in the future, here, Gerhold presented evidence that would allow a jury to determine that a specific oral contract had been formed under which First Dakota agreed to pay for the May through July invoices in exchange for Gerhold's continuing to provide concrete. Whether a contract was formed is a question of fact that should have been submitted to the jury. Accordingly, we agree that the court erred when it dismissed the contract claim against First Dakota and reverse, and remand for a new trial against First Dakota.

Prejudgment Interest

Gerhold next argues that the district court erred by refusing to award prejudgment interest. St. Paul argues, however, that the claim was not liquidated.

[11,12] A plaintiff can recover prejudgment interest only when the claim is liquidated, that is, when no reasonable controversy exists to either the plaintiff's right to recover or the amount. *Davis v. Davis*, 265 Neb. 790, 660 N.W.2d 162 (2003). Thus, a two-prong inquiry is required. A dispute must not exist either to the amount due or to the plaintiff's right to recover. See *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993).

Here, a reasonable controversy existed both to Gerhold's right to recover and to the amount due. A reasonable controversy existed under § 52-118.01 whether there was a contractual relationship. Further, the amount in controversy changed during the proceedings. Gerhold initially sought $111,137.34, but later stipulated that the amount should be reduced by $16,473.06. Because the issue presented a reasonable controversy about whether Gerhold could recover and the amount of the recovery, the claim was not liquidated. Accordingly, we affirm the district court's order denying prejudgment interest.

REMAINING ASSIGNMENTS OF ERROR

In its brief, St. Paul states:

> In the event this matter is reversed and a new trial occurs, it will be necessary for the appellate court to review some of the trial court's evidentiary rulings which would have been prejudicial to the appellant and First Dakota had the jury been called upon to make a decision respecting the appellee's alleged contract claim.

Brief for appellant at 25. Accordingly, we address the remaining assignments of error.

Exclusion of Lien Waiver

St. Paul contends that the court erred by excluding evidence of a lien waiver between Gerhold and CMS. Before trial, Gerhold moved in limine to exclude evidence concerning how it credited payments from CMS that were made in July and September 1999. According to Gerhold, under an agreement with CMS, it credited

payments to an open account, with the oldest invoices paid first. Gerhold anticipated that St. Paul and First Dakota would argue that the payments came from funds paid to CMS by First Dakota or that Gerhold should have applied the payments to the May through July invoices for the project instead of older invoices on the open account.

The record indicates that the court excluded the evidence before trial under Neb. Rev. Stat. §§ 27-401 and 27-403 (Reissue 1995). At trial, St. Paul and First Dakota offered an exhibit showing a partial lien release between Gerhold and CMS for $70,000. After an offer of proof at trial, the court sustained Gerhold's objection and did not receive the exhibit into evidence. The court did allow evidence of other documents showing the charges that Gerhold sought to recover.

[13,14] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Kvamme v. State Farm Mut. Auto. Ins. Co.*, 267 Neb. 703, 677 N.W.2d 122 (2004). Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under §§ 27-401 and 27-403, the trial court's decision will not be reversed absent an abuse of discretion. *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000).

Here, Gerhold argued in its motion in limine that the evidence was irrelevant or unduly prejudicial because it did not relate to the May through July 1999 invoices. The court then excluded the evidence. We have reviewed this assignment of error and determine that the court did not abuse its discretion.

Evidence Concerning Inconsistent Statements in Pleadings

St. Paul argues that the court erred by not allowing an inquiry about inconsistent statements in Gerhold's pleadings or answers to interrogatories. At trial, a witness stated that he was not aware of a joint check issued to Gerhold and CMS. St. Paul and First Dakota then sought to inquire about a pleading which alleged that a joint check had been issued. They stated that they desired to impeach witnesses regarding "claims made in the petition that

they are no longer claiming." Gerhold objected and stated it would drop those claims, and First Dakota and St. Paul then argued that the matter affected credibility. The court sustained the objection based on relevancy.

The record shows that the inquiry related to claims that Gerhold was no longer pursuing and that the evidence could be confusing to a jury. We have reviewed this assignment of error and determine that the court did not abuse its discretion.

CONCLUSION

We determine that resolving every controverted fact in Gerhold's favor and giving it the benefit of every reasonable inference, the evidence showed that under the contractual relationship between First Dakota and Gerhold, First Dakota contracted to pay for the May though July 1999 invoices or that First Dakota had actual knowledge of the claim that would excuse Gerhold from the notice requirements of § 52-118.01. We also determine that the court erred when it dismissed the claim against First Dakota. Gerhold was not entitled to prejudgment interest, and we determine that the remaining assignments of error are without merit. Accordingly, we affirm in part, and in part reverse and remand for a new trial against First Dakota.

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

STATE OF NEBRASKA, APPELLEE, V. SUSANA MURO, ALSO KNOWN AS SUSANA MURO ANDRADE, APPELLANT.

695 N.W.2d 425

Filed April 28, 2005. No. S-03-1399.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Criminal Law: Judgments: Appeal and Error.** In a bench trial of a criminal case, the trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous.
3. **Proximate Cause.** The determination of causation, including proximate causation, is ordinarily a question of fact.

4. **Proximate Cause: Words and Phrases.** Criminal conduct is a cause of an event if the event in question would not have occurred but for that conduct; conversely, conduct is not a cause of an event if that event would have occurred without such conduct.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Dawson County, JAMES E. DOYLE IV, Judge. Judgment of Court of Appeals affirmed in part, and in part sentence vacated and cause remanded with directions.

Derek L. Mitchell for appellant.

Jon Bruning, Attorney General, and James H. Spears for appellee.

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

STEPHAN, J.

Susana Muro was convicted by the district court for Dawson County of child abuse resulting in the death of a child and sentenced to 20 years' imprisonment. The Nebraska Court of Appeals affirmed her conviction, finding there was sufficient evidence that she knowingly failed to secure necessary medical care for her daughter, Vivianna Muro, after becoming aware that the child had sustained a serious injury, and that such failure was a proximate cause of the child's death. *State v. Muro*, 13 Neb. App. 38, 688 N.W.2d 148 (2004). On further review, we conclude that while the evidence in the record is sufficient to support the finding that Muro knowingly and intentionally caused or permitted Vivianna to be deprived of medical care, it is insufficient as a matter of law to establish that such deprivation caused the child's death.

I. BACKGROUND

1. FACTS

The facts are set forth in detail in the published opinion of the Court of Appeals. *State v. Muro, supra*. We summarize here the sequence of events which preceded the death of Vivianna on October 28, 2002. Additional facts and opinion evidence will be discussed in our analysis of the causation issue.

On October 27, 2002, Muro resided in Lexington, Nebraska, with her husband, Jose Muro (Jose), and their children, a 4-year-old son and 8-month-old Vivianna. At approximately 3:20 p.m. on that day, Muro left the children at home in the care of Jose while she ran errands. Vivianna appeared normal at that time. When Muro returned home sometime after 6 p.m., Jose was holding Vivianna but the child was not crying as she usually did when held by Jose. Muro inquired about Vivianna, and Jose replied that she was asleep. He placed her in her crib while Muro fed their son and performed various chores.

Between 7 and 7:30 p.m., Muro took Vivianna from her crib and noticed that something was wrong. Vivianna was unresponsive and appeared "dazed," and her eyes were "half open, half closed." Muro observed that Vivianna was "limp, kind of like a rag doll." Over the next several hours, both Muro and Jose called the Tri-County Hospital in Lexington for advice without identifying themselves or disclosing that Vivianna was limp and unresponsive. A nurse testified that she advised the unidentified callers to bring the baby to the emergency room if they had any concern or uncertainty regarding her condition. Muro then called her mother-in-law, who resided in another state, and asked for advice about a " 'friend's' " baby who appeared " 'dazed' " and " 'loose,' " specifically denying that she was referring to Vivianna. Muro's mother-in-law told her to tell her friend to take the baby to the hospital as soon as possible. Muro and Jose then took Vivianna to Tri-County Hospital.

When she arrived at the hospital at approximately 11 p.m., Vivianna was not breathing, her pupils were fixed and dilated, and she was limp and cold. Although medical personnel performing resuscitation were able to establish a heartbeat, they were never able to stabilize Vivianna or establish spontaneous respiration. A physician diagnosed various injuries, including a hematoma on the left side of her head. The physician concluded that the severity of the child's condition necessitated transfer to Good Samaritan Hospital in Kearney, Nebraska, and made the necessary arrangements. An ambulance crew accompanied by Dr. Stephen Parys, a pediatrician, arrived in Lexington and transported Vivianna to Good Samaritan Hospital. During the transfer process, Parys noted various injuries, including the hematoma,

bruising, and an old rib fracture depicted on x ray. He suspected that the injuries were traumatic in origin. Parys continued assisted breathing measures during the transfer, but the child remained unresponsive and unconscious.

Upon arrival at Good Samaritan Hospital at approximately 1:30 a.m., a CT scan was performed which revealed a slightly displaced skull fracture in the left parietal area with an overlying hematoma, as well as other signs of brain injury. After consulting a neurosurgeon who concluded that surgical intervention was not feasible, Parys and other physicians conducted tests from which they concluded that brain death had occurred. Parys explained Vivianna's condition to Muro and Jose, and they made the decision to discontinue life support. Death occurred at 6:28 a.m. on October 28, 2002.

An autopsy was performed by Dr. Blaine Roffman the next day. He made certain findings indicative of trauma, including torn skin over the right lateral thorax and the left anterior thorax, broken and hemorrhaged fingernails, recent bruising of the right side of the neck and the midline of the forehead, bruising to "the left of the oral cavity on the cheek," and a fracture of the left parietal skull. At trial, Roffman ultimately opined that the cause of death was "a fracture of the left parietal skull, which resulted in cerebral edema [swelling], which resulted in brain death."

There is no contention or evidence that Muro inflicted or witnessed the infliction of the fatal injuries. There is evidence that the injuries occurred during the period when Muro was away from the family home on October 27, 2002.

2. Procedural History

(a) District Court

On November 19, 2002, Muro was charged by information with felony child abuse resulting in death under Neb. Rev. Stat. § 28-707 (Cum. Supp. 2004). Muro stood mute at her arraignment, and a plea of not guilty was entered for her. Following a bench trial at which Muro testified on her own behalf, the district court entered an order finding Muro guilty of the charged crime. The court found that Muro knowingly and intentionally failed to provide necessary care, that Vivianna's condition worsened as a result, and that the worsening of her condition ultimately led to

her death. The court specifically found that Muro's deprivation of care for Vivianna contributed in a natural and continuous sequence to Vivianna's death. At a subsequent sentencing hearing, the district court imposed the minimum sentence for a Class IB felony of imprisonment for 20 years. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002).

(b) Court of Appeals

Muro perfected a timely appeal in which she asserted that the evidence was insufficient to sustain her conviction and that her sentence was excessive. *State v. Muro*, 13 Neb. App. 38, 688 N.W.2d 148 (2004). The Court of Appeals affirmed the conviction and sentence. After summarizing the evidence viewed in a light most favorable to the State, the majority of the panel determined that "[t]he evidence was sufficient to support the trial court's conclusion that Muro acted knowingly and intentionally, that her actions knowingly and intentionally deprived Vivianna of necessary medical care, and that such denial of medical care was a proximate cause of Vivianna's death." *Id.* at 55, 688 N.W.2d at 161. The majority further found no error in the sentence imposed by the district court. The dissenting judge concluded that the medical evidence was insufficient as a matter of law to prove beyond a reasonable doubt that Muro's delay in seeking treatment caused Vivianna's death. We granted Muro's petition for further review.

II. ASSIGNMENTS OF ERROR

In her petition for further review, Muro assigns, restated, that the Court of Appeals erred in (1) ruling that the State provided sufficient evidence that any act or omission done by her was the proximate cause or resulted in the death of Vivianna, (2) finding that any act of omission by Muro was done knowingly and intentionally, and (3) finding that the trial court did not abuse its discretion in imposing a prison sentence of 20 years in lieu of probation.

III. STANDARD OF REVIEW

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light

most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004); *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004).

[2,3] In a bench trial of a criminal case, the trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous. *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997). The determination of causation, including proximate causation, is ordinarily a question of fact. *State v. Sommers*, 201 Neb. 809, 272 N.W.2d 367 (1978). See *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003).

IV. ANALYSIS

Muro was charged with Class IB felony child abuse under § 28-707, which 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:
>
> . . . .
>
> (c) Deprived of necessary food, clothing, shelter, or care;
>
> . . . .
>
> (3) Child abuse is a Class I misdemeanor if the offense is committed negligently.
>
> (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.
>
> (5) Child abuse is a Class III felony if the offense is committed knowingly and intentionally and results in serious bodily injury as defined in such section.
>
> (6) Child abuse is a Class IB felony if the offense is committed knowingly and intentionally and results in the death of such child.

Under this statute, the proscribed conduct for felony child abuse and misdemeanor child abuse is exactly the same; it is the actor's state of mind which differentiates the offenses. *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998). Similarly, the three gradations of felony child abuse set forth in § 28-707 are all based upon the same proscribed conduct; the differentiating factor is the degree of harm caused by such conduct.

It is undisputed that Muro did not seek medical care for Vivianna for a period of approximately 4 hours after she first noticed the child's unresponsiveness and other abnormal symptoms. Muro argues in this appeal that the State failed to prove both that the deprivation of care was knowing and intentional on her part and that it resulted in the death of Vivianna.

1. State of Mind

Muro argues that because she did not realize or comprehend the extent of Vivianna's injuries, she could not have knowingly and intentionally deprived Vivianna of necessary medical care. The Court of Appeals examined the evidence pertaining to the events which transpired during the 4-hour period before Vivianna was taken to the hospital and concluded that such evidence, viewed in a light favorable to the State, was sufficient to support an inference that Muro knowingly and intentionally failed to provide necessary medical care for Vivianna after the seriousness of the child's condition became readily apparent to her. See *State v. Muro*, 13 Neb. App. 38, 688 N.W.2d 148 (2004). We agree with the disposition of this issue by the Court of Appeals and the reasoning upon which it is based.

2. Causation

It is clear from the record that Vivianna sustained a serious traumatic head injury inflicted by someone other than Muro. The issue, as accurately stated by the Court of Appeals, is

> whether, viewing the evidence in a light most favorable to the prosecution, the court was clearly erroneous in finding that Muro's failure to seek medical treatment for Vivianna was a proximate cause of her death. In other words, does the evidence support a finding that Vivianna's death would not have occurred had Muro not failed to seek medical treatment for Vivianna?

Id. at 50, 688 N.W.2d at 158.

(a) Principles of Law

[4] In criminal cases where a defendant's conduct is alleged to have resulted in death, we have defined proximate cause as " 'a moving or effective cause or fault which, in the natural and continuous sequence, unbroken by an efficient intervening cause,

produces the death and without which the death would not have occurred.' " *State v. William*, 231 Neb. 84, 88, 435 N.W.2d 174, 177 (1989), quoting *State v. Sommers*, 201 Neb. 809, 272 N.W.2d 367 (1978). " 'Conduct is a cause of an event if the event in question would not have occurred but for that conduct; conversely, conduct is not a cause of an event if that event would have occurred without such conduct.' " *Id.*, quoting *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986).

Applying these principles, we held in *State v. William, supra*, a motor vehicle homicide case, that a motorcyclist's unlawful acts in attempting to avoid apprehension were a proximate cause of his passenger's death from injuries sustained when the motorcycle collided with another vehicle during a police pursuit. In *State v. Sommers, supra*, another motor vehicle homicide case, the issue was whether a motorist's intoxication was a proximate cause of a death which resulted from a collision on an icy bridge. Based on evidence demonstrating that the intoxication caused the defendant to be physically impaired and that other nonimpaired drivers were able to avoid collisions at the scene, we concluded the evidence was sufficient to permit a finding that the defendant's intoxication was a proximate cause of the decedent's death. In *State v. Dixon, supra*, we held that a victim's fatal heart attack, proximately caused by a defendant's felonious conduct in burglarizing the victim's home, established the causal connection necessary to sustain a felony murder conviction. In reaching this conclusion, we relied in part upon a physician's testimony that the " 'shock value and the emotional trauma inflicted upon [the victim] at the time of the break-in caused the arrhythmia, which caused her death.' " *Id.* at 793, 387 N.W.2d at 686.

However, in *State v. Doyle*, 205 Neb. 234, 287 N.W.2d 59 (1980), an appeal from a manslaughter conviction, we held that the evidence was insufficient to establish that the defendant's conduct was a proximate cause of the death. A dead human infant was found on premises occupied by the defendant, but there was no evidence of internal or external trauma and a pathologist was unable to state the cause of death. Witnesses testified that the defendant appeared to be pregnant before the body was found and that she appeared not to be pregnant thereafter. In determining that this evidence was insufficient to support the manslaughter

conviction, we reasoned that there was "no evidence offered by the State that had the defendant done something, which she did not do, the infant would have lived; nor that had she not done anything, which she did do, the infant would have lived." *Id.* at 239, 287 N.W.2d at 63.

(b) Medical Testimony

In this case, the State attempted to prove through the testimony of two physicians that Muro's conduct was a proximate cause of the death. Parys, the pediatrician who treated Vivianna during and after her transport to Good Samaritan Hospital, testified at trial that there was very little chance of saving her life while she was in his care. Parys did state, with reasonable medical certainty, that "[i]f treatment was sought earlier, then there would've been a chance of survival." On cross-examination, he testified that he could not give a percentage of what the chance for survival would have been. He stated that if treatment had been sought immediately, survival was possible, but he could not say it was probable. He opined that Vivianna "might have survived" if treatment was sought earlier. He further testified that a person's condition progressively worsens after the type of skull injury suffered by Vivianna.

Dr. Randell Alexander, a pediatrician and an expert on child abuse, testified that a brain could swell to the degree seen in Vivianna within an hour, or it could also take several hours. He testified that in most cases with this type of injury, a child will die within 1 to 2 hours even with medical care. He opined, based upon the fact that Vivianna was still alive 4 hours after the trauma was inflicted, that "this is an injury that might have been survivable." He further testified that because of the delay in seeking treatment, Vivianna's survival was hopeless, but that there may have been a small amount of hope if prompt treatment had been sought. He testified that there was an opportunity to save Vivianna if treatment had been sought earlier and that if 100 children survived this type of injury for 4 hours, "a substantial fraction" could be saved with early treatment.

On cross-examination, Alexander admitted the possibility that doctors may not have been able to save Vivianna even if Muro had sought immediate treatment. He could not say that she

would have survived if treatment had been sought 3 hours earlier. Alexander testified there was a reasonable likelihood that Vivianna could have survived with early treatment, but declined to say whether survival was possible or probable. He testified that her chance of survival with early treatment was more than 5 percent but less than 95 percent. On redirect, he stated that the long delay in seeking treatment and the fact that most children would have died within 2 hours of the injury suggested that Vivianna's injury was not "invariably fatal." Thus, he opined that the delay in treatment "may have" contributed to her death.

(c) Resolution by Court of Appeals

Based upon the foregoing evidence and legal principles, a majority of the Court of Appeals panel concluded that it was "sufficient that the evidence establish that the injury could have been survived but for a defendant's actions." *State v. Muro*, 13 Neb. App. 38, 54, 688 N.W.2d 148, 161 (2004). The majority thus determined that evidence of an unquantified chance of survival with prompt treatment was sufficient to establish that Muro's conduct was a proximate cause of Vivianna's death. The dissenting judge reasoned that because there was no evidence that survival would have been probable with prompt medical care, it cannot be said that Muro's failure to seek prompt care was a proximate cause of Vivianna's death. The dissenting judge considered the "core question" to be "whether, with the requisite degree of probability, earlier treatment would have made a difference—meaning whether it was probable that Vivianna would have lived, because the proof must show that the delay caused her death." *Id.* at 60, 688 N.W.2d at 164 (Sievers, Judge, dissenting). Based in part upon our decision in *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999), the dissenting judge reasoned that in order to establish the element of proximate cause, the State had the burden to prove that survival in the absence of the unlawful conduct would have been probable, i.e., more likely than not, noting that

> a criminal conviction which requires proof of guilt beyond a reasonable doubt should not be based upon medical evidence of proximate cause which would, as a matter of law, clearly fall short of the proof needed to support a workers'

> compensation claim, a personal injury claim, or a medical malpractice claim.

State v. Muro, 13 Neb. App. at 62, 688 N.W.2d at 165-66 (Sievers, Judge, dissenting).

(d) Disposition on Further Review

Our case law, as summarized above, establishes that criminal conduct is a proximate cause of an event if the event in question would not have occurred but for that conduct; conversely, conduct is not a proximate cause of an event if that event would have occurred without such conduct. *State v. William*, 231 Neb. 84, 435 N.W.2d 174 (1989); *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986). The burden in a criminal proceeding is on the State to produce proof beyond a reasonable doubt of every element of a charged offense. *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999). Thus, to establish that Muro's unlawful conduct was a proximate cause of Vivianna's death, the State was required to prove beyond a reasonable doubt that but for Muro's delay in seeking medical treatment, Vivianna would have survived her preexisting traumatic head injury. We agree with the dissenting judge that the State did not meet this burden. The State proved only the *possibility* of survival with earlier treatment. Such proof is insufficient to satisfy even the lesser civil burden of proof by a preponderance of the evidence. See *Doe v. Zedek, supra*.

Viewing the evidence in this case in the light most favorable to the prosecution, a finder of fact could not reasonably conclude beyond a reasonable doubt that but for Muro's unlawful conduct, Vivianna would have survived. Accordingly, the evidence is legally insufficient to establish that Vivianna's death resulted from the conduct in question.

The State's failure to prove that Muro's unlawful conduct caused the death, however, does not relieve her of criminal responsibility. As noted above, § 28-707 includes multiple gradations of felony child abuse, depending upon the result of the abusive conduct. We agree with the trial court and the Court of Appeals that the State proved beyond a reasonable doubt that Muro knowingly and intentionally deprived Vivianna of necessary care. That finding is sufficient to sustain a conviction for Class IIIA felony child abuse under § 28-707(4) without any

proof of resulting harm to the child. Accordingly, Muro's sentence must be vacated and the cause remanded for imposition of an appropriate sentence for the Class IIIA felony.

V. CONCLUSION

For the reasons discussed, we affirm the judgment of the Court of Appeals which affirmed Muro's conviction of felony child abuse. However, based upon our determination that the Court of Appeals erred in finding that the evidence was sufficient to establish that the child abuse resulted in death, and therefore constituted a Class IB felony under § 28-707, we vacate the sentence and remand the cause to the Court of Appeals. We direct that court to remand the cause to the district court with directions to impose an appropriate sentence for Class IIIA felony child abuse. See, § 28-707(4); *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

AFFIRMED IN PART, AND IN PART SENTENCE VACATED AND CAUSE REMANDED WITH DIRECTIONS.

MAX GABEL AND ROSALIE GABEL, APPELLANTS, v. POLK COUNTY, NEBRASKA, BOARD OF COMMISSIONERS ET AL., APPELLEES.

695 N.W.2d 433

Filed April 28, 2005. No. S-04-488.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues.
3. **Political Subdivisions: Appeal and Error.** An appeal from a board of supervisors denying a conditional use permit is to be taken in accordance with Neb. Rev. Stat. §§ 23-168.01 to 23-168.04 (Reissue 1997) and not by a petition in error.

Appeal from the District Court for Polk County: MICHAEL OWENS, Judge. Appeal dismissed.

Bruce E. Stephens, of Stephens & Sutter, for appellants.

Ronald E. Colling, Polk County Attorney, for appellee Polk County, Nebraska, Board of Commissioners.

Kent E. Rauert, of Svehla, Barrows, Thomas & Rauert, P.C., for appellees Pat Gabel and Brian Gabel.

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

CONNOLLY, J.

Max Gabel and Rosalie Gabel filed a petition in error challenging a conditional use permit granted to Pat Gabel and Brian Gabel by the Polk County Board of Commissioners. The petition in error named the board of commissioners, the Polk County Planning Commission, and Pat and Brian as defendants (collectively the appellees). Under *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004), the proper procedure to challenge the board of commissioners' decision was to appeal to the Polk County Board of Adjustment rather than by filing a petition in error in district court. Thus, the district court lacked jurisdiction. Consequently, we also lack jurisdiction and therefore dismiss Max and Rosalie's appeal.

BACKGROUND

In September 2001, the Polk County Board of Commissioners voted to approve a conditional use permit that allowed Pat and Brian to operate an intensive livestock confinement facility. Max and Rosalie did not appeal the decision to the Polk County Board of Adjustment. Instead, they filed a petition in error challenging the conditional use permit.

The appellees then entered special appearances, arguing that the court lacked jurisdiction because they had not been properly served. The court agreed and sustained the special appearances.

Max and Rosalie then appealed. In a memorandum opinion filed on January 14, 2005, this court noted that an order sustaining a special appearance is not a final, appealable order unless the plaintiff elects to stand on it and bring about a dismissal. See *Busboom v. Gregory*, 179 Neb. 254, 137 N.W.2d 825 (1965). Because Max and Rosalie had not stood on the order sustaining the special appearances, we dismissed their appeal for lack of jurisdiction.

After we dismissed Max and Rosalie's appeal, they stood on the order sustaining the special appearances and brought about a dismissal of the case. They appeal from that order of dismissal.

ASSIGNMENTS OF ERROR

Max and Rosalie assign, restated and consolidated, that the district court erred in sustaining the appellees' special appearances and dismissing the case.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court. *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues. *Mogensen v. Board of Supervisors, supra*.

[3] In *Mogensen*, the Antelope County Board of Supervisors denied appellant a conditional use permit. After the denial, he filed a petition in error in district court challenging the decision. On appeal, we first noted that under Neb. Rev. Stat. §§ 23-168.01 to 23-168.04 (Reissue 1997), when a county board of supervisors or board of commissioners makes a zoning decision, a party adversely affected by the decision may appeal to the county board of adjustment. We went on to hold that this procedure outlined in §§ 23-168.01 to 23-168.04 forecloses the ability to appeal the zoning decision by petition in error. Thus, the district court had no jurisdiction to entertain the petition in error.

This case is identical in all relevant respects to *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004). The Polk County Board of Commissioners made a zoning decision adverse to Max and Rosalie. Under §§ 23-168.01 to 23-168.04 and our decision in *Mogensen*, their remedy was to appeal the board of commissioners' decision to the Polk County Board of Adjustment, rather than to file a petition in error in district court. As a result, the district court lacked jurisdiction over the error proceedings.

Because the district court lacked jurisdiction, we also lack jurisdiction. See *Mogensen v. Board of Supervisors, supra*. Accordingly, we dismiss Max and Rosalie's appeal.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLANT, v. MELVIN J. RICE, APPELLEE.

695 N.W.2d 418

Filed April 28, 2005. No. S-04-547.

1. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Sentences: Appeal and Error.** When the State challenges a sentence as excessively lenient, the appellate court should consider (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed (a) to afford adequate deterrence to criminal conduct, (b) to protect the public from further crimes of the defendant, (c) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (4) any other matters appearing in the record which the appellate court deems pertinent.
4. **Sentences.** A sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. But there also must be some reasonable factual basis for imposing a particular sentence.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Dakota County, MAURICE REDMOND, Judge. Sentence vacated, and cause remanded with directions.

Jon Bruning, Attorney General, and Kevin J. Slimp, and Edward H. Matney, Dakota County Attorney, and Amber L. Hegarty for appellant.

Scott M. Dugan, Dakota County Public Defender, for appellee.

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

STEPHAN, J.

Melvin J. Rice entered a guilty plea to a reduced charge of driving during revocation, a Class IV felony. After receiving a

standard presentence investigation report and referring Rice to the Department of Correctional Services Diagnostic and Evaluation Center for additional evaluation, the district court for Dakota County sentenced Rice to probation for a term of 36 months under specified terms and conditions. The State of Nebraska, through the Dakota County Attorney, appealed the sentence as excessively lenient, and the Nebraska Court of Appeals affirmed. *State v. Rice*, No. A-04-547, 2004 WL 2937184 (Neb. App. Dec. 21, 2004) (not designated for permanent publication). We granted the State's petition for further review and now conclude that the sentence was excessively lenient. We therefore vacate Rice's sentence and remand the cause with directions for resentencing by a different judge.

BACKGROUND

The following summary of the pertinent facts is taken nearly verbatim from the unpublished opinion of the Court of Appeals. At approximately 10:30 a.m. on August 11, 2003, Rice was stopped by a deputy sheriff of Dakota County, after a citizen complaint of Rice's erratic driving. Rice was found to have an open container of whiskey in the vehicle, was too drunk to perform the usual field sobriety tests, and could hardly stand. Rice's blood alcohol level was .307. The deputy checked Rice's driver's history and found that his driving privileges were revoked for 15 years after a conviction on February 19, 2002, for third-offense driving under the influence. Through a plea agreement, the original charge from the August 11, 2003, arrest, a Class III felony, was amended to driving during revocation, a Class IV felony, to which Rice pled guilty.

Previous Convictions.

Rice's record shows the following pertinent convictions:

July 1972—convicted of drunk driving in California (placed on probation for 3 years);

July 1977—convicted of driving under the influence in Nevada;

September 1977—convicted of drunk driving in California;

May 1984—convicted of driving under the influence in Thurston County, Nebraska (sentenced to 7 days in jail with a license revocation for 6 months);

July 1984—convicted twice of driving under the influence in Dakota County, Nebraska (fined and placed on probation, from which he was ultimately unsuccessfully released);

November 1984—convicted in Dakota County of driving under the influence, third offense, as well as driving under suspension;

April 1990—convicted of driving during suspension, second offense, in Dakota County;

May 1990—convicted of driving under the influence, third offense, in Dakota County, but charges for driving under suspension and driving left of center were dismissed (sentenced to 3 months in jail, $500 fine, and 15-year loss of driving privileges);

April 1992—convicted of driving under suspension, third offense, in Dakota County (sentenced to a 90-day jail sentence, $250 fine, and 2-year license suspension);

May 1996—convicted in Douglas County, Nebraska, of driving under the influence, second offense, as well as driving under suspension (sentenced to 90 days in jail, $500 fine, and 1-year license suspension for driving under the influence, plus 24 months of intensive supervision probation for driving under suspension—from which probation he was unsatisfactorily released in November 1997);

November 1997—convicted in Dakota County of driving under suspension after driving under the influence, third offense, but a driving under the influence charge was dismissed (sentenced to 9 months in county jail);

November 1998 and *January 2002*—convicted of public intoxication in Sioux City, Iowa; and

February 2002—charged in Dakota County with driving during revocation, driving under the influence, third offense, and having an open container, leading to convictions for driving under the influence, third offense, and driving during revocation (sentenced to 90 days in jail, $600 fine, and 15-year license suspension, and 11 months in jail and $1,000 fine, respectively).

Presentence Investigation.

The Nebraska Probation System presentence report for the present offense reveals that Rice was married from 1955 to 1967 and that no children resulted from the marriage. He had an 11-year relationship from 1967 to 1978, during which one child was

born. He has been in his present relationship since 1980. Two children have been born of this relationship, a daughter in 1985 and a son in 1987. Rice claims a close relationship with his children. Rice worked as a pipewelder, retiring in 2000. He was 67 years old at the time of sentencing. He suffered his first heart attack in 1999, a second in 2001, and a third in June 2003. He began drinking alcoholic beverages when he was 14 years of age and his drinking has steadily increased over time. At the age of 48, he entered inpatient treatment at a veterans' hospital for 45 days, and he states that he successfully completed the program and remained sober for approximately 2½ years. When he relapsed at the age of 51, he began drinking every day, and he continued until, at 61 years of age, he reentered inpatient treatment at another veterans' hospital. He claims to have successfully completed this program, but he relapsed again at the age of 63. He remained sober for 3 years until his relapse in December 2001, and he became sober again while in jail for his February 15, 2002, offense. He began drinking again in June 2003, continuing to the time of his arrest for the present offense.

The probation officer's summary concludes that Rice has an extreme alcohol addiction and displays "disrespect for a Court order, which distinctively [sic] ordered for [sic] him not to drive for fifteen years." The probation officer stated that she believed that if Rice were placed on probation, the risk is substantial that Rice will engage in additional criminal conduct. She recommended commitment to a correctional facility, stating that a lesser sentence "will depreciate the seriousness of [Rice's] crime or promote disrespect for the law." Finally, the probation officer said that Rice does not fall within the target population for the intensive supervision probation program based upon the "current offense, criminal history and [Rice's] criminogenic needs."

Department of Correctional Services Evaluation.

The court-ordered evaluation by the Department of Correctional Services revealed that Rice functions somewhere in the high average range of intelligence. In terms of treatment and programming recommendations, the evaluation determined that Rice could use "some substance abuse treatment relapse prevention programming and possible follow-up to that." Rice did not have any adjustment problems while in the evaluation

process. The evaluation notes that Rice has "a fairly extensive history of Driving Under Suspension and Driving While Intoxicated" but that "[h]e does not appear to be a violent individual and does have a history of health problems in particular with his heart." The evaluation concluded that Rice did not like the prison environment and would not like to return. The final recommendations from the evaluation were as follows:

> [Rice] would benefit from some substance abuse relapse prevention treatment and aftercare and could receive this if he was sentenced to a period of probation and required to attend these classes. If [Rice] were sentenced to prison, some form of substance abuse treatment would be available to him. [Rice] would also be able to obtain counseling for what appears to be some depression if he were sentenced to probationary status.

At the sentencing hearing, the State argued that given his record, Rice was a "severe risk to the public," and that "a period of incarceration is necessary and a lesser sentence would depreciate the seriousness of the offense." Defense counsel argued that because Rice would be entitled to a credit for 247 days served while awaiting sentencing, any sentence of incarceration would necessarily be for a brief period which would not allow for effective treatment. The district court prefaced its pronouncement of sentence by stating to Rice that "the Court is going to take a chance on you. It believes that the time that you spent at the [Diagnostic and Evaluation Center] should have got [sic] your attention and wake [sic] you up a little bit." Under the terms of his probation, Rice was ordered to serve 180 days in the Dakota County jail, which could be waived by the court upon application by Rice's probation officer if Rice satisfactorily completed his probation; to pay a $1,000 fine; to have his driver's license revoked for a period of 15 years; to abstain from all drug and alcohol use and submit to random testing for the same; to perform 200 hours of community service; to complete a drug and alcohol evaluation; and to attend drug and alcohol treatment and counseling at his cost and complete any recommended aftercare. Rice was referred to an appropriate mental health center for evaluation and was ordered not to ride in the front seat of any vehicle while on probation.

ASSIGNMENT OF ERROR

In its petition for further review, the State contends that the Court of Appeals erred in concluding that the district court did not abuse its discretion in imposing a sentence that was excessively lenient.

STANDARD OF REVIEW

[1,2] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004); *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

ANALYSIS

Rice was convicted of driving during revocation, a Class IV felony, punishable by up to 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. §§ 60-6,196(6) (Cum. Supp. 2002) and 28-105 (Cum. Supp. 2004). Rice's guilty plea resulted from an agreement which reduced the charge from second-offense driving during revocation, a Class III felony punishable by up to 25 years' imprisonment, a $25,000 fine, or both. See *id.*

[3,4] When the State challenges a sentence as excessively lenient, the appellate court should consider:

> (1) The nature and circumstances of the offense;
>
> (2) The history and characteristics of the defendant;
>
> (3) The need for the sentence imposed:
>
> (a) To afford adequate deterrence to criminal conduct;
>
> (b) To protect the public from further crimes of the defendant;
>
> (c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; and
>
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and

> (4) Any other matters appearing in the record which the appellate court deems pertinent.

Neb. Rev. Stat. § 29-2322 (Reissue 1995). Accord *State v. Fields, supra*. A sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Fields, supra*; *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999). But there also must be some reasonable factual basis for imposing a particular sentence. *State v. Fields, supra*; *State v. Hamik, supra*.

Rice's offense involved operation of a motor vehicle on the highways or streets of the State of Nebraska while his operator's license had been revoked as part of his sentence for driving under revocation and third-offense driving under the influence. Despite his counsel's argument that this offense is not one of the more serious crimes in the "hierarchy of [f]elonious conduct," brief for appellee at 10, the circumstances of the current offense leave no doubt as to its very serious nature. Rice was operating a motor vehicle without a license but with a blood alcohol content almost four times the legal limit and with an open container of whiskey in his vehicle. This conduct posed an obvious and real threat to public safety, which we take into consideration in determining whether a sentence of probation was excessively lenient.

As noted, Rice has a history of alcohol-related motor vehicle offenses spanning more than 30 years, including at least two prior convictions for operating a motor vehicle during periods when his license was suspended or revoked. Prior to the offense involved in this case, he was incarcerated on at least 13 separate occasions and placed on probation 3 times, 2 of which resulted in unsatisfactory release. The presentence investigation report accurately characterized Rice as having an extreme alcohol addiction coupled with a lack of respect for court orders revoking his privilege to operate a motor vehicle.

Although we take note of Rice's age and medical history as mitigating factors, it is difficult to discern a need or justification for leniency in this case. Given Rice's record of recidivism with respect to alcohol-related offenses and the egregious circumstances

of the current offense, a sentence of probation does not adequately reflect the seriousness of the offense, promote respect for the law, or provide just punishment. We agree with the Court of Appeals that a primary objective of sentencing in this case must be to protect the public from the very real risk posed by Rice's operation of a motor vehicle while intoxicated. However, in light of the record, we cannot agree with the court's reasoning that the probationary program outlined by the district court offers the "best chance of protecting the public." *State v. Rice*, No. A-04-547, 2004 WL 2937184 at *6 (Neb. App. Dec. 21, 2004) (not designated for permanent publication). Probation has not deterred Rice's conduct in the past, and we find nothing in the record to suggest that it would be more likely to succeed now. Rice has obtained treatment before, but he has continued to relapse into alcohol abuse. His driver's license has been revoked, but he continues to drink and drive. While we agree, and indeed hope, that Rice may benefit from additional substance abuse treatment, the evaluation performed by the Department of Correctional Services indicates that some form of such treatment would be available to him if he were incarcerated in the custody of the department.

In short, we find nothing in this record which would justify taking a chance that probation will end a 30-year pattern of alcohol abuse and disregard for its legal consequences. Here, protection of the public requires certainty, not chance, and the only certainty we can perceive is that Rice cannot drink and drive while incarcerated.

CONCLUSION

For the reasons discussed, we conclude that the district court abused its discretion by imposing an excessively lenient sentence of probation, and the Court of Appeals erred in affirming the sentence. In this circumstance, Neb. Rev. Stat. § 29-2323 (Reissue 1995) permits an appellate court to set aside the sentence and either (1) remand the cause for imposition of a greater sentence, (2) remand the cause for further sentencing proceedings, or (3) impose a greater sentence. We elect the first option and, therefore, vacate the sentence and remand the cause to the Court of Appeals, directing that court to remand the cause to the district court with instructions to impose a greater sentence. The resentencing should be conducted by one of the current sitting district

judges in the Sixth Judicial District or the retired district judge who has been appointed by this court to serve as an active district judge in that district until further order of the court. See *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004).

SENTENCE VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

CITIZENS OPPOSING INDUSTRIAL LIVESTOCK AND VILLAGE BOARD OF REYNOLDS, APPELLANTS, V. JEFFERSON COUNTY BOARD OF ADJUSTMENT, APPELLEE.

695 N.W.2d 435

Filed April 28, 2005. No. S-04-669.

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. **Political Subdivisions: Jurisdiction: Pleadings.** Verification of a petition under Neb. Rev. Stat. § 23-168.04 (Reissue 1997) is a purely procedural direction which is formal but does not go to the essence of the law with regard to requirements for jurisdiction of the courts.

Appeal from the District Court for Jefferson County: PAUL W. KORSLUND, Judge. Reversed and remanded for further proceedings.

Steven M. Virgil, Patricia Knapp, and, on brief, Andrew W. Simpson for appellants.

Daniel L. Werner for appellee.

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

CONNOLLY, J.

Citizens Opposing Industrial Livestock (COIL) and the village board of Reynolds (village) appeal the district court's order dismissing their action against the Jefferson County Board of Adjustment. The district court determined that it lacked subject matter jurisdiction because COIL and the village did not file a

verified petition as required by Neb. Rev. Stat. § 23-168.04 (Reissue 1997). We determine that although the petition was not verified, the failure to verify does not deprive the court of jurisdiction. Accordingly, we reverse, and remand for further proceedings.

BACKGROUND

In February 2004, the Jefferson County Board of Commissioners approved a special use permit to allow the operation of a finishing site for swine. In March, the board of adjustment affirmed the board of commissioners' decision.

COIL and the village filed a petition in the district court challenging the ruling by the board of adjustment. The petition was signed by COIL and the village's attorney, but did not include a verification affidavit. The board of adjustment moved to dismiss, contending that the district court lacked jurisdiction because the petition was not verified as required by § 23-168.04.

The district court determined that the petition was not duly verified and that the failure to file a verified petition was jurisdictional. So the court dismissed the petition, and COIL and the village appeal.

ASSIGNMENTS OF ERROR

COIL and the village assign that the district court erred by determining that the petition was not verified and dismissing the action.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

ANALYSIS

COIL and the village argue that an attorney's signature is sufficient to verify a petition. They further argue that if an attorney's signature is insufficient, the failure to verify a petition is not jurisdictional.

Section § 23-168.04 provides:

> Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment . . . may present to

> the district court for the county a petition, duly verified, setting forth that such decision is illegal, in whole or in part, and specifying the grounds of the illegality. The petition must be presented to the court within fifteen days after the filing of the decision in the office of the board of adjustment. . . . Within ten days after the return day of the summons, the county board shall file an answer to the petition which shall admit or deny the substantial averments of the petition and matters in dispute as disclosed by the petition. The answer shall be verified in like manner as required for the petition.

Section 23-168.04 does not define how a petition should be verified. Nebraska's civil procedure, however, previously required verification of pleadings. Under Neb. Rev. Stat. § 25-824 (1943), every pleading of fact was required to be verified by the affidavit of the party or the party's agent or attorney. *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986). In 1969, the Legislature eliminated the requirement of verified pleadings in civil cases. § 25-824 (Cum. Supp. 1969); *In re Interest of L.D. et al., supra*.

Even before the verification requirement was eliminated, we held that usually, verification of a pleading constitutes no part of a pleading and ordinarily is not necessary to vest jurisdiction in a court. *In re Interest of L.D. et al., supra*, citing *Johnson v. Jones*, 2 Neb. 126 (1873); *Northup v. Bathrick*, 80 Neb. 36, 113 N.W. 808 (1907) (syllabus of court, "verification of a pleading is not jurisdictional"); *Dorrington v. Meyer*, 8 Neb. 211 (1879). But § 23-168.04 still contains a verification requirement.

[2] We recently discussed the verification requirement of § 23-168.04 in *Hanchera v. Board of Adjustment, ante* p. 623, 694 N.W.2d 641 (2005). In *Hanchera*, the operative petition was not verified as required by § 23-168.04, and the Red Willow County Board of Adjustment argued that the failure to verify deprived the district court of jurisdiction. Relying on *In re Interest of L.D. et al., supra*, we determined that verification " ' " is a purely procedural direction which is formal but does not go to the essence of the law with regard to requirements for jurisdiction of the courts." ' " *Hanchera v. Board of Adjustment, ante* at 628, 694 N.W.2d at 646.

The lack of verification was not jurisdictional, and the district court should have allowed leave to amend. Accordingly, the court erred when it dismissed for lack of subject matter jurisdiction, and we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLANT, V.
ADRIAN C. WASHINGTON, APPELLEE.

695 N.W.2d 438

Filed April 28, 2005. No. S-04-868.

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.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial.
4. ____. Final disposition under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995) occurs on the date the motion is "granted or denied."

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Exceptions sustained.

Stuart J. Dornan, Douglas County Attorney, Rob D. MacTaggart, and Casey J. Symonds, Senior Certified Law Student, for appellant.

Thomas C. Riley, Douglas County Public Defender, and Matthew J. Miller for appellee.

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

MCCORMACK, J.

BACKGROUND

Adrian C. Washington was charged with second degree assault by information filed December 4, 2003. The next day, Washington

waived his right to physically appear for his arraignment and also filed a motion for discovery. That motion was not disposed of until May 27, 2004, when the district court ordered mutual and reciprocal discovery.

On June 9, 2004, Washington filed a motion to discharge, claiming his right to a speedy trial had been violated. At a hearing on his motion to discharge, Washington argued that the time period during which his motion for discovery was pending should not be excluded for speedy trial calculation purposes. He claimed that the discovery motion did not cause any delay in the case's progression toward a trial because he and the State had exchanged discovery while his motion was pending. The district court sustained Washington's motion to discharge and dismissed the information.

Pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2004), the State filed an application for leave to docket an appeal.

ASSIGNMENTS OF ERROR

The State claims that the district court erred in concluding that Washington's statutory right to a speedy trial had been violated and in granting his motion to discharge.

STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Petty, ante* p. 205, 691 N.W.2d 101 (2005).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Id*.

ANALYSIS

[3] Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). An information was filed against Washington on December 4, 2003. Therefore, absent any excluded time periods, he should have been

brought to trial by June 4, 2004, 5 days before he filed his motion to discharge.

In computing the 6-month period for statutory speedy trial purposes, § 29-1207(4)(a) excludes the "period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . the time from filing until final disposition of pretrial motions of the defendant." The issue in this case is whether the time period during which Washington's motion for discovery was pending should be excluded under § 29-1207(4)(a).

That issue is far from unsettled. Several cases of this court plainly indicate that a motion for discovery filed by a defendant is a pretrial motion and that the time period during which it is pending should be excluded for speedy trial calculation purposes. See, *State v. Steele*, 261 Neb. 541, 624 N.W.2d 1 (2001); *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999), *disapproved on other grounds, State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004); *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983). See, also, *State v. Castillo*, 11 Neb. App. 622, 657 N.W.2d 650 (2003).

Washington argues that the time period for *his* motion for discovery should not be excluded because it caused no delay in the progression of his case to trial. He also argues that to the extent the motion's disposition by the district court was delayed, such delay was unreasonable. We recently rejected similar arguments:

> "[T]he plain terms of § 29-1207(4)(a) exclude all time between the time of the filing of the defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay." . . . Thus, we have recognized that under § 29-1207(4)(a), the period of delay is defined by the statute itself as the period between the filing and final disposition of the pretrial motion. We have also stated that "where the excludable period properly falls under § 29-1207(4)(a) rather than the catchall provision of § 29-1207(4)(f), no showing of reasonableness or good cause is necessary to exclude the delay," and that "conspicuously absent from § 29-1207(4)(a) is any limitation, restriction, or qualification of the time which may be charged to the defendant as a result of the defendant's motions."

(Citation omitted.) *State v. Covey*, 267 Neb. 210, 216-17, 673 N.W.2d 208, 213 (2004).

[4] Final disposition under § 29-1207(4)(a) occurs on the date the motion is " 'granted or denied.' " *State v. Covey*, 267 Neb. at 217, 673 N.W.2d at 213. Washington's December 5, 2003, motion for discovery was not disposed of until May 27, 2004, when the district court ordered mutual and reciprocal discovery. For the reasons set forth above, that time period should be excluded for speedy trial calculation purposes. Excluding that time period, Washington's motion to discharge was filed long before the 6-month period expired. Thus, the district court erred in sustaining Washington's motion to discharge and in dismissing the information. We sustain the State's exceptions. Because jeopardy did not attach, the cause is remanded to the district court for further proceedings pursuant to Neb. Rev. Stat. § 29-2316 (Cum. Supp. 2004).

EXCEPTIONS SUSTAINED.

GREGORY F. JOHNSON, APPELLANT, V. UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION NOW KNOWN AS ST. PAUL FIRE AND MARINE INSURANCE COMPANY, AND EMPLOYERS MUTUAL CASUALTY COMPANY, A CORPORATION, APPELLEES.

696 N.W.2d 431

Filed May 6, 2005. No. S-03-748.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **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.
4. **Jurisdiction: States.** When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law.

5. ____: ____. The first step in a conflict-of-law analysis is to determine whether there is an actual conflict between the legal rules of different states.
6. ____: ____. An actual conflict exists when a legal issue is resolved differently under the law of two states.
7. **Insurance: Contracts: Motor Vehicles: Torts: Liability.** Because actions for uninsured and underinsured coverage can involve both tort and contract liability, a court must classify the nature of the specific conflict issue as sounding in tort or in contract.
8. **Insurance: Contracts.** 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.
9. ____: ____. The right of an insured to recover benefits from his or her insurer requires a court to review the scope of the insurance contract as well as any statutes governing the contract provisions.
10. **Torts: Motor Vehicles: States: Damages.** A conflict regarding a motor vehicle accident victim's right to bring a tort action against a tort-feasor for damages arising out of an accident in the foreign state is governed by the Restatement (Second) of Conflict of Laws § 146 (1971).
11. **Insurance: Motor Vehicles: Contracts.** The enforceability of the insurers' setoff provisions in their underinsured motorist coverages presents an issue of coverage, which is governed by the provisions for contract of the Restatement (Second) of Conflict of Laws (1971).
12. **Insurance: Torts: Case Disapproved.** To the extent that *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977), can be interpreted as authorizing the application of the Restatement (Second) of Conflict of Laws § 146 (1971) to resolve a conflict limited to the issue of insurance coverage, not implicating threshold tort liability, it is disapproved.
13. **Contracts.** For the resolution of contract conflicts, the Nebraska Supreme Court has adopted the Restatement (Second) of Conflict of Laws § 188 (1971).
14. **Jurisdiction: States: Contracts.** Usually, when determining whether another state has a more significant interest in having its law applied to a specific contract issue, the most compelling factor under general conflict-of-laws principles is the protection of the parties' justified expectations.
15. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Daniel H. Friedman and Herbert J. Friedman, of Friedman Law Offices, for appellant.

Cathy S. Trent and Stephen L. Ahl, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee United States Fidelity and Guaranty Company.

Randall L. Goyette and Molly M. Egley Brummond, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Employers Mutual Casualty Company.

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

HENDRY, C.J.

NATURE OF CASE

This is an action arising out of a motor vehicle accident that occurred in Colorado in which appellant Gregory F. Johnson was injured. After recovering from the tort-feasor's insurers, Johnson sought additional benefits from his own insurer and the insurer of the car he was driving when injured. The district court for Lancaster County granted the insurers' motions for summary judgment, determining that in accordance with Colorado law, Johnson was not entitled to any additional benefits.

BACKGROUND

At the time of the accident, Johnson was a partner in a Kearney, Nebraska, automobile dealership known as Action Auto Exchange. Action Auto Exchange was insured by Employers Mutual Casualty Company (EMC). EMC's policy provided, inter alia, underinsured motorist (UIM) coverage in the amount of $100,000 and medical payments coverage.

In December 1993, another Kearney automobile dealer, Leon Brown, asked Johnson to ride with him to Denver in order to drive back any vehicle Brown might purchase at an automobile auction. Brown paid Action Auto Exchange for Johnson's services. Brown's dealership was insured under a policy issued by United States Fidelity and Guaranty Company (USF&G), which also provided, inter alia, UIM coverage in the amount of $100,000 and medical payments coverage.

On December 15, 1993, while driving a pickup Brown purchased in Colorado, Johnson was struck from behind by an automobile driven by Melissa Schultz. The impact caused the pickup to roll over. Johnson was seriously injured and sued Schultz and her insurers, Shelter Insurance Company and Allstate Insurance Company. These policies provided, respectively, $50,000 and $100,000 of automobile liability coverage. Both of Schultz'

insurers tendered their policy limits to settle Johnson's claims, which offers Johnson accepted in November 2000.

Johnson then made demand against USF&G and EMC for unpaid medical expenses and UIM benefits. Both of these policies contained out-of-state coverage extensions, requiring the insurers to "[p]rovide the minimum amounts and types of other coverages, such as no-fault, required of out-of-state vehicles by the jurisdiction where the covered 'auto' is being used." Both policies also contained setoff provisions, purporting to reduce the insurer's UIM liability by any moneys recovered from a legally responsible party. In conformance with Colorado law and the out-of-state coverage provisions, USF&G paid Johnson the maximum required personal injury protection (PIP) benefits of $100,000. EMC denied coverage for the balance of Johnson's claimed medical expenses. Both USF&G and EMC denied Johnson's claim to UIM benefits.

On November 13, 2000, Johnson brought suit against USF&G and EMC in the district court for Lancaster County, alleging he was totally and permanently disabled, had incurred medical expenses in excess of $151,000 to date, and would require future surgery and medical treatment. Johnson set out three causes of action. In his first cause of action, Johnson alleged that USF&G and EMC each owed him $100,000, their respective policy limits for UIM coverage. In his second cause of action, Johnson asserted that EMC owed him $51,000, which he claimed was the balance of his medical expenses not covered by the $100,000 PIP benefit previously paid by USF&G. In his third cause of action, Johnson alleged that USF&G and EMC's denials of benefits were made in bad faith.

USF&G and EMC moved for summary judgment. Following an evidentiary hearing, the district court found there were no genuine issues of material fact and that USF&G and EMC were entitled to judgments against Johnson. In granting summary judgment, the district court concluded that (1) under *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977), Colorado law applied to Johnson's UIM claim, and that as a result, Johnson was not entitled to UIM benefits from either USF&G or EMC; (2) under Colorado law, Johnson was not entitled to PIP benefits from EMC; (3) pursuant to a contract

exclusion, Johnson was not entitled to medical payments benefits from EMC; and (4) USF&G and EMC had not acted in bad faith. Johnson appeals.

ASSIGNMENTS OF ERROR

Johnson assigns, restated and renumbered, that the district court erred in (1) applying Colorado law and (2) granting summary judgment on the issues of (a) UIM benefits, (b) PIP benefits, and (c) medical payments benefits.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Cave v. Resier*, 268 Neb. 539, 684 N.W.2d 580 (2004).

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Auto-Owners Ins. Co. v. Home Pride Cos.*, 268 Neb. 528, 684 N.W.2d 571 (2004). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

Conflict of Law Regarding UIM Benefits: Application of Tort or Contract Principles

Although recognizing that Johnson's claims against USF&G and EMC "arguably arise out of insurance contracts," the district court determined that under *Crossley, supra*, "the Nebraska Supreme Court has nevertheless held that Section 146 of the Restatement governs choice of law questions in actions for uninsured or UIM benefits." The Restatement (Second) of Conflict of Laws § 146 at 430 (1971) 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 [general choice-of-law] principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Applying § 146, the court concluded that Colorado law governed Johnson's claim for UIM benefits.

Johnson argues that *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977), is not controlling under these facts. Johnson contends that because insurance contracts are involved in this action, the conflict sounds in contract and should be resolved by applying the Restatement, *supra*, § 188(1) at 575 ("rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties"). We agree with Johnson.

[4] When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law. See, *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002); *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001); *Hughes Wood Products, Inc. v. Wagner*, 18 S.W.3d 202 (Tex. 2000) (stating that while which state's law governs issue is question of law, determining state contacts involves factual inquiry).

[5,6] The first step in a conflict-of-law analysis is to determine whether there is an actual conflict between the legal rules of different states. See *Malena*, 264 Neb. at 762-63, 651 N.W.2d at 854 (" '[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' "), quoting *Barron v. Ford Motor Co. of Canada Ltd.*, 965 F.2d 195 (7th Cir. 1992). An actual conflict exists when a legal issue is resolved differently under the law of two states. See, *Nodak Mut. Ins. v. American Family Mut.*, 604 N.W.2d 91 (Minn. 2000); *Seizer v. Sessions*, 132 Wash. 2d 642, 940 P.2d 261 (1997).

The district court properly concluded that under Colorado law at the time of the accident, an insurer was liable for UIM benefits only when there was a "gap" between the moneys recovered from the person or organization legally liable and the limit of the insurer's UIM coverage. See Colo. Rev. Stat. Ann. § 10-4-609(5) (West 1990) (governing insurer's maximum UIM liability).

Because it was undisputed that Johnson had recovered $150,000 in liability benefits from Schultz' insurers and that the USF&G and EMC policies provided only $100,000 in UIM coverage, the court determined: "Whereas there is no 'gap' in this case . . . Johnson is precluded as a matter of Colorado law from recovering UIM benefits from either defendant."

In contrast, under Nebraska law since 1991, an insured is entitled to recover UIM benefits when there was a "gap" between the insured's *damages* and the moneys recovered from the person or organization legally liable, up to the limits of the UIM coverage provided. See 1990 Neb. Laws, L.B. 1136, § 124 (operative July 1, 1991), codified as Neb. Rev. Stat. § 44-6409 (Reissue 2004) (transferred from Neb. Rev. Stat. § 60-578 (Reissue 1993)). Thus, there is an actual conflict of law regarding the enforceability of the setoff provisions in these contracts. Having determined that an actual conflict exists, we next determine whether the choice-of-law rules for tort or contract govern the resolution of this conflict.

[7] Actions for uninsured (UM) and UIM coverage can involve both tort and contract liability. See *Lee v. Saliga*, 179 W. Va. 762, 373 S.E.2d 345 (1988). Thus, in such actions, a court's second step is to classify the nature of the specific conflict issue: Does the conflict sound in tort or in contract? See, *Ohayon v. Safeco Ins. Co. of Ill.*, 91 Ohio St. 3d 474, 476, 747 N.E.2d 206, 208 (2001) ("[w]e must *classify* the [plaintiffs'] cause of action before we answer the choice-of-law question raised in their complaint because different choice-of-law rules apply depending on whether the cause of action sounds in *contract* or in *tort*"); *Buchanan v. Doe*, 246 Va. 67, 71, 431 S.E.2d 289, 291 (1993) ("forum state applies its own law to ascertain whether the issue is one of tort or contract"). See, also, Eugene F. Scoles et al., Conflict of Laws §§ 3.3 to 3.5 (4th ed. 2004) (discussing, generally, importance of initial subject matter characterization in conflict analysis).

[8] "[I]t 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." *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 344, 647 N.W.2d 599, 606 (2002). See, also, *Schrader v. Farmers Mut. Ins. Co.*, 259 Neb. 87, 608 N.W.2d 194 (2000)

(holding that Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 2004), barring actions for UM or UIM coverage when insured's underlying claim against tort-feasor expires, is inapplicable when insured timely files action against tort-feasor; in that circumstance, applicable statute of limitations on claim against insurer for UM or UIM benefits is statute governing actions on written contracts).

[9] The right of an insured to recover benefits from his or her insurer requires a court to review the scope of the insurance contract as well as any statutes governing the contract provisions. See, e.g., *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000) (stating that provision drawn by insurer to comply with statutory requirements of UM or UIM coverage must be construed in light of purpose and policy of statute). Thus, we determine Johnson's action sounds in contract, not tort, "even though it is tortious conduct that triggers applicable contractual provisions." See *Ohayon*, 91 Ohio St. 3d at 480, 747 N.E.2d at 211. Accord, *Miller v. State Farm Mut. Auto. Ins. Co.*, 87 F.3d 822 (6th Cir. 1996) (rejecting executrix's argument that tort conflict-of-law provisions determined which state's law governed issue of whether insurer was required to provide per-person or per-accident UIM coverage and affirming district court's application of contract provisions); *Walker v. State Farm Mut. Auto. Ins. Co.*, 973 F.2d 634 (8th Cir. 1992) (applying conflict-of-law provisions for contract to determine which state's law governed insureds' right to stack UIM coverages); *Vaughan v. Nationwide Mut. Ins. Co.*, 702 A.2d 198 (D.C. App. 1997) (applying conflict-of-law provisions for contract to determine which state's law governed insurer's right to reduce UM coverage by money recovered from state disability plan); *Ryals v. State Farm Mut. Auto. Ins. Co.*, 134 Idaho 302, 1 P.3d 803 (2000) (applying conflict-of-law provisions for contract to determine which state's law governed interpretation of UM coverage provisions); *Lee v. Saliga*, 179 W. Va. 762, 766, 373 S.E.2d 345, 349 (1988) (noting that UM cases involve both contract and tort law, but that where question "involves an aspect of policy *coverage*, rather than *liability*, it is treated as a contract question for purposes of conflicts analysis").

The district court's determination that *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977), controlled in this factual circumstance was error. In *Crossley*, the

Nebraska plaintiff suffered minor injuries in an automobile accident while in Colorado riding as a passenger in a vehicle driven by a Nebraska resident. A Colorado driver was "at fault" for the accident, but the plaintiff's medical costs and wage losses fell below the minimum liability threshold for asserting a tort claim against a Colorado driver insured under the Colorado Auto Accident Reparations Act. After the Colorado driver's insurer refused to pay personal injury damages to the plaintiff, he filed suit against his own insurer for UM benefits in the district court for Douglas County. The plaintiff's policy provided $10,000 in UM coverage for all sums to which the insured was " 'legally entitled to recover as damages from the owner or operator' " of a UM vehicle. 198 Neb. at 28, 251 N.W.2d at 385. The district court found that the Colorado vehicle was a UM vehicle as a matter of law, and the jury returned a verdict for the plaintiff.

On appeal, the plaintiff argued that he was entitled to recover if the Colorado driver would be liable under the tort law of Nebraska, but that in the alternative, if this court determined that Colorado law controlled, he should be allowed to recover UM benefits from his own insurer. In response, this court determined that under the Restatement (Second) of Conflict of Laws § 146 (1971), the law of the state where the accident occurred controls the right to recover and the amount of the recovery. *Crossley, supra*.

[10] We reaffirm the holding in *Crossley* that under the Restatement, *supra*, § 146, Colorado's no-fault law governed the threshold issue of the tort-feasor's liability. As this court noted, "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." *Crossley*, 198 Neb. at 30, 251 N.W.2d at 386, citing Restatement, *supra*, § 146, comment *d*. See, also, *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002) (recognizing foreign state's dominant interests in limiting less serious tort claims in order to protect claimants with more serious damages and to maintain low insurance premiums for its residents, when conduct and injury occurred in foreign state).

But this court's reliance on § 146 in *Crossley, supra*, should not be read as a determination that Colorado law governed the interpretation of a Nebraska contract. Rather, we stated:

> [T]he plaintiff could only recover under his own uninsured motorist coverage any sums which the operator of the Colorado automobile would be legally responsible to pay to the plaintiff as damages, and that issue is determined under Colorado law. Uninsured motorist coverage is dependent upon legal liability on the part of the uninsured motorist to the insured for the personal injuries sustained. *The claimant must establish the liability of the uninsured motorist to him before he can recover*. . . . Whether the Colorado driver is regarded as an insured motorist or an uninsured motorist, there is simply no dispute that she is not legally liable to the plaintiff for his bodily injuries suffered in this accident.

(Emphasis supplied.) *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 30, 251 N.W.2d 383, 386 (1977). Thus, our reliance on § 146 was simply a rejection of the plaintiff's contention that he was entitled to have the issue of the tort-feasor's underlying liability resolved under Nebraska's tort rules. Instead, we interpreted the insurance policy to require the insured to prove he or she could establish the tort-feasor's threshold liability under the law of the state where the accident occurred. See Eugene F. Scoles et al., Conflict of Laws § 17.56 (4th ed. 2004) (citing cases showing split of authority whether insureds must prove they are legally entitled to recover under law of state where policy was issued or state in which accident occurred, for purposes of UM or UIM coverage).

This application of *Crossley* is supported by cases from other jurisdictions cited in that opinion. See, *Bachman v. American Mutual Insurance Co. of Boston*, 338 F. Supp. 1372 (D. Kan. 1972) (concluding in action against decedent's insurer that plaintiff had failed to sustain his burden of showing uninsured motorist was liable for injuries to plaintiff's son); *Noland v. Farmers Insurance Exchange*, 413 S.W.2d 530, 533 (Mo. App. 1967) (holding that where Missouri insured was injured in Missouri when car in which she was riding was struck by separate uninsured vehicle driven by her husband and where Missouri law precluded wife from suing husband, insured was not entitled to UM

benefits because coverage was provided only when UM motorist was legally responsible for damages, noting that action against insurer "was upon contract (not tort), and that the terms of the contract govern").

This application of *Crossley, supra*, is also consistent with the language this court adopted in *Lane v. State Farm Mut. Auto. Ins. Co.*, 209 Neb. 396, 405, 308 N.W.2d 503, 509 (1981):

> "We construe the words 'legally entitled to recover as damages' to mean simply that the insured must be able to establish fault on the part of the uninsured motorist which gives rise to the damages and to prove the extent of those damages. This would mean that in a direct action against the insurer *the insured has the burden of proving that the other motorist was uninsured, that the other motorist is legally liable for damage to the insured, and the amount of this liability. . . .*"

(Emphasis supplied.) Quoting *Winner v. Ratzlaff*, 211 Kan. 59, 505 P.2d 606 (1973).

We acknowledge that the *Crossley* analysis has led to some confusion as to whether this court applied tort or contract conflict-of-law provisions to determine which state's law controls the interpretation of an insurance contract. See *Lane, supra* (concluding that *Crossley, supra*, was inapplicable to issue of whether Nebraska insured was required to obtain judgment against Nebraska tort-feasor before proceeding against UM insurer because *Crossley* was decided under Colorado law and not Nebraska's UM statute). We take this opportunity, however, to clarify *Crossley*. In doing so, we decline to interpret *Crossley* as adopting the Restatement (Second) of Conflict of Laws § 146 (1971) to determine the governing state law for the interpretation or enforcement of a contract issued by a Nebraska insurer to a Nebraska insured when the issue does not involve the tort-feasor's threshold liability. Such interpretation would run counter to generally recognized conflict-of-law principles and perpetuate unnecessary confusion in our conflict-of-law jurisprudence.

The Ohio Supreme Court resolved an issue similar to the case now before this court and, in doing so, addressed similar confusion in Ohio's case law. *Ohayon v. Safeco Ins. Co. of Ill.*, 91 Ohio St. 3d 474, 747 N.E.2d 206 (2001). In *Ohayon*, the son of an Ohio

insured was struck by a car in Pennsylvania and settled with the tort-feasor for the limits of the tort-feasor's liability coverage. In an action brought in Ohio, the Ohio insureds argued that Pennsylvania's law controlled the issue of whether the insureds could stack their UIM coverage amounts for separate vehicles and whether their UIM insurer could limit its liability by the moneys recovered from the person or organization legally responsible. Pennsylvania law permitted stacking and prohibited the setoff provisions, but the insureds' policy, issued in Ohio, contained provisions barring stacking and permitting setoffs, consistent with Ohio's statutes. The trial court determined that the action was based on tort law and applied the Restatement's tort conflict-of-law provisions to determine that Pennsylvania law governed the coverage issue. See *Ohayon, supra*. The Ohio Ninth District Court of Appeals reversed, and the Ohio Supreme Court affirmed the Court of Appeals' decision.

The Ohio Supreme Court reasoned that a tort conflict-of-law analysis was appropriate where the issue was the measure of damages recoverable from the tort-feasor, but that "[t]he resolution of . . . stacking and setoff issues is a coverage issue, separate and independent from the measure of damages assessed to the tortfeasor." *Id*. at 482, 747 N.E.2d at 213. Similar to the confusion arguably created by this court's decision in *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977), the Ohio Supreme Court had previously applied a tort conflict-of-law analysis in *Kurent v. Farmers Ins.*, 62 Ohio St. 3d 242, 581 N.E.2d 533 (1991), to determine whether the insured was legally entitled to recover from the tort-feasor pursuant to the foreign state's no-fault law. In *Ohayon, supra*, the court clarified that *Kurent* was not applicable to issues of coverage.

We agree with the reasoning in *Ohayon, supra*, and conclude that in applying *Crossley, supra*, the district court "confused the issue of a tort-feasor's liability to a plaintiff with the issue of an insurer's liability on its contract." See *Miller v. State Farm Mut. Auto. Ins. Co.*, 87 F.3d 822, 826 & n.1 (6th Cir. 1996) (discussing Ohio Supreme Court's decision in *Kurent, supra*, and concluding that in another case, Ohio's Seventh District Court of Appeals had misapplied *Kurent* by concluding it controlled in any claim against insurer for recovery of damages caused by third party).

[11,12] The issue in *Crossley, supra*—whether, in the first instance, the insured was legally entitled to recover from the tort-feasor—is simply not before this court in Johnson's case. USF&G and EMC do not contend that the Colorado Auto Accident Reparations Act prevented Johnson from maintaining a tort action against Schulz, that it limited his recovery, or that Johnson failed to satisfy the minimum liability threshold for pursuing a tort action. See Colo. Rev. Stat. Ann. § 10-4-714 (West 1990). Compare *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002) (reversing application of Nebraska law and determining that defendant was entitled to jury instruction based on California law that precluded plaintiff's recovery for parasitic damages for fear of developing illness in certain circumstances). The fact that Schulz' insurers paid the limits of their liability obligations demonstrates that Schulz' underlying tort liability was not at issue. Rather, the issue is the enforceability of the insurers' setoff provisions in their UIM coverages. We conclude that the record in this case limits the conflicts issue to coverage, which is governed by the Restatement's conflict-of-law provisions for contract. To the extent that *Crossley* can be interpreted as authorizing the application of the Restatement (Second) of Conflict of Laws § 146 (1971) to resolve a conflict limited to the issue of insurance coverage, not implicating threshold tort liability, it is hereby disapproved.

Application of Restatement (Second) of Conflict of Laws § 188 Principles to Johnson's Case

Johnson asserts that under the Restatement, *supra*, Nebraska has the most significant relationship to the insurance contracts in dispute and that Nebraska law should apply. USF&G and EMC argue that regardless of whether the conflict provisions for tort or contract are applied, Colorado has the most significant interest in applying its law to an accident which occurred in Colorado.

[13] For the resolution of contract conflicts, this court has adopted the Restatement, *supra*, § 188. *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001), citing *Powell v. American Charter Fed. Sav. & Loan Assn.*, 245 Neb. 551, 514 N.W.2d 326 (1994). Section 188 at 575 provides:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state

> which, with respect to that issue, has the most significant relationship to the transaction and the parties under the [general choice-of-law] principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties . . . the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

In this case, it is undisputed that the insurance contracts in question were issued in Nebraska. The insured risks, the coverage limits, and the premium costs were all negotiated in Nebraska. The insured risk was principally located in this state. Johnson is a resident of this state, and USF&G and EMC were licensed to conduct insurance business in this state. Thus, the general contacts under § 188 unquestionably point to Nebraska contract law as controlling. In *Mertz*, we stated that "[w]hile § 188 sets out the general contacts to consider in contract cases involving conflict of law disputes, §§ 189 through 197 deal with conflict of laws disputes with regard to specific types of contracts." 261 Neb. at 709, 625 N.W.2d at 202. The Restatement, *supra*, § 193 at 610, addresses the issue of covered risks in an insurance policy:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the [general choice-of-law] principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Comment *a*. clarifies that the law selected by application of § 193 "determines such questions as . . . what risks are covered by the

policy." *Id.* at 610. Comment *b.* provides that the principal location of the insured risk is the state "where it will be during at least the major portion of the insurance period." *Id.* at 611. Thus, regardless of whether the issue is analyzed under § 188 or § 193, Nebraska's law should govern what UM or UIM risks were covered by Johnson's insurance contracts unless Colorado has a more significant relationship to the parties and the transaction under the general choice-of-law principles stated in § 6 of the Restatement. See *Mertz, supra* (discussing presumption created by application of sections dealing with specific types of contracts).

The Restatement (Second) of Conflict of Laws § 6(2) at 10 (1971) provides that when there is no statutory provision directing a court's choice-of-law decision, the relevant factors include:

> (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.

[14] Usually, when dealing with contract claims, the most compelling factor under § 6 is the protection of the parties' justified expectations. See, Restatement, *supra*, § 188, comment *b.*; Restatement, *supra*, § 193, comment *c.* at 612 ("location of the insured risk . . . has an intimate bearing upon the risk's nature and extent and is a factor upon which the terms and conditions of the policy will frequently depend"). Compare *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002) (setting out most relevant principles under § 6 for tort claims). However, in a circumstance not implicating either a tort-feasor's threshold liability or the amount a tort victim can recover, and focusing only upon coverage based upon a contract entered into in Nebraska, this state would also have the most significant interest in applying its law when such law specifically prohibits the enforcement of a contract provision. See Restatement, *supra*, § 205, comment *c.* at 662 (explaining that even if application of rule defeats

expectations of parties to contract, state with "a local law rule which requires that the contract give rise to certain rights and duties or which provides that the parties may not limit the extent of their obligations by a certain provision" is likely to represent strongly felt policy under the principles stated in § 6). Compare *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 710, 625 N.W.2d 197, 204 (2001) ("Iowa's interest in protecting the expectations of the parties is outweighed by Nebraska's strong public policy considerations").

In 1990, the Nebraska Legislature amended its statutory formula for determining an insurer's maximum liability for UIM coverage to permit benefits to an insured when the tort-feasor is underinsured relative to the insured's actual damages. See 1990 Neb. Laws, L.B. 1136, § 124. The insurance contracts in this case were negotiated and issued after that amendment was enacted. Nebraska therefore has a significant interest not only in ensuring that its residents with UIM coverage are compensated for their injuries to the extent required by the governing statutes, but also in ensuring that policies issued in this state conform to those statutes.

We reject USF&G and EMC's arguments that the application of contract conflict-of-law principles leads to the determination that Colorado law would apply. We conclude that Colorado would not have a more significant relationship to this issue under the interests stated in the Restatement, *supra*, § 6, because the determination of a Nebraska resident's right to recover UIM benefits from a Nebraska insurer does not, under the record before us, impact Colorado residents or insurers, or the application of its no-fault rules, as they then existed. Finally, the application of Nebraska's laws to resolve the enforceability of contract coverage provisions between Nebraska insurers and insureds enhances the predictability of the parties' contractual rights and obligations by removing the constant variable of different states in which insureds travel. See *Vaughan v. Nationwide Mut. Ins. Co.*, 702 A.2d 198 (D.C. App. 1997).

PIP Benefits

In contrast to the setoff provisions for UIM coverage, we determine that there is no conflict of law presented by the PIP

issue. The out-of-state coverage provisions of both the USF&G and EMC policies specified that the insurer would provide any coverage "*required of out-of-state vehicles by the jurisdiction where the covered 'auto' is being used.*" (Emphasis supplied.) UIM coverage was required by both Nebraska and Colorado, and the coverage was provided in both policies. PIP coverage, however, was required only by Colorado law and was provided only as a result of the out-of-state coverage provisions. Thus, there is no conflict between Nebraska and Colorado laws regarding this coverage, and the coverage provided was entirely dependent upon the requirements of Colorado law. As such, the issue is simply an application of Colorado law as provided by the insurance contracts.

In applying Colorado law to Johnson's claim for PIP coverage, the district court determined that Johnson was not entitled to PIP benefits from EMC under the Colorado Auto Accident Reparations Act, see Colo. Rev. Stat. Ann. § 10-4-701 et seq. (West 1990 & Supp. 1999), as construed in *State Farm Mut. Auto. Ins. Co. v. Ketcham*, 849 P.2d 871 (Colo. App. 1994). Although the Colorado Legislature repealed the no-fault act, effective July 2001, see § 10-4-701 (West Supp. 1999), it was in effect at the time of this accident.

In 1993, the Colorado Auto Accident Reparations Act required every *owner* of a motor vehicle operated on the public highways of Colorado to have a complying policy in effect, which included mandatory PIP coverage. See §§ 10-4-705 to 10-4-707. As noted, the PIP coverage requirements extended to out-of-state policies while the covered vehicle was in Colorado. See § 10-4-711(4).

In *Ketchum*, the plaintiff was a California resident who was injured in Colorado while operating a Colorado resident's vehicle while his own vehicle remained in California. He sought PIP benefits from his insurer, which were denied. The Colorado Court of Appeals held that under § 10-4-711, an insurer was "not required to provide no-fault benefits under § 10-4-706 and § 10-4-707 to a nonresident whose insured vehicle is not located in Colorado at the time of the accident." *Ketchum*, 849 P.2d at 873.

We agree with the district court's application of *Ketchum*. Pursuant to *Ketchum*, only Brown, the owner of the automobile at the time of the accident, was required to have PIP coverage.

Brown's insurance provider, USF&G, in fact paid Johnson PIP benefits in accordance with its out-of-state policy provisions and Colorado law. As such, we find no merit to Johnson's argument that EMC was also required to provide him with PIP benefits.

Medical Payments Benefits

Finally, the court determined that Johnson was not entitled to medical payments benefits under his EMC policy because an exclusion precluded that coverage for an insured's bodily injury sustained " 'while working in a business of selling, servicing[,] repairing or parking 'autos' unless that business is yours.' " The court determined the language was unambiguous and found that Johnson was clearly working for Brown's business at the time of the accident.

In their briefs, the parties do not contend this issue would have been resolved differently depending upon whether Colorado or Nebraska law was applied or that an actual conflict exists. Rather, their arguments center upon the proper interpretation of the contract and whether that interpretation requires payment to Johnson under EMC's medical payments provisions. We therefore analyze the issue based upon the arguments in the parties' respective briefs.

[15] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *H & R Block Tax Servs. v. Circle A Enters., ante* p. 411, 693 N.W.2d 548 (2005).

Johnson argues that although he would not have gone to Denver but for Brown's request, once in Denver, Johnson was doing work for his own partnership business as well. While that may be the case, Johnson's evidence does not challenge the undisputed record establishing that at the time of the accident, Johnson was driving a vehicle owned by Brown from Colorado to Nebraska, the very service he had agreed to provide to Brown for a fee. Viewing the evidence in a light most favorable to Johnson and giving him the benefit of all reasonable inferences, we conclude that the district court did not err in determining as a matter of law that at the time of the accident, Johnson was in Brown's employ. The policy issued by EMC specifically

excluded coverage for medical payments under these facts. This assignment of error is without merit.

CONCLUSION

For the reasons stated above, we affirm the district court's order granting summary judgment to USF&G and EMC on the issues of medical payments and PIP benefits. We reverse, however, that portion of the court's order granting summary judgment on the issue of UIM benefits and remand the cause to the district court for further action consistent with this opinion.

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

STATE OF NEBRASKA, APPELLEE, V. KIMBERLY SUE FAUST, APPELLANT.

696 N.W.2d 420

Filed May 6, 2005. No. S-04-298.

1. **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.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Witnesses: Appeal and Error.** Witness credibility is not to be reassessed on appellate review.
4. **Constitutional Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.
5. ____: ____: ____. The initial inquiry is whether an identification procedure was unduly suggestive. A determination of impermissible suggestiveness is based on the totality of the circumstances.
6. **Trial: Identification Procedures: Evidence.** Even if there have been impermissible pretrial suggestions as to an accused's identity, in-court identification may be received when it is independent of and untainted by the impermissible identification procedures.
7. **Identification Procedures.** Reliability is the linchpin in determining the admissibility of identification testimony. The factors to be considered include (1) the opportunity of the witness to view the alleged criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his or her prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. Against these factors is to be weighed the corrupting influence of the suggestive identification itself.

8. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case.
9. **Trial: Prosecuting Attorneys: Juries.** The conduct of a prosecutor which does not mislead and unduly influence the jury and thereby prejudice the rights of the defendant does not constitute misconduct.
10. **Motions for New Trial: Proof.** In order for a new trial to be granted, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby.
11. **Criminal Law: Motions for New Trial: Evidence: Proof.** A criminal defendant who seeks a new trial on the basis of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

James R. Mowbray and Jeffrey A. Pickens, of Nebraska Commission on Public Advocacy, and Timothy W. Nelsen, Otoe County Public Defender, for appellant.

Jon Bruning, Attorney General, and Jeffery J. Lux for appellee.

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

GERRARD, J.

NATURE OF CASE

On April 25, 2000, Shannon Bluhm and Robert Parminter were killed on an Otoe County road. The appellant, Kimberly Sue Faust, was charged in the deaths and convicted of two counts of first degree murder and two counts of use of a weapon to commit a felony. On appeal, we reversed those convictions because the jury had been "exposed to a significant amount of improper and prejudicial testimony." *State v. Faust*, 265 Neb. 845, 849, 660 N.W.2d 844, 855 (2003). Faust was retried and convicted of one count of first degree murder, one count of second degree murder, and two counts of use of a firearm to commit a felony. Faust's motion for new trial was denied, and she appeals.

TRIAL EVIDENCE

The bodies of Bluhm and Parminter were found by the side of a road near Parminter's house, near Bluhm's burning car. Parminter was killed attempting to rescue Bluhm from the

burning automobile. Parminter died of at least two gunshot wounds to the head; Bluhm had stab wounds to the chest and gunshot wounds to the back of the head and to the back.

According to the State's evidence, Bluhm had been intimately involved with Faust's husband, Bruce Faust (Bruce). The parties agree that on April 25, 2000, Faust placed her bicycle into her Jeep Cherokee and drove to a county road near a paved highway, where she parked the Jeep, and from where she rode the bicycle into Eagle, Nebraska. Faust then testified that she arrived in Eagle at about 9:15 or 9:20 p.m. Faust came across Bluhm in Eagle and accepted Bluhm's offer of a ride back to Faust's Jeep. From there, the parties' accounts differ.

Faust testified at trial on January 7, 2004. According to Faust, when they arrived at the Jeep, Bruce was there and got into Bluhm's car on the driver's side. Faust claimed that Bruce was yelling at her, so she ran from the car to her Jeep and drove off. Faust said that she stopped and turned on the Jeep's dome light to look for her mobile telephone and that she saw that her pant leg was soaked in blood, although Faust herself was not bleeding. She testified that she reached under her seat looking for her telephone, but found a revolver that she had borrowed from her father and not yet returned. Faust testified that she accidentally fired the revolver inside the Jeep.

Faust said that she drove back toward Bluhm's car, which was then on fire, and saw someone lying on the road and another person standing nearby. According to Faust, she got out of her car and knelt next to the person in the road, who was Bluhm. Faust said that Bruce then grabbed her hair and began firing a gun. Faust claimed that Bruce tried to shoot her in the head, but that this time, the gun did not fire. Faust said that Bruce then threatened Faust and threw the gun to the ground. Faust testified that she picked up the gun, got in her Jeep, and drove home, where she burned her bloody clothing.

On cross-examination, the State questioned Faust about whether she was outside Bluhm's salon in Eagle at 8:45 p.m.

> Q. And the next time that you was [sic] in Eagle, Nebraska, then, was, according to your statement, was at about approximately 9:20 p.m. when you're pushing your bike?

A. Correct.

Q. Did you ever drive your Jeep Cherokee back to Eagle, Nebraska, between 7 p.m. and 9:30 p.m.?

A. Not that I recall.

Q. Okay. Well, wouldn't you know if you did or didn't?

A. I don't believe I did.

Q. Were you sitting outside of Shannon Bluhm's shop in your Jeep Cherokee at about 8:45 p.m.?

A. No.

Q. You're absolutely sure of that?

A. Yes.

The State later asked Faust:

Q. And you're absolutely sure that you were not sitting in your Jeep Cherokee at about 8:45 p.m., looking at Shannon's shop?

A. No, I wasn't.

Q. And I'm talking about the night of April 25 of 2000, when all this happened, you weren't there?

A. No, I wasn't.

The reason for this line of questioning was that on January 1, 2004—a week before Faust's trial testimony—an investigator with the Nebraska State Patrol became aware of and interviewed Belva Anderson, who had been a customer at Bluhm's salon on April 25, 2000. Anderson was called by the State as a rebuttal witness and testified that she had left Bluhm's salon on April 25 at 8:45 p.m. Anderson testified that as she went out the front door, she saw a Jeep that was parked "so close to the door that [she] had a hard time getting out." Anderson testified that there was one person in the Jeep and positively identified Faust as the person behind the steering wheel of the Jeep. Anderson was cross-examined with respect to the length of the sidewalk and the number of parking spaces near the salon, but the credibility of her in-court identification was not directly challenged by cross-examination at trial.

MOTION FOR NEW TRIAL

As previously noted, Faust was convicted pursuant to jury verdict, and Faust filed a motion for new trial. At the hearing on the motion for new trial, Faust called Anderson as a witness. Faust first examined Anderson with respect to the layout of the salon,

sidewalk, and parking lot as she recalled it on April 25, 2000. Anderson then said that she had thought that the person she had seen in the Jeep on April 25 had short, blonde hair and blue eyes, but that at trial, Faust had longer, brown hair and brown eyes.

Anderson was then examined with respect to a picture of Faust that Anderson had seen in the Hastings, Nebraska, newspaper prior to Anderson's trial testimony. Anderson said that she had seen the photograph prior to being contacted by law enforcement and that in the photograph, Faust had more closely resembled her appearance at trial as opposed to her appearance in April 2000. In other words, Anderson testified that she knew, prior to her in-court identification of Faust, that Faust had longer, brownish-colored hair. Anderson testified that she had been able to identify Faust at trial "[b]ecause [Anderson] trimmed [Faust's] hair and bleached, it in [Anderson's] mind." Anderson said that she had not been "bother[ed]" by the eye color problem because she had not been "100 percent sure . . . that [Faust's] eyes [had been] blue." Anderson insisted that she was "100 percent sure when [she] testified that that was [Faust]."

Anderson testified that when she was interviewed by law enforcement prior to trial, she had been shown a photograph of Faust's Jeep and had told law enforcement that she recalled the Jeep she saw outside Bluhm's salon as being darker in appearance, but that "it was dusk, you know." Faust then continued her attacks on inconsistencies between Anderson's recollection and the actual physical surroundings of the salon. Anderson still maintained, when asked if she was certain that the person she identified in court was the person she saw on April 25, 2000, "I swear to God. I'm sure."

Anderson then testified about meeting with a defense investigator on February 7, 2004, after she had testified at trial. Anderson admitted that at the time of the interview, she had expressed uncertainty about her prior in-court identification. Anderson said that she had "agonized over this" and "second-guessed" herself. Anderson said, however, that she had become certain again after law enforcement, on February 11, had shown Anderson a photograph of Faust on the night Faust had been arrested. Anderson said that seeing Faust in court, she again had "no doubts."

Faust then examined the criminal investigator from the Nebraska State Patrol who had located and made the initial contact with Anderson. The investigator testified that he had located Anderson after examining Bluhm's appointment book from April 25, 2000, and had interviewed Anderson on January 1 and 2, 2004. The investigator testified that he had not shown Anderson a photograph of Faust prior to Anderson's trial testimony. The investigator testified that he had shown Anderson a photograph of Faust's Jeep on the day of Anderson's trial testimony, as described by Anderson. The investigator said that Anderson had advised him that "she recalled the Jeep being a darker color, and then she also stated that it was dusk, so she was unsure of the color, but she was sure of the make."

The investigator then testified that he asked Anderson to make an identification of Faust on the morning of Anderson's trial testimony. Anderson was asked to take a seat in the courtroom gallery, to see if she could identify Faust as being in the courtroom. The investigator testified that Faust was not in the courtroom at that time. He then left the courtroom. Anderson then emerged from the courtroom and advised the investigator that she was able to recognize Faust. The investigator returned to the courtroom and saw Faust, separated from the gallery by the courtroom bar. Faust was the only woman seated at counsel table. The investigator testified that Faust was wearing civilian clothing and that he had not advised Anderson what entrance into the courtroom Faust would use. The investigator also said that on February 11, 2004, after trial, he had shown Anderson three booking photographs of Faust.

Anderson was then recalled to the stand. Anderson testified that prior to her trial testimony, she had been seated in the courtroom gallery and had seen Faust when she walked in. Faust had come into the courtroom through a different entrance from the public entrance, escorted by a man. Anderson said that Faust had been seated at counsel table with three men.

The district court overruled Faust's motion for new trial. Faust has perfected this timely appeal.

ASSIGNMENT OF ERROR

Faust assigns that the district court erred in overruling her motion for new trial. In her brief, Faust argues that the motion for

new trial should have been granted because of (1) witness misconduct on the part of Anderson, (2) prosecutorial misconduct in using a suggestive identification technique and failing to inform Faust of that technique, and (3) newly discovered evidence, i.e., evidence of Anderson's and the prosecution's misconduct.

STANDARD OF REVIEW

[1,2] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003). See *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. King, ante* p. 326, 693 N.W.2d 250 (2005).

ANALYSIS

Neb. Rev. Stat. § 29-2101 (Cum. Supp. 2004) provides, in relevant part:

> A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following grounds affecting materially his or her substantial rights: . . . (2) misconduct of the jury, of the prosecuting attorney, or of the witnesses for the state . . . (5) newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial[.]

Faust's first two arguments are based on alleged witness and prosecutorial misconduct; her third argument is based on alleged newly discovered evidence. We address each argument in turn.

Witness Misconduct

Faust's first argument is that Anderson committed witness misconduct when she made her in-court identification of Faust. The sole authority cited by Faust in support of this argument is *State v. Tainter*, 218 Neb. 855, 359 N.W.2d 795 (1984), in which the defendant introduced collateral evidence to attack the credibility of the police officer who had administered the defendant's breath alcohol test. The officer denied having, on another

occasion, removed evidence from the police evidence room for other than law enforcement purposes, but the defendant adduced evidence that the officer had previously been suspended for such conduct. We stated:

> The defendant seems to have a theory that an incorrect or false statement by a witness for the State about his own past misconduct on the job somehow invalidated the results of the breath test.
>
> The fact that a witness may have lied about a past act does not invalidate the rest of his testimony. It only means the jury must weigh these statements against the rest of the evidence in reaching a verdict. . . . This court will not reexamine or pass on the trier of fact's determination of credibility. . . .
>
> . . . .
>
> The misconduct of the State's witness here was insufficient to materially affect the defendant's substantive rights. As pointed out in the early case of *Argabright v. State*, 62 Neb. 402, 87 N.W. 146 (1901), which dealt with misconduct of an attorney at trial, to warrant reversal the misconduct must be of such a nature as to unduly influence the decision of the jury. Here, there was no undue influence.

(Citations omitted.) *State v. Tainter*, 218 Neb. at 859-60, 359 N.W.2d at 798.

[3] Clearly, the issue presented in *Tainter* has no bearing in the instant case. Faust's entire argument with respect to "witness misconduct" is that Anderson committed misconduct when she purportedly made an unreliable identification of Faust at trial, because, according to Faust, Anderson's in-court identification was tainted by her observation in the courtroom prior to testifying and her viewing of Faust's photograph in the newspaper prior to trial. But the record does not suggest, nor does Faust argue, that Anderson's trial testimony was deliberately false. In other words, Faust argues that Anderson committed misconduct because her testimony was not credible. But witness credibility is not to be reassessed on appellate review, *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003), and reframing the issue as "witness misconduct" does not change this well-established principle. Faust's appellate argument does not support a finding

of witness misconduct. The district court did not abuse its discretion in rejecting this basis for Faust's motion for new trial.

PROSECUTORIAL MISCONDUCT

Next, Faust argues that there was prosecutorial misconduct in using a suggestive identification technique—specifically, Anderson's observation in the courtroom prior to testifying—and failing to inform Faust of the use of that technique. Faust contends that Anderson's in-court identification of Faust was irreparably tainted by the allegedly suggestive identification made in the courtroom prior to her testimony, based upon the constitutional standards for suggestive identifications that have been articulated by this court and the U.S. Supreme Court. Consequently, in order to evaluate Faust's claim of prosecutorial misconduct, the first step is to consider, pursuant to those standards, whether the in-court identification was actually rendered unreliable by the allegedly suggestive identification technique used by the State.

[4-6] An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992). The initial inquiry is whether an identification procedure was suggestive. *Id.* A determination of impermissible suggestiveness is based on the totality of the circumstances. *Id.* Furthermore, even if there have been impermissible pretrial suggestions as to an accused's identity, in-court identification may be received when it is independent of and untainted by the impermissible identification procedures. *Id.*

[7] Reliability is the linchpin in determining the admissibility of identification testimony. *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). The factors to be considered include (1) the opportunity of the witness to view the alleged criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his or her prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. *Id.*, citing *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). Against these factors is to be weighed the corrupting influence of the suggestive identification itself. *Manson v. Brathwaite, supra.*

Admittedly, application of the factors enumerated in *Manson v. Brathwaite, supra*, is not particularly supportive of Anderson's in-court identification. According to Anderson's testimony regarding the events of April 25, 2000, she observed the person she identified as Faust for approximately 5 to 10 seconds. The record does not establish the degree of attention that Anderson gave to her observation of Faust, although it was clearly not the attention that might be expected from a trained observer, or someone who knew that her observations might be subject to later scrutiny. Compare *id*. Anderson provided no prior description of the person she observed that can be evaluated for accuracy. Anderson's in-court identification was made more than 3½ years after her observations outside Bluhm's salon.

However, Anderson did testify that she noticed the person particularly because of the unusual way in which the person's vehicle was parked and that she was positive of the time that the incident occurred. Anderson was candid about the details of the incident that she could remember and those she could not, and overall, her trial testimony demonstrated a high level of certainty in her observations and identification. Compare *id*. Anderson's testimony, as she explained it at trial and at the motion for new trial, was based on the observations she made on April 25, 2000. See, *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988).

More importantly, as previously noted, these factors are to be weighed against the corrupting influence—if any—of the allegedly suggestive identification. See *Manson v. Brathwaite, supra*. In this case, the pretestimonial identification at issue was not so suggestive as to undermine the reliability of Anderson's in-court identification. As stated by the U.S. Court of Appeals for the Eighth Circuit, "[t]o inquire of a witness in a nonleading fashion, shortly before she takes the stand, whether she can identify a person, which is the same question she will be asked while testifying, is not a procedure that we believe to be impermissibly suggestive." *United States v. Wade*, 740 F.2d 625, 628 (8th Cir. 1984). "[W]here the witness confronts the defendant, prior to testifying, in substantially the same circumstances in which he would have encountered him from the witness stand, his in-court identification cannot be said to have been infected

by the pre-testimonial identification." *United States v. Williams*, 596 F.2d 44, 49 (2d Cir. 1979). See, also, *United States v. Domina*, 784 F.2d 1361 (9th Cir. 1986); *United States v. Famulari*, 447 F.2d 1377 (2d Cir. 1971); *Middleton v. United States*, 401 A.2d 109 (D.C. 1979); *Com. v. Sexton*, 485 Pa. 17, 400 A.2d 1289 (1979); *People v. York*, 189 Colo. 16, 537 P.2d 294 (1975).

United States v. Famulari, supra, presents an analysis that is instructive in the instant case. In *Famulari*, a witness was unsure of his identification of the defendant from a photograph and looked through the window in the courtroom door to see whether he could identify any defendant. The parties disagreed about whether the witness had been asked by the prosecutor to look through the window. However, on appeal, the Second Circuit concluded that even if the courtroom door identification had been deliberately staged, the in-court identification was admissible. The court reasoned that the in-court identification was still admissible if it could be shown that the "identification did not result from the 'exploitation' of the 'primary illegality,' but would have been made even if the improper identification had not taken place." *Id*. at 1380, quoting *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

Except for the fact that the witness had viewed the defendant from one side of the room rather than the other and that the jury could not see him viewing the defendant, "the setting for the courtroom door identification was identical to the setting in which the courtroom identification was made, and the in-court identification was virtually contemporaneous with the pre-testimonial identification." *United States v. Famulari*, 447 F.2d at 1380-81. "[T]his was not a case in which a witness may have felt some compulsion to stick to an earlier identification even though he might not really have been sure of his identification in the courtroom." *Id*. at 1381. In sum, the court concluded that "the allegedly improper identification was so related in time and circumstance to the in-court identification that it cannot be said to have tainted [the witness'] testimony or infected the trial." *Id*. Accord *United States v. Hamilton*, 469 F.2d 880 (9th Cir. 1972).

Similarly, it is difficult to conclude that the identification techniques at issue in the instant case were impermissibly suggestive,

when the alleged taint of the in-court identification is derived from circumstances substantially indistinguishable from the in-court identification itself. Anderson sat in the courtroom, saw Faust enter the room and sit at counsel table, and identified Faust as the person she saw on April 25, 2000. Later, Anderson took the witness stand, saw Faust at counsel table, and identified her as the person she saw on April 25. In short, the pretestimonial identification was so related in time, place, and circumstances to the in-court identification that we cannot conclude the in-court identification was tainted.

We also rejected an argument similar to Faust's in *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998). In *Jacob*, a coworker and tenant of a murder victim identified the defendant, Steven Jacob, at a retrial following a reversed conviction, as being the driver of a vehicle that passed the victim's residence shortly after the murder. The witness had also identified Jacob at a pretrial hearing before the first trial. We rejected Jacob's argument that the in-court identification was tainted.

> [Jacob] argues that the trial court erred in allowing [the witness'] identification testimony into evidence. Jacob asserts that [the witness'] testimony is unreliable, is the result of a suggestive "showup" at the preliminary hearing for the first trial, and is based on seeing Jacob identified as a suspect on television and in the newspaper. Prior to trial, the court overruled Jacob's motion to suppress the eyewitness identification . . . based upon its alleged suggestive nature. The court again overruled an objection to [the witness'] identification during trial.
>
> During trial, [the witness] testified that when he saw a picture of Jacob on the news, he called the police to tell them that he had seen that person drive by shortly after the shooting. He clarified, however, that his testimony identifying Jacob as the man who drove by was based on what he saw while standing in front of the neighbor's house. The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Rules of Evidence commit the evidentiary question at issue to the discretion of the trial court. . . . The trial court did not abuse its discretion in allowing [the witness'] testimony.

(Citation omitted.) *State v. Jacob*, 253 Neb. at 981-82, 574 N.W.2d at 141.

The same principles apply in the instant case. As previously stated, the identification technique at issue in this case was not unduly suggestive. Beyond that, even had it been, in-court identification may be received when it is independent of and untainted by the impermissible identification procedures. *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992). The evidence adduced at trial and at the hearing on the motion for new trial indicates, clearly, that Anderson's testimony was based upon her observations of April 25, 2000. Simply stated, the identification technique used by the State did not taint Anderson's in-court identification, and Anderson's in-court identification was properly admitted in any event.

Faust also argues that had the pretestimonial identification been disclosed, she would have been better prepared to cross-examine Anderson and discredit her in-court identification. However, we conclude that the district court did not abuse its discretion in finding that Faust had not been prejudiced by the lack of disclosure. Faust's argument rests on the contention that Anderson's in-court identification could have been undermined had she been subject to cross-examination about seeing Faust in the courtroom before testifying. However, as discussed above, the circumstances of the pretestimonial identification did not undermine the reliability of the in-court identification, because the time, place, and circumstances of each identification were nearly identical.

[8,9] Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998). The conduct of a prosecutor which does not mislead and unduly influence the jury and thereby prejudice the rights of the defendant does not constitute misconduct. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003). Under the circumstances of this case, cross-examining Anderson with respect to the pretestimonial identification would not have discredited her in-court identification, and there was not a " ' " 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " ' " See *id*. at 354, 656 N.W.2d at 633. The district court did not abuse its discretion in failing to grant a new trial on this basis.

Newly Discovered Evidence

Faust's remaining argument with respect to her motion for new trial is that the alleged misconduct of Anderson and the State was newly discovered evidence warranting a new trial. Having rejected Faust's claims with respect to that misconduct, we also conclude that the district court did not abuse its discretion in finding no newly discovered evidence warranting a new trial.

[10,11] In order for a new trial to be granted, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby. *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004). A criminal defendant who seeks a new trial on the basis of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result. *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004). Even if we assume, for the sake of argument, that Faust was reasonably diligent in discovery of this evidence, see *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004), we conclude, based on our analysis above, that this evidence was insufficient to demonstrate that had it been admitted at trial, it would probably have produced a substantially different result. The district court did not abuse its discretion in denying Faust's motion for new trial on the basis of newly discovered evidence.

CONCLUSION

The district court did not abuse its discretion in overruling Faust's motion for new trial. The judgment of the district court is affirmed.

Affirmed.

State of Nebraska, appellee, v. Michael W. Loyd, appellant.

696 N.W.2d 860

Filed May 6, 2005. No. S-04-534.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.

2. **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.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
4. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
5. **Final Orders: Speedy Trial: Waiver: Appeal and Error.** The denial of a motion to discharge based upon speedy trial grounds is a final order, as an order affecting a substantial right made in a special proceeding, and failure to perfect an appeal within 30 days of the overruling of such a motion to discharge results in a waiver of that issue.
6. **Limitations of Actions: Words and Phrases.** A statute of limitations is not jurisdictional, but is, rather, an affirmative defense.
7. **Criminal Law: Limitations of Actions: Pleas.** The defense of the statute of limitations in a criminal case is raised by a defendant's not guilty plea.
8. **Criminal Law: Limitations of Actions: Proof.** The general issue in a criminal case interposes the defense of the statute of limitations, and the burden is on the State to prove all essential elements of the crime charged, including the fact that charges were filed within the period specified by the applicable statute of limitations.
9. **Limitations of Actions: Indictments and Informations: Convictions.** If the statute of limitations has expired before an information is filed by the State, a conviction for the offense alleged is not sustained by the evidence.
10. **Criminal Law: Pleadings.** Criminal defendants who wish to challenge the sufficiency of the charges against them do so by filing a plea in abatement or motion to quash.
11. **Pleadings.** A defect apparent on the face of the record may properly be reached by a motion to quash.
12. **Plea in Abatement.** An irregularity in the proceedings which does not appear on the face of the record and can be established only by extrinsic evidence can be raised only by a plea in abatement.
13. **Pretrial Procedure: Limitations of Actions: Pleadings.** A pretrial proceeding raising a statute of limitations defense—a challenge to the sufficiency of the charges—is brought either by a motion to quash or plea in abatement, depending on whether or not the defense appears on the face of the record.
14. **Final Orders: Pleadings.** An order overruling a plea in abatement or motion to quash is not a final, appealable order.
15. **Pleadings.** A determination as to how a motion should be regarded depends upon the substance of the motion, not its title.
16. **Judgments: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.

17. **Actions: Words and Phrases.** Where the law confers a right and authorizes a special application to a court to enforce the right, the proceeding is special, within the ordinary meaning of the term "special proceeding."
18. ____: ____. A special proceeding is, by definition, not part of an action.
19. ____: ____. An action involves prosecuting the alleged rights between the parties and ends in a final judgment, whereas a special proceeding does not.
20. **Pretrial Procedure: Limitations of Actions.** The overruling of a pretrial motion raising a statute of limitations defense neither affects a substantial right nor occurs in the context of a special proceeding.
21. **Judgments: Final Orders: Words and Phrases.** A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
22. **Judgments: Final Orders: Appeal and Error.** An order entered by a court may affect a substantial right and be subject to review as a final order although it could not or need not be properly denominated a judgment.
23. **Judgments: Final Orders: Jurisdiction: Appeal and Error.** An appellate court's jurisdiction is limited to the judgment or final order from which the appeal is taken.
24. **Final Orders: Appeal and Error.** An appeal from a final order may raise, on appeal, every issue presented by the order that is the subject of the appeal.
25. **Final Orders: Jurisdiction: Appeal and Error.** While an appellate court can reverse, vacate, or modify a final order, it cannot address issues that do not bear on the correctness of the final order upon which its appellate jurisdiction is based.
26. **Constitutional Law: Speedy Trial: Statutes.** The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other.
27. ____: ____: ____. The same standards apply to a speedy trial analysis under both U.S. Const. amend. VI and Neb. Const. art. I, § 11.
28. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant.
29. ____: ____. The right to a speedy trial, as guaranteed under the Sixth Amendment, is not implicated until after the accused has been charged or arrested, even though the prosecuting authorities had knowledge of the offense.
30. **Due Process: Final Orders: Pleadings.** The overruling of a motion based upon an argument that the defendant's rights under the Due Process Clause were violated by preindictment delay is not a final, appealable order.

Appeal from the District Court for Douglas County, PATRICIA A. LAMBERTY, Judge, on appeal thereto from the County Court for Douglas County, DARRYL R. LOWE, Judge. Judgment of District Court affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

GERRARD, J.

Michael W. Loyd appeals from the denial of his "motion to discharge," raising a statute of limitations defense, and a supplemental motion to discharge based upon the alleged violation of Loyd's right to a speedy trial. The issues presented in this appeal are (1) whether a motion to discharge is the appropriate procedure for raising a statute of limitations defense; (2) whether an order overruling a pretrial motion raising a statute of limitations defense is a final, appealable order; and (3) whether, when an appeal is taken from a final, appealable order, an appellate court acquires jurisdiction over issues not presented in the final order from which the appeal is taken.

BACKGROUND

Loyd was arrested on June 18, 2001, and cited by the arresting officer for driving under the influence of alcoholic liquor (DUI). On June 29, Loyd was charged by complaint in the county court with several offenses: (1) second-offense DUI, in violation of Omaha Mun. Code, ch. 36, art. III, § 36-115 (1998); (2) speeding, in violation of Neb. Rev. Stat. § 60-6,186(2) (Reissue 1998); (3) negligent driving, in violation of Omaha Mun. Code, ch. 36, art. V, § 36-131 (1980); (4) and operating a motor vehicle during a period of suspension or revocation, in violation of Neb. Rev. Stat. § 60-4,108 (Reissue 1998).

Loyd filed a motion to quash the complaint, pursuant to § 36-115 of the Omaha Municipal Code, arguing that the penalty provisions of the ordinance were inconsistent with those of Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2000). The county court granted the motion to quash; the State filed an exception; and on appeal, we agreed that the provisions were inconsistent and overruled the State's exception. Our opinion issued on January 24, 2003. See *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003).

On March 18, 2003, Loyd was charged by complaint in the county court with second-offense DUI in violation of § 60-6,196(2). Loyd filed a motion to discharge, contending that the complaint had not been filed within the 18-month statute of limitations set forth in Neb. Rev. Stat. § 29-110(1) (Reissue 1995). Loyd subsequently filed a supplemental motion to discharge based upon his federal and state constitutional rights to a speedy trial. Loyd's motion to discharge on statute of limitations grounds was denied on May 22. Loyd's supplemental motion on speedy trial grounds was denied on December 4. Loyd filed his appeal to the district court from both orders on December 4. The district court found no violation of Loyd's rights to a speedy trial and affirmed the decision of the county court, but did not discuss Loyd's statute of limitations argument. Loyd appeals.

ASSIGNMENTS OF ERROR

Loyd assigns that the county and district courts erred in failing to conclude that the complaint against Loyd should be dismissed because (1) the complaint was filed more than 18 months after the date of the alleged offense and (2) Loyd's constitutional rights to a speedy trial were violated.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

[2] 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. Covey*, 267 Neb. 210, 673 N.W.2d 208 (2004).

ANALYSIS

Timeliness of Appeal

[3] We first consider whether we have jurisdiction with respect to Loyd's statute of limitations defense. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *State v. Bao, ante* p. 127, 690 N.W.2d 618 (2005). The State argues that because

Loyd styled his statute of limitations argument as a "motion to discharge," he waived his appeal with respect to that argument because he failed to appeal within 30 days of the order overruling that particular motion. The State contends that the order overruling Loyd's statute of limitations motion was final and appealable and, thus, should have been appealed within 30 days.

[4,5] The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004). The State relies upon *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997), in which this court held that the denial of a motion to discharge based upon speedy trial grounds is a final order, as an order affecting a substantial right made in a special proceeding, and that failure to perfect an appeal within 30 days of the overruling of such a motion to discharge results in a waiver of that issue. Since Loyd styled his statute of limitations argument as a "motion to discharge," the State asserts that he waived the statute of limitations issue by failing to appeal within 30 days.

[6-9] However, a "motion to discharge" is generally not the means by which a statute of limitations claim is raised in a criminal proceeding. The statute of limitations is not jurisdictional, but is, rather, an affirmative defense. See, *State v. Keithley*, 236 Neb. 631, 463 N.W.2d 329 (1990); *State v. Nuss*, 235 Neb. 107, 454 N.W.2d 482 (1990); *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989); *Jacox v. State*, 154 Neb. 416, 48 N.W.2d 390 (1951). The defense of the statute of limitations in a criminal case is raised by a defendant's not guilty plea. *Nuss, supra*. The general issue in a criminal case interposes the defense of the statute of limitations, and the burden is on the State to prove all essential elements of the crime charged, including the fact that charges were filed within the period specified by the applicable statute of limitations. See *Jacox, supra*. Accord *Nuss, supra*. If the statute of limitations has expired before an information is filed by the State, a conviction for the offense alleged is not

sustained by the evidence. *Jacox, supra*. See, also, *Nuss, supra* (determining State had not satisfied burden that charges were filed within period specified by applicable statute of limitations).

[10-13] Procedurally, criminal defendants who wish to challenge the sufficiency of the charges against them do so by filing a plea in abatement or motion to quash. See, e.g., *State v. Lauck*, 261 Neb. 145, 621 N.W.2d 515 (2001); *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000); *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975); *State v. Ludwig*, 143 Neb. 278, 9 N.W.2d 292 (1943). A defect apparent on the face of the record may properly be reached by a motion to quash. *Ludwig, supra*. An irregularity in the proceedings which does not appear on the face of the record and can be established only by extrinsic evidence can be raised only by a plea in abatement. *Id*. Consequently, a pretrial proceeding raising a statute of limitations defense—a challenge to the sufficiency of the charges—is brought either by a motion to quash or plea in abatement, depending on whether or not the defense appears on the face of the record.

[14] We have consistently held that an order overruling a plea in abatement or motion to quash is not a final, appealable order. See *id*. Most recently, in *Lauck, supra*, we held that the overruling of a plea in abatement challenging the sufficiency of the evidence adduced at a preliminary hearing was not a final order, because the defendant could still make a motion to dismiss at the close of the State's case and raise on appeal the issue whether there was sufficient evidence to convict him. See, also, *Franklin, supra*. Similarly, in *Pruett, supra*, the defendant filed a motion to quash, arguing that the information failed to charge him with a crime. We determined that since the overruling of the defendant's motion did not preclude him from raising the issue on appeal, it was not a final, appealable order. See *id*.

[15] Loyd's statute of limitations argument, while styled as a "motion to discharge," presented a challenge to the sufficiency of the complaint, apparent from the face of the record. We cannot blindly treat this motion as a "motion to discharge" simply because of its title; instead, a determination as to how a motion should be regarded depends upon the substance of the motion, not its title. Cf. *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). Regardless of how his motion was titled, Loyd's motion

was, in substance, a motion to quash, the overruling of which we have held in other circumstances not to be a final, appealable order.

[16] However, we have not specifically addressed whether the overruling of a motion to quash raising a statute of limitations defense is a final, appealable order. The holding upon which the State relies, that the denial of a motion to discharge on speedy trial grounds affects a substantial right and occurs in a special proceeding, was specifically grounded in the unique right to a speedy trial. A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. *Lauck, supra*. This court explained, in *State v. Gibbs*, 253 Neb. 241, 245, 570 N.W.2d 326, 330 (1997), that the denial of a motion for absolute discharge based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated was a ruling affecting a substantial right, because the right to a speedy trial "would be significantly undermined if appellate review of nonfrivolous speedy trial claims were postponed until after conviction and sentence." The denial of such a motion "unquestionably affects the subject matter of the litigation because denial of such a motion effectively denies an appellant's speedy trial rights." *State v. Jacques*, 253 Neb. 247, 252, 570 N.W.2d 331, 335 (1997).

[17-19] This court also explained that a motion for absolute discharge based on the alleged violation of the defendant's speedy trial rights occurred in a special proceeding because a motion to discharge was a legally conferred right that authorized a special application to the court for enforcement. See *id*., citing Neb. Rev. Stat. § 29-1208 (Reissue 1995). Where the law confers a right and authorizes a special application to a court to enforce the right, the proceeding is special, within the ordinary meaning of the term "special proceeding." *Jacques, supra*. Furthermore, this court explained that a special proceeding is, by definition, not part of an action. *Id*. An action involves prosecuting the alleged rights between the parties and ends in a final judgment, whereas a special proceeding does not. *Id*. A motion to discharge is a special proceeding, because it is a statutory remedy which is not itself an action, and because the motion

does not prosecute alleged rights between parties or end in final judgment. *Id*.

This court's reasoning in *Jacques, supra*, and *Gibbs, supra*, does not apply in this case. When Loyd's "motion to discharge" was overruled by the county court, Loyd did not suffer the diminishment of a defense previously available to him, because he could continue to challenge the sufficiency of the evidence to prove that the charges were filed within the period specified by the applicable statute of limitations. See *State v. Nuss*, 235 Neb. 107, 454 N.W.2d 482 (1990). The overruling of Loyd's motion did not affect a substantial right. Furthermore, the statutory motion to discharge that this court held to be a special proceeding in *Jacques* is not implicated here, because that statute is limited to alleged violations of the right to a speedy trial. See § 29-1208. Loyd's motion was not brought in the context of a special statutory remedy. Instead, because a statute of limitations defense is part of the general issue in a criminal case, see *Jacox v. State*, 154 Neb. 416, 48 N.W.2d 390 (1951), it addresses the merits of the State's case against the defendant, and a motion premised on such a defense is not a special proceeding, but part of the action.

[20] In short, the overruling of Loyd's motion, based on the statute of limitations, was not a final, appealable order. Loyd's motion, while titled a "motion to discharge," was in substance a motion to quash, the overruling of which we have repeatedly held is not a final, appealable order. The overruling of a pretrial motion raising a statute of limitations defense neither affects a substantial right nor occurs in the context of a special proceeding. The State's argument that Loyd was required to appeal from the overruling of his motion within 30 days is without merit.

Jurisdiction Based on Supplemental Motion to Discharge

The next question to be considered, however, is whether the statute of limitations argument is properly before this court in this appeal. It is well established, as previously noted, that the overruling of Loyd's supplemental motion to discharge on speedy trial grounds was a final, appealable order. But while that suffices to establish appellate jurisdiction over that order, it does

not confer jurisdiction on this court to consider Loyd's statute of limitations argument.

[21,22] While the terms are closely related, there is an important distinction between a "final judgment" and a "final order" as that term is used in § 25-1902. A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000). An order entered by a court may affect a substantial right and be subject to review as a final order although it could not or need not be properly denominated a judgment. *Western Smelting & Refining Co. v. First Nat. Bank*, 150 Neb. 477, 35 N.W.2d 116 (1948). Cf. *Akins v. Chamberlain*, 164 Neb. 428, 82 N.W.2d 632 (1957); *Wunrath v. Peoples Furniture & Carpet Co.*, 98 Neb. 342, 152 N.W. 736 (1915).

[23-25] A judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. Neb. Rev. Stat. § 25-1911 (Reissue 1995). But pursuant to this statute, an appellate court's jurisdiction is limited to the judgment or final order from which the appeal is taken. An appeal from a final order may raise, on appeal, every issue presented by the order that is the subject of the appeal. *Tom-Wat, Inc. v. Fink*, 741 N.E.2d 343 (Ind. 2001). Cf., *Upah v. Ancona Bros. Co.*, 246 Neb. 608, 521 N.W.2d 906 (1994); *In Matter of Estate of Ruediger*, 83 Wis. 2d 109, 264 N.W.2d 604 (1978). But that jurisdiction does not extend to issues that are not presented by the final order, because an appellate court's jurisdiction to grant relief pursuant to § 25-1911 is limited to reversal, vacation, or modification of the final order from which the appeal is taken. In other words, while an appellate court can reverse, vacate, or modify a final order, it cannot address issues that do not bear on the correctness of the final order upon which its appellate jurisdiction is based.

In the instant case, the final order at issue is the overruling of Loyd's supplemental motion to discharge on speedy trial grounds. We have jurisdiction, pursuant to § 25-1911, to reverse, vacate, or modify that order. But whether or not the State's prosecution of Loyd is barred by the statute of limitations does not affect whether or not Loyd's supplemental motion to discharge on speedy trial

grounds was properly overruled. Consequently, the statute of limitations question is not relevant to our analysis of the only final order we have jurisdiction to affect in the instant appeal. Loyd's timely appeal from a final, appealable order does not confer jurisdiction on this court to consider other issues that may be present in the case, but are not implicated by the final order on appeal. As Loyd's statute of limitations claim is outside the scope of our appellate review, we do not consider it.

Speedy Trial Motion

[26,27] Loyd has perfected an appeal from the final, appealable order overruling his supplemental motion to discharge on speedy trial grounds. The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11. The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002). In this case, Loyd's supplemental motion to discharge was based solely on the alleged violation of his right to a speedy trial under the state and federal Constitutions. We have applied the same standards to our speedy trial analysis under both U.S. Const. amend. VI and Neb. Const. art. I, § 11. See, e.g., *State v. Pilgrim*, 182 Neb. 594, 156 N.W.2d 171 (1968).

[28] Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial; rather, the factors are related and must be considered together with such other circumstances as may be relevant. *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004).

[29] But the constitutional right to a speedy trial is not implicated until after the accused has been charged or arrested, even though the prosecuting authorities had knowledge of the offense. *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999); *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994), *abrogated on*

other grounds, State v. Morris, 251 Neb. 23, 554 N.W.2d 627 (1996). In this case, Loyd seeks discharge of the charge of second-offense DUI in violation of § 60-6,196(2), but the delay on which his speedy trial argument is based occurred before that particular complaint was filed. Consequently, his speedy trial argument is without merit.

[30] We note that preindictment delay can form the basis of an argument that a defendant's rights under the Due Process Clause were violated, see *Meese, supra*, and that Loyd made a short argument in that regard. However, we held in *Meese* that the overruling of a motion based upon such a due process argument is not a final, appealable order, and we refused to consider such an argument in an interlocutory appeal. We likewise lack jurisdiction to consider such an argument in this appeal.

CONCLUSION

Loyd's speedy trial argument is without merit, as it is based on delays which occurred before the complaint which he seeks to discharge was filed. Because we do not have jurisdiction to consider Loyd's other arguments, the order of the district court, affirming the order of the county court overruling Loyd's motion to discharge on speedy trial grounds, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ANTHONY J. SMITH, APPELLANT.

696 N.W.2d 871

Filed May 13, 2005. No. S-03-1225.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
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: 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.
4. **Jurisdiction: Words and Phrases.** Jurisdiction of the subject matter means the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to decide.
5. **Judgments: Collateral Attack.** When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.
6. **Collateral Attack: Jurisdiction.** Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.
7. **Public Officers and Employees: Negligence: Appeal and Error.** Where a duty is placed upon a public officer to perform acts necessary to perfect an appeal, his or her failure to perform cannot be charged to the litigant or operate to defeat the appeal. If the negligence of the appellant or his or her agent concurs with that of the court official, it precludes the appeal.
8. **Public Officers and Employees: Negligence: Pleadings: Appeal and Error.** When an appeal has been dismissed in a civil proceeding due to the negligence of a public officer, the appropriate procedure for the appellant is a motion to reinstate the appeal, filed with the same court in which the case was adjudicated.
9. **Postconviction.** A postconviction proceeding is civil in nature.
10. **Negligence: Public Officers and Employees: Pleadings: Appeal and Error.** The appropriate procedure for securing a new appeal when an appeal is lost due to official negligence is to file a motion in the lower court and establish the factual basis for obtaining relief.
11. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of 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.
12. **Effectiveness of Counsel: Proof: Words and Phrases.** To prove prejudice for a claim of ineffective assistance of counsel, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
13. **Effectiveness of Counsel: Proof.** Where a defendant is unable to demonstrate sufficient prejudice in establishing a claim for ineffectiveness of counsel, no examination of whether counsel's performance was deficient is necessary.
14. **Motions to Suppress: Appeal and Error.** When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal.
15. **Constitutional Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.

16. **Identification Procedures.** Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures.
17. ____. The factors to be considered in determining whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness, and the length of time between the crime and the identification.
18. **Trial: Identification Procedures.** An in-court identification may properly be received in evidence when it is independent of and untainted by illegal pretrial identification procedures. A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant in circumstances free from taint.
19. **Indictments and Informations: Complaints: Pretrial Procedure: Waiver: Pleas: Jurisdiction.** A defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads not guilty and proceeds to trial, provided the information or complaint contains no jurisdictional defect and is sufficient to charge an offense under the law. Defects and omissions which pertain to the form of the complaint or information or to the fact that the information or complaint is inartfully drawn are waived by not objecting at the preliminary stages of the proceeding or, as to some matters, before determination of the issue on the merits.
20. **Constitutional Law: Due Process: Double Jeopardy: Indictments and Informations.** Pursuant to constitutional considerations of due process and prohibition against double jeopardy, an information must inform an accused, with reasonable certainty, of the charge being made against him or her in order that the accused may prepare his or her defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense.
21. **Indictments and Informations: Complaints.** An information or complaint is sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted.
22. **Indictments and Informations.** Where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient.
23. ____. The district court, at its discretion, may permit an amendment of the information before the verdict or findings, provided no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.
24. **Trial: Evidence: Presumptions.** In a case tried to a court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant.
25. **Judges: Evidence: Presumptions.** In the absence of evidence to the contrary, the presumption is that a judge will disregard evidence that should not have been admitted.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Affirmed.

Jeffrey M. Wightman, of Wightman & Wightman, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

GERRARD, J.

I. NATURE OF CASE

Anthony J. Smith, the appellant, filed a motion for postconviction relief after his conviction and sentence for robbery were affirmed on appeal. Smith sought postconviction relief based on a defect in the information charging him with robbery and also based on the alleged ineffectiveness of his counsel. The motion was overruled, and Smith appealed. Smith's appeal was later dismissed as untimely, and he filed a second "motion for postconviction relief," asserting that he had provided the necessary documents to perfect an appeal from the first postconviction motion within the statutory time period but that a clerk's error had delayed the appeal. The district court sustained the second "postconviction motion" and "reestablished" the original order denying Smith's first motion for postconviction relief, allowing Smith to appeal from that order. Smith then filed this appeal, assigning that the district court erred in denying his first motion for postconviction relief.

II. FACTUAL AND PROCEDURAL BACKGROUND

In March 1999, an information was filed, charging Smith with robbery, use of a weapon to commit a felony, and possession of a firearm by a felon or fugitive from justice. Smith moved to suppress evidence related to a pretrial identification procedure conducted by law enforcement officers. The court overruled the motion, finding that although the photographic array used by the officers was unduly suggestive, the totality of the circumstances showed no irreparable harm to Smith with respect to the victim's subsequent identification of Smith.

Smith was found guilty of robbery and sentenced to 10 to 20 years' imprisonment. Smith appealed the conviction, assigning that the district court erred in finding sufficient evidence to sustain a conviction and in failing to suppress the pretrial identification evidence. The Nebraska Court of Appeals affirmed the judgment of the district court. See *State v. Smith*, No. A-99-1107,

2000 WL 1285496 (Neb. App. Sept. 12, 2000) (not designated for permanent publication).

In July 2001, Smith filed a motion for postconviction relief. Smith alleged that the information filed in March 1999 was defective because it failed to include an essential element of the crime charged—that is, it failed to specify against whom the robbery was alleged to have been committed. Smith also alleged that, but for the ineffective assistance of his counsel, the outcome of his direct appeal would have been different. On August 9, the district court overruled the motion for postconviction relief, finding no denial of or infringement upon Smith's federal or state constitutional rights which would render the judgment void or voidable.

Smith filed a notice of appeal on September 10, 2001, but was instructed that the appeal could not be docketed without a petition to proceed in forma pauperis and a poverty affidavit. Thereafter, Smith filed the notice of appeal and accompanying documents on September 28. The Court of Appeals dismissed the appeal as untimely. *State v. Smith*, 10 Neb. App. lv (No. A-01-1087, Nov. 7, 2001).

Smith filed a second "motion for postconviction relief" on October 3, 2002. Smith asserted that he had included the affidavit of poverty and other necessary documents with the notice of appeal filed with the clerk on September 10, 2001, but that the clerk had misplaced the documents, depriving him of his right to appeal. Smith asked the district court to permit him to appeal the August 9 order and to appoint counsel to represent him in the matter. The district court appointed counsel to represent Smith and, on October 6, 2003, sustained Smith's second "motion for postconviction relief," finding that an affidavit of poverty was included with the notice of appeal filed on September 10 and ordering the August 9 judgment to be "reestablished" in order to permit Smith to appeal the decision to the Court of Appeals.

Accordingly, Smith filed this appeal, challenging the August 9, 2001, order denying his first motion for postconviction relief.

III. ASSIGNMENTS OF ERROR

Smith assigns that the district court erred in failing to find that his constitutional rights were infringed upon as a result of his attorney's failure to object (1) at trial to pretrial identification evidence

and in-court identification, (2) to the defective information, and (3) to questioning with respect to Smith's prior convictions.

IV. STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Benzel, ante* p. 1, 689 N.W.2d 852 (2004).

V. ANALYSIS

1. Jurisdiction

[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. *Weeder v. Central Comm. College, ante* p. 114, 691 N.W.2d 508 (2005). In this case, the State argues that Smith's appeal should be dismissed for lack of jurisdiction because Smith did not timely appeal the order of August 9, 2001.

[3] In order to initiate an appeal, a notice of appeal must be filed within 30 days after entry of the judgment, decree, or final order. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004). An in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and an affidavit of poverty. *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002). The State asserts that Smith failed to file a poverty affidavit with his notice of appeal within 30 days of the August 9, 2001, order, noting that the notice and accompanying paperwork were not all filed until September 28.

However, in its October 6, 2003, order sustaining Smith's second "motion for postconviction relief," the district court found that a poverty affidavit was indeed included with the notice of appeal filed by the clerk on September 10, 2001. Consequently, the court ordered that the judgment entered on August 9, denying Smith's first motion for postconviction relief, be "reestablished" to allow Smith to take a proper appeal from the order.

The State asserts that there is no evidence to support the district court's order. However, the State did not appeal the October 6, 2003, decision of the district court. Therefore, unless the court did not have subject matter jurisdiction to order the relief contained in the October 6 decision, the only issues properly before this court are those presented by the August 9, 2001, order, denying Smith's first motion for postconviction relief.

[4] A judgment entered by a court which lacks subject matter jurisdiction is void. It is the longstanding rule in Nebraska that such a void judgment may be attacked at any time in any proceeding. *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996). Jurisdiction of the subject matter means the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to decide. *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999).

[5,6] When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack. *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004). Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). In this case, we must determine whether the district court had the subject matter jurisdiction to hear Smith's second "motion for postconviction relief" and to "reestablish" the August 9, 2001, order to allow Smith to file a proper appeal.

[7] This court has held that where a duty is placed upon a public officer to perform acts necessary to perfect an appeal, his or her failure to perform cannot be charged to the litigant or operate to defeat the appeal. *Purdy v. City of York*, 243 Neb. 593, 500 N.W.2d 841 (1993); *Harte v. Gallagher*, 186 Neb. 141, 181 N.W.2d 251 (1970). However, if the negligence of the appellant or his or her agent concurs with that of the court official, it precludes the appeal. See, *Larson v. Wegner*, 120 Neb. 449, 233 N.W. 253 (1930); *Continental Building & Loan Association v. Mills*, 44 Neb. 136, 62 N.W. 478 (1895). Consequently, if Smith's first

postconviction appeal was lost solely due to the clerk's error, Smith would be entitled to seek reinstatement of that appeal.

[8-10] In addition, we have indicated that in a civil proceeding, the appropriate procedure for the appellant to use in such cases is a motion to reinstate the appeal, filed with the same court in which the case was adjudicated. See *R. V. R. R. Co. v. McPherson*, 12 Neb. 480, 11 N.W. 739 (1882). A postconviction proceeding is civil in nature. *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). In *McPherson, supra*, the appellant instead filed a new petition in the district court, claiming the dismissal of her appeal was error; however, on appeal, this court considered it as a motion and found no error in the district court's decision to sustain the motion and reinstate the appeal. Cf. *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000) (district court may properly reinstate direct appeal as postconviction relief), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). Therefore, the appropriate procedure for securing a new appeal when an appeal is lost due to official negligence is to file a motion in the lower court and establish the factual basis for obtaining relief. In short, the district court in this case had the power to reinstate a civil appeal upon the motion of a litigant.

Thus, the district court had the power to reinstate Smith's appeal upon a finding that his appeal was dismissed as untimely as a result of an error on the part of the court clerk. The court made such a finding in its order on October 6, 2003:

> It is clear from the record that [Smith] adamantly believes that there was an affidavit of poverty attached to the notice of appeal, which was filed on September 10, 2001. The notice of appeal includes a statement that the poverty affidavit is attached. The Clerk of the District Court of Dawson County, Nebraska, is less than adamant about the receipt of the poverty affidavit and is not clear about the telephone conversation between herself and [Smith]. It is clear that [Smith] mailed the documents for the appeal. The preponderance of the evidence indicates that included in those documents was an affidavit of poverty.

Based on that finding, the court sustained Smith's second "motion for postconviction relief" and "reestablished" the judgment

entered on August 9, 2001, allowing Smith to take a proper appeal therefrom. The district court had jurisdiction over the subject matter and the power to grant a reinstatement of the prior appeal; therefore, the State cannot attack that order in this appeal.

The State did not perfect a timely appeal from the October 6, 2003, order, nor can that order be collaterally attacked in the present appeal. If the State believed the evidence was insufficient to support the order, or that a postconviction motion was an inappropriate vehicle for such relief, the State should have presented a timely appeal. Error, if any, committed by the trial court would have been an error in the exercise of jurisdiction, but it was not outside the subject matter jurisdiction of the court. See *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999). Because the court had subject matter jurisdiction, the order granting a new appeal was not void ab initio. The State waived challenges to the court's finding that a poverty affidavit was included with the notice of appeal filed by the clerk on September 10, 2001, and to questions with respect to the court's exercise of jurisdiction, by failing to appeal the October 6, 2003, order.

The only order before us is that of August 9, 2001, denying Smith's first motion for postconviction relief. As a result, it is not proper for us to here determine whether the district court's decision "reestablishing" the August 9 order was an appropriate exercise of jurisdiction or whether a second "motion for postconviction relief" was the correct method for Smith to challenge the Court of Appeals' dismissal of his initial appeal from the August 9 order.

2. Postconviction Relief

Smith argues that the district court erred in failing to grant him postconviction relief based on the ineffectiveness of his counsel in failing to object to evidence of the pretrial identification offered at trial, to the allegedly defective information filed against him, and to improper questioning related to his prior convictions.

Neb. Rev. Stat. § 29-3001 (Reissue 1995) provides a postconviction action when a prisoner is claiming a right to be released because there was a denial or infringement of the rights of the prisoner, rendering the judgment void or voidable under the Constitution of this state or the Constitution of the United States. *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001).

[11-13] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004). To prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). Where a defendant is unable to demonstrate sufficient prejudice, no examination of whether counsel's performance was deficient is necessary. *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000).

(a) Pretrial and In-Court Identifications

Smith first argues that his counsel was deficient in failing to object to testimony at the original bench trial related to the pretrial identification procedures conducted by law enforcement officers and to the victim's in-court identification of Smith.

Smith moved to suppress evidence of the pretrial identification procedures conducted by law enforcement officers. During the hearing on Smith's suppression motion, Kenneth J. Schumacher, an investigator with the Lexington Police Department, testified about his role in investigating the robbery. He testified that the report of a robbery came in at 6:05 in the morning on February 16, 1999, and that within 2½ hours, Schumacher had met with the victim of the robbery to prepare a computerized composite of the suspect. During their meeting, the victim indicated that the male suspect was wearing a white baseball cap with a Nike insignia, a jean jacket, and dark wrap-around sunglasses. In addition, the victim stated that—from what she could see—the suspect was approximately 5 feet 10 inches tall, weighed 180 pounds, and had shorter blond hair. The victim also told Schumacher that the suspect had a light growth of facial hair—a mustache and a goatee. After the composite was completed, Schumacher testified that the victim said that the computer-generated picture closely

represented the suspect. The composite was then distributed to the media.

Another investigator, Tommy Smith, testified that he visited a local company on the day of the robbery. After sharing the victim's description of the robber with the company's head of security and showing her the composite picture, she gave Investigator Smith the name and company identification photograph of an employee—Anthony Smith—fitting the description. Investigator Smith testified that he showed the company identification photograph to the victim that day and that she indicated that the photograph looked like the suspect. Early the next morning, Smith was brought in for questioning in connection with the robbery. Later that morning, around 5:15, Investigator Smith showed the victim a photographic array that included a Polaroid photograph of Smith, taken by Schumacher that morning. The photograph of Smith used in the array was different from the company identification photograph obtained and shown to the victim the day before. As noted by the Court of Appeals in its opinion affirming Smith's conviction on direct appeal, of the six photographs used in the array, Smith is the only individual wearing a white Nike cap backward. In addition, the six individuals depicted do not look significantly similar to one another. See *State v. Smith*, No. A-99-1107, 2000 WL 1285496 (Neb. App. Sept. 12, 2000) (not designated for permanent publication).

Investigator Smith testified that, upon viewing the photographic array, the victim selected the photograph of Smith and said she was 95 percent sure that the person in the photograph was the same person who committed the robbery. Investigator Smith then arranged for the victim to view Smith through a two-way mirror, and the victim again identified Smith as the robber.

The district court overruled Smith's motion to suppress, finding that although the photographic array used by the officers was unduly suggestive, the totality of the circumstances showed no irreparable harm to Smith with respect to the victim's subsequent identification of him. At trial, the victim again identified Smith as the man who committed the robbery.

[14] Smith failed to preserve the issue for appeal when he did not object to testimony at trial regarding the pretrial identification procedures or to the victim's in-court identification of Smith

as the person who committed the robbery. When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal. *State v. Schwartz*, 239 Neb. 84, 474 N.W.2d 461 (1991).

On appeal, Smith assigned error to the district court's refusal to suppress pretrial identification evidence. The Court of Appeals noted Smith's failure to preserve the issue for review but, nonetheless, addressed the merits of the issue, concluding that even if the pretrial identification procedure was unduly suggestive, the identification was sufficiently reliable to avoid suppression.

[15-17] An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. *State v. Faust, ante* p. 749, 696 N.W.2d 420 (2005). Whether identification procedures were unduly suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be determined by a consideration of the totality of the circumstances surrounding the procedures. See *id*. The factors to be considered are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness, and the length of time between the crime and the identification. See *id.*

Pursuant to these directives, the Court of Appeals stated:

> If we assume, without deciding, that the trial court was correct in finding the identification procedure used in this case was unduly suggestive, application of the foregoing factors to the facts demonstrates that the identification was sufficiently reliable to avoid suppression. The very proximity of the victim and the perpetrator during the robbery dictates that the victim's opportunity to view the perpetrator was good. The victim testified that there was bright lighting at the time of the robbery, further indicating that she had a good opportunity to view the perpetrator. There is no evidence to indicate the victim's description of the perpetrator varied from Smith's physical characteristics, and when Smith was located by police, he was wearing

> clothing substantially matching the description given by the victim. The victim's level of certainty was also high. Finally, the timespan between the crime and the identifications was very short, as all identifications occurred within approximately 24 hours of the robbery. Cloaked with these indicia of reliability, the identification procedure employed in this case was not constitutionally invalid.

See *State v. Smith*, No. A-99-1107, 2000 WL 1285496 at *2 (Neb. App. Sept. 12, 2000) (not designated for permanent publication).

We agree with the Court of Appeals' analysis. The record shows that the victim had a sufficient opportunity to view the suspect; she testified that she stood across from the suspect at the cash register when he commanded her to give him the money. In addition, it is apparent that the victim paid a great degree of attention during the robbery, as she was able to describe the suspect, including his height, weight, hair color, and attire. The victim was able to recall the lighting conditions at the time, as well as the suspect's rapid walk and stern look. Further, Schumacher testified that the day after the robbery, Smith was found in attire that was similar to that described by the victim, including a jean jacket and a white Nike cap. Finally, the victim made the pretrial identification within 24 hours of the crime and testified that upon viewing Smith through the two-way mirror, she was certain that Smith was the perpetrator. Based on this analysis, the identification was not conducive to a substantial likelihood of irreparable harm. Even if Smith's counsel had objected at trial to testimony about the pretrial identification procedures and, thereby, preserved the issue for appeal, it is quite apparent that the Court of Appeals would have found the pretrial identification to be sufficiently reliable to avoid suppression.

[18] The Court of Appeals stated that the victim's in-court identification, also not objected to at trial, was "wholly separate from the alleged unduly suggestive identification" and that even if evidence of the pretrial identifications was erroneously admitted, the result was harmless error. *Smith*, 2000 WL 1285496 at *2. As we stated in *State v. Auger & Uitts*, 200 Neb. 53, 54, 262 N.W.2d 187, 189 (1978):

> An in-court identification may properly be received in evidence when it is independent of and untainted by illegal

> pretrial identification procedures. . . . A primary factor in determining whether an independent basis for an in-court identification exists is the opportunity afforded the witness to observe the defendant in circumstances free from taint.

(Citation omitted.) Accord *State v. Faust, ante* p. 749, 696 N.W.2d 420 (2005). In this case, the victim had sufficient time to observe the suspect, and she identified him in the courtroom from that recollection of his features. Even if there had been impermissible pretrial suggestions as to the perpetrator's identity, an in-court identification may be received when it is independent of and untainted by impermissible pretrial identification procedures. Thus, no prejudice could be shown to have occurred in any event. See *State v. Hunt*, 212 Neb. 304, 322 N.W.2d 624 (1982).

Therefore, we conclude that Smith was not prejudiced as a result of his trial counsel's failure to object to evidence of the pretrial identification procedures and the victim's in-court identification at trial.

(b) Defective Information

Smith next argues that his counsel was deficient in failing to object to the information filed against Smith, which failed to specify the victim of the alleged robbery. Smith argues that his counsel should have requested a bill of particulars for additional specificity.

The information charges that "on or about the 16th day of February, 1999, with the intent to steal, [Smith] forcibly and by violence, or by putting in fear, took from the person of another any money or personal property of any value whatever." Smith claims that the charge lacked specificity in failing to indicate the victim of the alleged robbery and, thus, impaired Smith's ability to properly prepare a defense. Smith argues that his counsel was ineffective in failing to object to the information through a motion to quash or request for specificity and, as a result, waived Smith's right to challenge the sufficiency of the information at trial or on direct appeal.

[19] A defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads not guilty and proceeds to trial, provided the information or complaint contains no jurisdictional defect and is sufficient to charge an offense under the law. Defects and omissions which pertain to the form of the

complaint or information or to the fact that the information or complaint is inartfully drawn are waived by not objecting at the preliminary stages of the proceeding or, as to some matters, before determination of the issue on the merits. *State v. Laymon*, 239 Neb. 80, 474 N.W.2d 458 (1991).

In this case, Smith argues that the charge for robbery in the information was insufficient because it failed to indicate the victim of the alleged robbery. Any challenge to the sufficiency of the information was waived when Smith's trial counsel failed to challenge the information during the preliminary stages of the proceeding. However, the information was legally sufficient, and therefore, even if Smith's attorney had objected to the information on the ground that it failed to identify the victim, the case against Smith would have proceeded in the same manner.

[20-22] Pursuant to constitutional considerations of due process and prohibition against double jeopardy, an information must inform an accused, with reasonable certainty, of the charge being made against him or her in order that the accused may prepare his or her defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense. See, *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989); *State v. Wehrle*, 223 Neb. 928, 395 N.W.2d 142 (1986). An information or complaint is sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted. Furthermore, where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient. *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993).

Neb. Rev. Stat. § 28-324(1) (Reissue 1995) states that "[a] person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever." As quoted above, the charge of robbery set forth in the information in this case uses the exact language of the statute, supporting a presumption of sufficiency. In addition, Smith does not assert that he did not understand the nature of the charge against him and offers no explanation as to how he was prevented from preparing an appropriate defense. Moreover, the record shows

that Smith's attorney conducted cross-examinations of the State's witnesses and that Smith testified in his own behalf at trial. We fail to see how Smith's defense would have changed if the robbery charge had identified the victim of the alleged crime.

[23] Furthermore, this court has previously held that the district court, at its discretion, may permit an amendment of the information before the verdict or findings, provided no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. See *State v. Aldrich*, 226 Neb. 645, 413 N.W.2d 639 (1987). Consequently, if an objection to the information had been made in this case, the State could have amended the information to include the identity of the victim if the court found it necessary, and the case would have proceeded to trial.

Thus, we conclude that Smith was not prejudiced as a result of his counsel's failure to challenge the information or request a bill of particulars for specificity and preserve such issues for appeal.

(c) Improper Questioning at Trial

Finally, Smith argues that his counsel was deficient in failing to object to improper questioning at trial relating to Smith's prior criminal convictions. Smith sets forth the following trial excerpt in support of his argument:

> [State:] Mr. Smith, have you ever been convicted of a crime involving dishonesty?
>
> [Smith:] No.
>
> Q Theft?
>
> A No, no.
>
> Q Have you even been convicted of a felony?
>
> A Yes, I have.
>
> Q And that was in 1993?
>
> A Yeah.
>
> Q Is that correct? And that was for domestic abuse?
>
> A That was for domestic violence.
>
> Q In 1987 weren't you also found guilty of felony theft?
>
> A Yes. I stole a car.
>
> Q Okay. So, that would be a theft or a crime involving theft.
>
> A Yes, yes.

Q Okay.
THE COURT: That's not a crime involving dishonesty.
[State:] That is not?
THE COURT: No.
[State:] Okay.

Smith argues that the State's inquiry into his prior convictions was prejudicial and improper under the rules of evidence prohibiting the admission of evidence of convictions greater than 10 years old and of crimes not punishable by death or at least 1 year's imprisonment or involving dishonesty.

[24,25] This court has held that "[i]n a case tried to a court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant." *State v. Zaritz*, 235 Neb. 599, 607, 456 N.W.2d 479, 485 (1990). In the absence of evidence to the contrary, the presumption is that a judge will disregard evidence that should not have been admitted. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). In this case, Smith was convicted in a bench trial. Thus, even if the State improperly questioned Smith about his prior convictions, the district court is presumed to have considered only properly admissible evidence in reaching its decision. In fact, at trial, the court stated that the prior theft conviction about which the State inquired did not involve dishonesty, demonstrating that the court was familiar with the pertinent evidentiary rules and their applicability to the testimony set forth above. Such a statement by the court supports an even stronger presumption that the court disregarded the inadmissible evidence in making its decision. Thus, we conclude that Smith was not prejudiced by his counsel's failure to object to improper questioning by the State at trial because the district court is presumed to have considered only legally admissible evidence in deciding the case.

VI. CONCLUSION

For each of the above reasons, we find no infringement of Smith's constitutional rights such as to make the underlying criminal judgment void or voidable and, accordingly, affirm the decision of the district court denying Smith's motion for post-conviction relief.

AFFIRMED.

KENDRA JOHNSEN AND JAMIE KOCH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLANTS, AND JAMIE LONGWELL, APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLEES.

697 N.W.2d 237

Filed May 13, 2005. No. S-03-1319.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Rebecca L. Gould, of Nebraska Appleseed Center for Law in the Public Interest, Welfare Due Process Project, for appellants.

Jon Bruning, Attorney General, Royce N. Harper, and Mike Rumbaugh, Special Assistant Attorney General, for appellees.

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

CONNOLLY, J.

Neb. Rev. Stat. §§ 68-1202 to 68-1210 (Reissue 2003) allow the State to subsidize certain social services, including child-care. Acting under the auspices of these statutes, the Nebraska Department of Health and Human Services (DHHS) has created the "Child Care Subsidy Program." In 2002, DHHS adopted new regulations that would require that a family have income of less than 120 percent of the federal poverty level to be eligible for the Child Care Subsidy Program. The new regulations superseded regulations that had set the income eligibility level for the Child Care Subsidy Program at 185 percent of the federal poverty level.

The appellants, Kendra Johnsen and Jamie Koch, represent a class of persons whose income is between 120 and 185 percent of the federal poverty level and who lost the benefits they were receiving because of the new income eligibility level. They contend that the new regulation violates the principle of separation of powers found in Neb. Const. art. II, § 1, because it conflicts with an income eligibility level adopted by the Legislature. In

addition, Johnsen argues that DHHS violated her due process rights by notifying her before the new regulation went into effect that the new regulation would result in her losing benefits. We are not persuaded by either argument and affirm the district court's judgment.

I. BACKGROUND

For persons who are ineligible for the aid to dependent children program (ADC), there are two childcare assistance options in Nebraska. The first is transitional childcare, which provides childcare assistance to families who have previously received cash assistance under ADC, but are no longer eligible for ADC. Families can receive childcare assistance for up to 24 months after they have stopped receiving ADC if the family's income is at or below 185 percent of the federal poverty level. Neb. Rev. Stat. § 68-1724(1)(c) (Reissue 2003).

The second childcare assistance option and the one at issue is the Child Care Subsidy Program. The Child Care Subsidy Program, as implemented by DHHS regulations, provides childcare assistance to low-income families who either have never received ADC benefits or have not received ADC benefits within the last 24 months.

No statute expressly creates the Child Care Subsidy Program. But according to the parties, it is authorized by §§ 68-1202 to 68-1210. Section 68-1202 provides that social services, including childcare,

> may be provided on behalf of recipients with payments for such social services made directly to vendors. Social services shall include those mandatory and optional services to former, present, or potential social services recipients provided for under the federal Social Security Act, as amended, and described by the State of Nebraska in the approved State Plan for Services.

Section 68-1204 authorizes DHHS to "adopt and promulgate rules and regulations, enter into agreements, and adopt fee schedules with regard to social services described in section 68-1202."

In 1998, DHHS adopted 474 Neb. Admin. Code, ch. 7, § 002.01B2 (1998), which set the income eligibility limit for the Child Care Subsidy Program at 185 percent of the federal poverty

level, the same level that § 68-1724(1)(c) sets for transitional childcare. Under both options, the amount of aid an individual family received was set by a sliding scale. The closer a family was to the income eligibility limit, the less aid they received. See, § 68-1724(1)(c); 474 Neb. Admin. Code, ch. 7, § 002.02B (2000).

Here, the dispute found its impetus in 2002 Neb. Laws, L.B. 1309, an appropriations bill meant to address a shortfall in the 2001 budget. Section 74 of L.B. 1309 contained budget appropriations for DHHS program No. 347. Program No. 347 included the Child Care Subsidy Program, as well as a wide array of other public assistance programs. As initially presented to the Governor, L.B. 1309 provided enough funding in program No. 347 so that the income eligibility level for the Child Care Subsidy Program could remain at 185 percent of the federal poverty level.

The Governor, however, returned L.B. 1309 with several line-item vetoes. To notify the Legislature of his line-item vetoes, the Governor sent a letter and an attachment. The attachment included what the Governor referred to as "individual vetoes." One of these "individual vetoes" listed program No. 347 and gave the following description: "Return non-ADC child care subsidy eligibility to 120% FPL [federal poverty level]." The Legislature did not override the Governor's veto of funding for program No. 347.

After the Legislature failed to override the Governor's line-item veto, DHHS drafted new regulations for the Child Care Subsidy Program, one of which, 392 Neb. Admin. Code, ch. 3, § 004.01D (2002), reduced the income eligibility level for the program from 185 percent of the federal poverty level to 120 percent of the federal poverty level. The regulations were adopted and filed with the Secretary of State on June 12, 2002.

Over the course of the following week, DHHS caseworkers sent letters to those who would no longer be eligible for the Child Care Subsidy Program because of the new regulations. These notices informed the recipients that the changes would go into effect on July 1, 2002.

On June 26, 2002, Johnsen and Koch, individually and on behalf of all others similarly situated, filed a petition for injunctive and declaratory relief in Lancaster County District Court. They initially alleged seven causes of action, but they later dismissed five of those causes of action. In the first of their remaining causes

of action, the appellants alleged that by adopting 392 Neb. Admin. Code, ch. 3, § 004.01D, DHHS had violated the principle of separation of powers by exceeding the rulemaking authority granted to it by the Legislature. In the second, they alleged that by sending out termination-of-benefits notices before the effective date of § 004.01D, DHHS had violated their due process rights. The appellants requested that the court certify the action as a class action and declare § 004.01D unconstitutional and enjoin its enforcement.

After the court certified the action as a class action, both the appellants and the State moved for summary judgment. The court entered summary judgment for the State on both of the appellants' causes of action.

II. ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in holding that (1) the director of DHHS can determine income eligibility requirements for the Child Care Subsidy Program and (2) the class members' due process rights were not violated when notices were sent to them before the effective date of 392 Neb. Admin. Code, ch. 3, § 004.01D.

III. STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004).

IV. ANALYSIS

1. Separation of Powers

The appellants first argue that 392 Neb. Admin. Code, ch. 3, § 004.01D, violates the constitutional principle of separation of powers. Neb. Const. art. II, § 1, provides, "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

The appellants' separation of powers argument has been a moving target throughout this litigation. Initially, they seemed to

argue that the Legislature had not properly delegated the authority to DHHS to set income eligibility for the Child Care Subsidy Program. This argument appeared to be based on the rule that the "Legislature may enact statutes to set forth the law, but it may not delegate that function to the executive or judicial branches of government." *Clemens v. Harvey*, 247 Neb. 77, 82, 525 N.W.2d 185, 189 (1994). In other words, the appellants were claiming that the Legislature had attempted to delegate to DHHS the authority to set eligibility for the Child Care Subsidy Program, but that this delegation was invalid because it would have ceded the Legislature's constitutional power to the executive branch. If we accepted this argument, however, it would mean not only that the regulation setting income eligibility at 120 percent of the federal poverty level was unconstitutional, but that no valid income eligibility rule existed for the Child Care Subsidy Program. Under such a ruling, the entire program would collapse.

Apparently realizing that a court order causing the collapse of the Child Care Subsidy Program would do little to advance their cause, the appellants recast their argument. Before this court and the district court, they have argued that the Legislature has set an income eligibility level for the Child Care Subsidy Program and that by adopting a different, lower eligibility level, DHHS acted outside its rulemaking authority. See *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 528, 650 N.W.2d 467, 478 (2002) ("administrative agency cannot use its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering"). It is this argument that we consider. It is, however, a murky and complex argument, and to understand it, we need to cut through the thicket of the federal scheme that funds the Child Care Subsidy Program.

(a) Federal Law Providing Funding for Child Care Subsidy Program

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996). PRWORA made significant changes to federal oversight and funding of public assistance programs, including childcare programs. Before PRWORA, the states received funding for childcare programs primarily from

the following four sources: (1) Part of the federal Social Security Act guaranteed childcare assistance to families participating in the aid to families with dependent children program (AFDC); (2) another part of the federal Social Security Act guaranteed childcare assistance to families transitioning off AFDC; (3) a third part of the federal Social Security Act granted funds to the states to create programs to assist working parents not eligible for AFDC, but at risk of becoming dependent upon AFDC; and (4) the Child Care and Development Block Grant Act of 1990 (CCDBGA) provided childcare assistance to low-income families who were working or in education or training programs. See, generally, Jo Ann C. Gong, *Child Care in the Wake of the Federal Welfare Act*, 30 Clearinghouse Rev. 1044 (1997).

The childcare provisions of the PRWORA were meant to streamline what was considered to be a confusing system. See *id.* States now receive most of their federal funding for childcare assistance out of the childcare and development fund. This fund is created out of three primary funding streams. The first stream is set out at 42 U.S.C. § 618(a)(1) (2000), part of subchapter IV of the Social Security Act. The second stream is found at 42 U.S.C. § 9858 (2000), part of the CCDBGA. The third stream is set out at 42 U.S.C. § 618(a)(2), also part of subchapter IV of the Social Security Act. In addition to these three funding streams, states have the option of diverting 30 percent of the funds they receive under the temporary assistance for needy families program, which supplanted AFDC, to the childcare and development fund. See 42 U.S.C. § 604(d)(1)(B) (2000). See, also, Gong, *supra*.

As noted, these funding streams flow into the childcare and development fund, which is governed by the CCDBGA. So, although the funding streams originate in different places, once they flow into the childcare and development fund, they are subject to the "requirements and limitations of [the CCDBGA]." 42 U.S.C. § 618(c).

The CCDBGA contains many limitations and requirements, but for the purposes of this case, the pertinent limitation is 42 U.S.C. § 9858n(4) (2000). It defines an eligible child as one:

> (A) who is less than 13 years of age;
>
> (B) *whose family income does not exceed 85 percent of the State median income for a family of the same size*; and

> (C) who—
>
> (i) resides with a parent or parents who are working or attending a job training or educational program; or
>
> (ii) is receiving, or needs to receive, protective services and resides with a parent or parents not described in clause (i).

(Emphasis supplied.) This provision, however, does not require that states make aid available to all children who meet the definition of "eligible child." This is made clear by 42 U.S.C. § 9858d(a) (2000), which states, "Nothing in this subchapter shall be construed . . . (2) to limit the right of any State to impose additional limitations or conditions on contracts or grants funded under this subchapter."

Therefore, the definition of "eligible child" in 42 U.S.C. § 9858n(4) acts as a cap; it prevents the states from providing aid to children whose family income exceeds 85 percent of the state median income for a family of the same size. For example, a state could limit aid to children whose family income does not exceed 40 percent of the state median income, but the state could not provide aid to a child whose family income is 95 percent of the state median income for a family of the same size.

(b) Appellants' Argument

Nothing in §§ 68-1202 to 68-1210 expressly sets out an income eligibility level for the Child Care Subsidy Program. But § 68-1204 states in part, "For the purpose of providing or purchasing [childcare] the state hereby accepts and assents to all applicable provisions of the federal Social Security Act, as amended." The appellants claim this language incorporates by reference the CCDBGA. The appellants then focus on the definition of "eligible child" in 42 U.S.C. § 9858h(4) of the CCDBGA. As previously discussed, this statute states in part that an eligible child is someone whose family income does not exceed 85 percent of the state's median income for a family of the same size, an amount that, according to the parties, is roughly 270 percent of the federal poverty level. The appellants acknowledge that this definition acts as a cap on income eligibility. But, they argue that because the Legislature has not expressly adopted a lower income eligibility level, it must have intended that the

CCDBGA's definition of eligible child govern the income eligibility limit for the Child Care Subsidy Program.

In other words, according to the appellants, the Legislature, by incorporating the CCDBGA, has mandated that the income eligibility level for the Child Care Subsidy Program be 85 percent of the state median income (i.e., roughly 270 percent of federal poverty level) and that DHHS has no authority to set a lower income eligibility level. Thus, DHHS' decision to set income eligibility at 120 percent of the federal poverty level ran afoul of a direct legislative command and therefore violates the principle of separation of powers. The appellants further point out that if we were to accept their argument, it would mean that the predecessor to 392 Neb. Admin. Code, ch. 3, § 004.01D, which set the income eligibility level at 185 percent of the federal poverty level, was also unconstitutional.

(c) Resolution

Initially, we are skeptical that § 68-1204 incorporates the CCDBGA. A statute may adopt all or a part of another statute by a specific reference, and the effect is the same as if the statute or part thereof adopted had been written into the adopting statute. *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994). Section 68-1204 states that the State of Nebraska "accepts and assents to all applicable provisions of the federal Social Security Act." Both DHHS and the appellants assume that the CCDBGA is part of the federal Social Security Act. The federal Social Security Act, however, consists of 21 subchapters. See 42 U.S.C. §§ 301 to 1397jj (2000 & Supp. I 2001). The CCDBGA is codified at 42 U.S.C. §§ 9858 to 9858q (2000). Thus, although the CCDBGA operates in conjunction with the federal Social Security Act, it is not actually part of that act.

We, however, need not definitively decide whether § 68-1204 incorporates the CCDBGA. Even if we assume that it does, the appellants draw the incorrect inference from that incorporation. The incorporation would mean that Nebraska has "accepted and assented" to the requirements and limitations imposed by the CCDBGA, therefore limiting the ability of DHHS to adopt regulations that contravene the CCDBGA. One of the requirements of the CCDBGA is that states not provide federal aid to children

whose family income is greater than 85 percent of the state median income for families of the same size (i.e., roughly 270 percent of the federal poverty level). Thus, § 68-1204, if it does in fact incorporate the CCDBGA, would prevent DHHS from adopting regulations that set an income eligibility level above 85 percent of the state median income for families of the same size. DHHS would remain free, however, to adopt regulations that, like the ones here, set the income eligibility level below 85 percent of the state median income level for a family of the same size. So, even if we assume that the Legislature has incorporated the CCDBGA, that fact would not mean that DHHS, in adopting 392 Neb. Admin. Code, ch. 3, § 004.01D, violated the principle of separation of powers. Therefore, we reject the appellants' first assignment of error.

2. Due Process

DHHS' regulations require written notice from caseworkers to clients when a provided service is to be reduced or eliminated. 392 Neb. Admin. Code, ch. 4, § 002.03 (2002) (effective June 17, 2002). The notice must include a statement of what action the worker intends to take, the reasons for the intended action, and the corresponding manual reference. *Id.* The caseworker must send the notice 10 calendar days before the adverse action is effective. 392 Neb. Admin. Code, ch. 4, § 002.03A (2002) (effective June 17, 2002). If the client files a notice within 10 days after the date the notice was mailed, then the services cannot be reduced or eliminated until "a fair hearing decision is made." 392 Neb. Admin. Code, ch. 4, § 002.03D (2002) (effective June 17, 2002).

Johnsen was sent a notice on June 15, 2002, informing her that on July 1, the benefits she was receiving under the Child Care Subsidy Program would be terminated because of the adoption of 392 Neb. Admin. Code, ch. 3, § 004.01D. When notice was sent, § 004.01D had been signed by the Governor and was on file with the Secretary of State. But it had only been on file with the Secretary of State since June 12, i.e., for 3 days. Under Neb. Rev. Stat. § 84-906 (Reissue 1999), "[n]o rule or regulation of any agency shall be valid as against any person until five days after such rule or regulation has been filed with the Secretary of State." Consequently, when Johnsen's caseworker mailed her the termination-of-benefits notice, § 004.01D was not yet effective.

Johnsen argues that because 392 Neb. Admin. Code, ch. 3, § 004.01D, was not effective when the notice was sent, the notice was a nullity. She claims that § 004.01D could not be enforced against her or similarly situated members of the class until they received another notice sent after the effective date of the regulation.

We also note that Koch claims that she, too, was sent a premature termination-of-benefits notice. However, during the proceedings before the district court, DHHS conceded that the notice that it had originally sent to Koch had not contained information required by DHHS regulations. DHHS agreed to send Koch and those in a similar situation a new notice and provide them with an additional month of benefits. These new notices would have been sent well after 392 Neb. Admin. Code, ch. 3, § 004.01D, had been on file with the Secretary of State for 5 days, and thus, the appellants' second assignment of error concerns only Johnsen and those whose situation mirrored hers.

Johnsen relies on our decision in *Gausman v. Department of Motor Vehicles*, 246 Neb. 677, 522 N.W.2d 417 (1994). In that case, Russell Gausman's driver's license was automatically revoked after he was arrested for driving under the influence of alcohol. Gausman appealed, and a revocation hearing was held by the Department of Motor Vehicles (DMV). The DMV had not filed with the Secretary of State its rules governing practice and procedure for contested license revocations either at the time of the arrest or at the time of the hearing. So, under § 84-906, those rules were not valid. We concluded that because the rules used to govern the revocation hearing were not valid at the time of the hearing, Gausman had been denied due process. We rejected the DMV's argument that due process had been satisfied because Gausman had been given notice of his hearing and of the procedures that the DMV used in the revocation proceedings.

This case, however, presents a factual situation different than that presented by *Gausman, supra*. Gausman had his driver's license revoked and his appeal of that revocation heard before the rules and procedures governing license revocations were in place. The situation in *Gausman* was similar to the State's trying and convicting a person for a crime under criminal procedure rules proposed but not yet enacted by the Legislature. Under such

circumstances, the risk of abuse is obvious and prejudice will be assumed.

In contrast to Gausman, who lost his license before any rules or procedures were in place, Johnsen did not lose her childcare benefits before 392 Neb. Admin. Code, ch. 3, § 004.01D, became effective. Rather, Johnsen's benefits ended on July 1, 2002, 13 days after § 004.01D became effective. Further, nothing in the record indicates that Johnsen was harmed by her caseworker's sending the notice before § 004.01D went into effect. Moreover, unlike *Gausman, supra*, it is not clear to us how the premature notice could have possibly harmed her. In fact, it benefited her. The loss of her childcare benefit undoubtedly created a financial crisis for Johnsen. The premature notice meant that she had a few extra days to secure alternative childcare arrangements. In short, the State gave Johnsen more process than was due to her, not less, and therefore, its conduct was not unconstitutional.

V. CONCLUSION

We are not persuaded by the appellants' argument that DHHS violated the principle of separation of powers by adopting an income eligibility rule for the Child Care Subsidy Program that conflicted with an income eligibility rule set by the Legislature. We also reject Johnsen's argument that DHHS violated her due process rights by sending her a termination-of-benefits notice before the operative date of 392 Neb. Admin. Code, ch. 3, § 004.01D.

AFFIRMED.

NORRIS OLSON, APPELLEE, V. LE MARS MUTUAL INSURANCE COMPANY OF IOWA, APPELLANT.

696 N.W.2d 453

Filed May 13, 2005. No. S-04-045.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Final Orders: Appeal and Error.** When adverse parties have each moved for summary judgment and the trial court has sustained one of the

motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just.

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. **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.
5. **Insurance: Contracts: Words and Phrases.** Regarding words in an insurance policy, the language should be considered not in accordance with what the insurer intended the words to mean but according to what a reasonable person in the position of the insured would have understood them to mean.
6. **Insurance: Contracts: Damages: Words and Phrases.** As used in a property insurance policy, the phrase "actual cash value" is a limitation on the amount of recovery for the protection of the insurer and not a substantive measure of damages.
7. **Insurance: Contracts.** In the context of property insurance, actual cash value of property means the market value of it; that market value is the amount for which property may be sold by a willing seller who is not compelled to sell it to a buyer who is willing but not compelled to buy it. In determining such value, the finder of fact should consider the situation and condition of the property as it was at the time of loss and all other facts and circumstances shown by the evidence that affected or had a tendency to establish its value.
8. ____: ____. Under an actual cash value policy which does not expressly provide otherwise, an insurer may not deduct depreciation from the cost of repairing partial damage to insured property where the actual cash value of the property, as repaired, does not exceed its actual cash value at the time of loss.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed as modified.

Albert M. Engles, Jason R. Yungtum, and Robert B. Quigley, of Engles, Ketcham, Olson & Keith, P.C., for appellant.

Kenneth F. George, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

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

STEPHAN, J.

A grain storage building owned by Norris Olson and insured by Le Mars Mutual Insurance Company (Le Mars) was damaged by hail. The cost of repairing the damage was $95,040. The issue

presented is whether the insurance policy permits the insurer to deduct a depreciation factor from the repair cost in adjusting the loss. We agree with the district court for Buffalo County that it does not.

BACKGROUND

Olson purchased a commercial property insurance policy from Le Mars to insure a grain storage building located in Buffalo County, Nebraska, for the period from March 20, 2002, through March 20, 2003. The policy insured the property against various types of loss, including hail. The coverage limit was $160,000, with coinsurance of 80 percent and a $500 deductible. The policy included the following provisions:

> 4. **Loss Payment**
>
> a. In the event of loss or damage covered by this Coverage Form at our option, we will either:
>
> 1) Pay the value of lost or damaged property;
>
> 2) Pay the cost of repairing or replacing the lost or damaged property;
>
> 3) Take all or any part of the property at an agreed or appraised value; or
>
> 4) Repair, rebuild or replace the property with other property of like kind and quality.
>
> b. We will give notice of our intentions within 30 days after we receive the sworn statement of loss.
>
> c. We will not pay you more than your financial interest in the Covered Property.
>
> . . . .
>
> 7. **Valuation**
>
> We will determine the value of Covered Property in the event of loss or damage as follows:
>
> a. At actual cash value as of the time of loss or damage . . . .

The policy also included various "optional coverages," including replacement cost coverage, which Olson did not purchase. With respect to this coverage, the policy provided "Replacement Cost (without deduction for depreciation) replaces Actual Cash Value in the Loss Condition, Valuation, of this Coverage Form."

On June 12, 2002, the insured building was damaged by hail. The building was 42 years old at the time of the damage. Between

June 13 and 28, an employee of Interstate Structures, Inc., inspected and examined the building at Olson's request and determined that the cost for material, labor, and equipment to repair the hail damage would be $95,040.

Olson demanded payment from Le Mars for $94,540, representing the cost of repair less the $500 deductible. On July 18, a claims service prepared an adjuster summary for Le Mars in which it estimated total repair costs at $94,576 and deducted $36,710.40 from that total for depreciation, thereby arriving at an "ACV," or actual cash value, in the amount of $57,865.60. Le Mars thereafter claimed the actual cash value of the claim was $57,865.60 and offered Olson $57,365.60 (representing $57,865.60 less the $500 deductible), which he refused.

Olson filed a petition in the district court for Buffalo County seeking judgment against Le Mars in the amount of $94,540 and an attorney fee. The parties subsequently filed cross-motions for summary judgment. In support of his motion, Olson submitted the pleadings, a copy of the insurance policy, the adjuster's summary, his affidavit, and the affidavits of Dennis Land, a Nebraska general real estate certified appraiser, and the employee of Interstate Structures. In their affidavits, Land and Olson stated that shortly before the building was damaged, Land offered to purchase it from Olson for $200,000, and Olson made a counteroffer to sell for $225,000. Land had leased the building from Olson for the 3-year period prior to his offer and had extensive, full, and complete knowledge and information regarding the building. Land averred that he was still willing to pay $200,000 for the building immediately prior to the damage. In his affidavit, the certified appraiser stated that the building had a fair market value of $200,000 as of June 12, 2002, immediately prior to the hail damage. On September 1, Olson sold the building to Land in its damaged state for $100,000.

Le Mars submitted the affidavits of an underwriter employed by Le Mars and an analyst of market conduct regulatory compliance and coverage interpretation. The underwriter stated in his affidavit that it was "the standard and practice of the insurance industry to adjust a partial loss for property damage to the insured premises on a policy such as the one issued to [Olson] by reducing the actual cash value (cost to repair) by depreciation." He

opined that because the building was approximately 40 years old at the time of the loss and had a useful life of 100 years, it was appropriate for Le Mars to apply a 40-percent depreciation factor. The analyst stated in his affidavit that the "correct and only method for determining 'actual cash value' under [Olson's] policy is replacement cost less depreciation."

The district court granted summary judgment in favor of Olson, noting that the facts were generally undisputed and that the dispositive issue involved interpretation of the meaning of "actual cash value" as used in the policy. The court was not persuaded by Le Mars' experts, noting that the underwriter "defines actual cash value as cost to repair . . . then states that the insurance practice is to reduce actual cash value by depreciation" and that the analyst

> suggests that actual cash value must mean "replacement costs less depreciation." If the definition[s] of [Le Mars'] own experts are to have meaning one must also then conclude that cost of repair is synonymous with cost of replacement [and] must equate actual cash value with replacement costs absent a deduction for depreciation.

Opining that Le Mars was seeking to utilize "a special meaning and definition for actual cash value as a term of art in the insurance industry," the court held that actual cash value means fair market value, noting that the "determination of fair market value in of [sic] itself includes depreciation of the asset from its original value," and awarded Olson $99,500 to reflect the loss of fair market value to the building less the $500 deductible. Olson was allowed to amend his petition to conform to the evidence and the amount of damages awarded by the court.

ASSIGNMENTS OF ERROR

Le Mars assigns, consolidated and restated, that the district court erred (1) in determining that actual cash value in the general loss provision of a property insurance policy means the market value of real property before and after a loss, rather than repair cost minus depreciation; (2) in failing to find that a deduction for depreciation upholds the terms of the policy as intended by the parties at the time of policy formation in this case; and (3) in making its determination as to actual cash value based on insufficient evidence.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Dworak v. Farmers Ins. Exch., ante* p. 386, 693 N.W.2d 522 (2005); *Range v. Abbott Sports Complex, ante* p. 281, 691 N.W.2d 525 (2005).

[2] When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as the court deems just. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004).

[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. *Auto-Owners Ins. Co. v. Home Pride Cos.*, 268 Neb. 528, 684 N.W.2d 571 (2004); *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004).

ANALYSIS

Key facts are not in dispute. Olson's building was insured under the Le Mars policy when it was partially damaged by hail, which is one of the causes of loss covered by the policy. The cost of repairing the hail damage was $95,040. The dispute involves whether Le Mars is obligated under its policy to pay this entire amount, less Olson's deductible, or whether it is permitted to deduct a depreciation factor from the repair cost in order to arrive at a net amount due. Le Mars contends that because it insured the building for actual cash value, not replacement cost, the deduction of depreciation is proper.

[4,5] Whether the policy permits this deduction is a question of law. 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. *Auto-Owners Ins. Co. v. Home Pride Cos., supra*; *Poulton v. State Farm Fire & Cas. Cos., supra*. Regarding words in an insurance policy, the language should be considered not in accordance with what the insurer intended the words to mean but according to what a reasonable person in the position of the insured would have understood them to mean. *Guerrier v. Mid-Century Ins. Co.*, 266 Neb. 150, 663 N.W.2d 131 (2003); *Decker v. Combined Ins. Co. of Am.*, 244 Neb. 281, 505 N.W.2d 719 (1993).

Actual Cash Value

[6] As used in a property insurance policy, the phrase "actual cash value" is a limitation on the amount of recovery for the protection of the insurer and not a substantive measure of damages. *Borden v. General Insurance Co.*, 157 Neb. 98, 59 N.W.2d 141 (1953); *Clouse v. St. Paul Fire and Marine Ins. Co.*, 152 Neb. 230, 40 N.W.2d 820 (1950); 12 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 175:26 (1998). Where, as here, the policy does not include a specific definition, it has been noted that

> there is a priority of rules to determine actual cash value as follows, (1) where market value is easily determined, actual cash value is market value, (2) if there is no market value, replacement or reproduction cost may be used, (3) failing the other two tests, any evidence tending to formulate a correct estimate of value may be used.

12 Russ & Segalla, *supra*, § 175:24 at 175-32, citing *Sullivan v. Liberty Mutual Fire Ins. Co.*, 174 Conn. 229, 384 A.2d 384 (1978).

[7] We have directly addressed the meaning of "actual cash value" in the context of property insurance in two cases. In *Borden v. General Insurance Co., supra*, we held that the actual cash value of property "means the market value of it; that market value is the amount for which property may be sold by a willing seller who is not compelled to sell it to a buyer who is willing but not compelled to buy it." 157 Neb. at 113, 59 N.W.2d at 149-50. We further stated that in determining such value, the finder of fact "should consider the situation and condition of the property as it was at the time [of loss] and all other facts and circumstances shown by the evidence that affected or had a tendency to establish its value." *Id.* at 114, 59 N.W.2d at 150. We applied the

same definition to actual cash value, as used in a coinsurance clause, in *Erin Rancho Motels v. United States F. & G. Co.*, 218 Neb. 9, 352 N.W.2d 561 (1984). We were urged by the insurer in that case, as we are in this case by Le Mars, to adopt the "broad evidence rule," which permits a finder of fact to

> "consider every fact and circumstance which would logically tend to the formation of a correct estimate of the building's value, including the original cost, the economic value of the building, the income derived from the building's use, the age and condition of the building, its obsolescence, both structural and functional, its market value, and the depreciation and deterioration to which it has been subjected."

Id. at 14, 352 N.W.2d at 564-65, quoting *Messing v. Reliance Ins. Co.*, 77 N.J. Super. 531, 187 A.2d 49 (1962). While indicating that we had "no particular quarrel with that definition," we stated that

> actual cash value must still be measured as an economic unit, i.e., related to what, in terms of value, one could receive for his or her property. Fair market value is a term which has been used and is generally understood by experts and lay people alike, and which may be found by employing, if you will, the broad evidence rule. . . . We continue to approve that definition for "actual cash value" *wherever it is used in a policy of property damage insurance*.

(Emphasis supplied.) *Erin Rancho Motels v. United States F. & G. Co.*, 218 Neb. at 14, 352 N.W.2d at 565. Applying either a market value test or the broad evidence rule, there is undisputed evidence in this case that the value of the insured building as an economic unit, and therefore its actual cash value, was $200,000 immediately prior to the occurrence of the hail damage.

Depreciation Deduction From Cost of Repair

Under the policy at issue in this case, Le Mars had four options for paying Olson's insured hail loss. It could have paid the value of the property, determined at actual cash value as of the time of loss. In the alternative, it could elect to pay the cost of repairing or replacing the damaged property; take all or any part of the property at an agreed or appraised value; or repair, rebuild, or replace the property with other property of like kind and quality. Because the policy gave Le Mars the right to select the payment

option, it effectively insured the property for the lesser of actual cash value or the cost to repair or replace the damaged property.

It is apparent from the record that Le Mars chose the second option, in that it calculated its proferred payment on the undisputed cost of repairing the partially damaged building. Le Mars argues that because the optional replacement cost coverage, which Olson did not purchase, is defined by the policy as being "without deduction for depreciation," it necessarily follows that the basic actual cash value coverage, for which a lower premium is charged, permits a deduction for depreciation from the cost of repair. This would be a persuasive argument if we were dealing with the total destruction of a building insured for an actual cash value determined solely on the basis of replacement cost. In that circumstance, application of a depreciation factor would serve to indemnify the insured for the value of that which was lost, but no more, and it would prevent the insured from receiving a windfall in the form of full replacement cost coverage for which no premium was paid.

In this case, however, we are presented with partial damage to a building which will be repaired, not replaced. The Le Mars policy does not specifically provide for a depreciation deduction in this circumstance. Cf. *Voges v. Mechanics Ins. Co.*, 119 Neb. 553, 230 N.W. 105 (1930). The evidence offered by Le Mars regarding standard loss adjustment practices in Nebraska is not useful in resolving the legal issue of whether deducting depreciation from repair costs is permissible under the language of this specific policy.

Cases from other jurisdictions can be found to support or refute the argument that depreciation should be deducted from repair costs under actual cash value coverage. In *Ins. Co. of North America v. City of Coffeyville*, 630 F. Supp. 166 (D. Kan. 1986), the court held that the insurer was entitled to deduct depreciation from the cost of repairing a structure partially damaged by fire. In that case, the insured did not purchase replacement cost coverage, which was defined as the full cost of repair or replacement and was not subject to a depreciation deduction, and the parties' prior course of dealing demonstrated that the insured shared the insurer's definition of actual cash value. See, also, *Zochert v. National Farmers Union Property*, 576 N.W.2d 531 (S.D. 1998)

(permitting deduction of depreciation from repair cost where policy differentiated between actual cash value and replacement cost coverages, and insured elected former).

On the other hand, the court in *Kane v. State Farm Fire and Cas. Co.*, 841 A.2d 1038, 1047 (Pa. Super. 2003), held that "in the absence of clear language to the contrary, an insurer may not deduct depreciation from the replacement cost" and that the phrase " 'actual cash value' may not be interpreted as including a depreciation deduction, where such deduction would thwart the insured's expectation to be made whole." The court concluded that "[w]here qualifying language is absent and an insured is promised 'actual cash value,' the insured is entitled to the cost to repair or replace the damaged property." *Id.* In *Glens Falls Ins. Co. v. Gulf Breeze Cottages*, 38 So. 2d 828, 830 (Fla. 1949), the Florida Supreme Court affirmed a chancellor's refusal to permit a depreciation deduction from the cost of repairing storm damage to insured structures, reasoning that "[i]f depreciation were allowed, it would cast upon the owner an added expense which we do not believe was contemplated by the parties when they entered into the insurance contract." See, also, *McIntosh et al. v. Hartford Fire Ins. Co.*, 106 Mont. 434, 78 P.2d 82 (1938) (holding that depreciation could not be deducted from cost to repair building to its condition prior to fire under actual cash value policy).

Most of the cases addressing this issue focus on the principle that an insured under an actual cash value policy is entitled to be indemnified for the actual amount of property loss, but should not be permitted to benefit from the loss. See, e.g., *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982) (agreeing that principle of indemnity is best served by considering evidence relevant to effect of over and under insurance); *Elberon Bathing Co. v. Ambassador Insurance Co.*, 77 N.J. 1, 8, 389 A.2d 439, 442 (1978) ("allowing pure replacement cost would violate the principle of indemnity by providing a windfall to the insured"). See, also, 6 John Alan Appleman & Jean Appleman, Insurance Law and Practice § 3823 (1972 & Cum. Supp. 2005). The parties in this case agree with this general principle, but disagree as to its application to these facts.

[8] We agree with the district court that on the record presented, the policy did not permit the depreciation deduction

claimed by Le Mars. As we have previously determined, the insured building had an actual cash value of $200,000 at the time of the loss. In its damaged condition, its value was reduced to $100,000, the price for which Olson sold it to Land. Le Mars elected to calculate its payment under the policy based upon the cost of repairing the partial damage, which was $95,040. There is no evidence that the repairs would cause the actual cash value of the building to exceed $200,000. Recovery of the full repair costs without a depreciation deduction will therefore restore the value of the insured property that existed immediately prior to the loss, but will not enhance that value. Accordingly, we conclude that under an actual cash value policy which does not expressly provide otherwise, an insurer may not deduct depreciation from the cost of repairing partial damage to insured property where the actual cash value of the property, as repaired, does not exceed its actual cash value at the time of the loss.

Although we agree with the district court that Le Mars was not entitled to a deduction for depreciation, we disagree with its entry of judgment in the amount of $99,500. Le Mars' liability under its policy is limited to the repair cost of $95,040 less the insured's $500 deductible. Accordingly, we reduce the amount of the judgment to $94,540 and affirm as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
MOHAMED EL-TABECH, APPELLANT.

696 N.W.2d 445

Filed May 13, 2005. No. S-04-527.

1. **Motions for New Trial: DNA Testing: Appeal and Error.** A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2004), is addressed to the discretion of the district court, and unless an abuse of discretion is shown, the court's determination will not be disturbed.
2. **Motions for New Trial: DNA Testing.** To warrant a new trial, the district court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2004), is of such a nature that if it had been offered and admitted at the trial, it probably would have produced a substantially different result.

3. **DNA Testing.** A movant may obtain DNA testing if, inter alia, the testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.
4. **Motions to Vacate: Motions for New Trial: DNA Testing.** A court may vacate and set aside the judgment in circumstances where DNA testing results are either completely exonerative or highly exculpatory—when the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged. In other circumstances where the evidence is merely exculpatory, the court may order a new trial if the newly discovered exculpatory DNA evidence is of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.
5. **Motions for New Trial: DNA Testing: Time.** The DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2004), permits the testing of relevant biological material and provides the means by which a person in custody may seek relief based upon newly discovered exculpatory DNA test results obtained after the statutory time period for requesting a new trial based upon newly discovered evidence has expired.
6. **Constitutional Law: Effectiveness of Counsel: Proof.** An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

WRIGHT, J.

NATURE OF CASE

Mohamed El-Tabech appeals from the judgment of the Lancaster County District Court which held that the results of DNA testing did not afford him relief in the form of an order vacating or setting aside his convictions and sentences or an order granting him a new trial.

SCOPE OF REVIEW

[1] A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act, Neb.

Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2004), is addressed to the discretion of the district court, and unless an abuse of discretion is shown, the court's determination will not be disturbed. *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

[2] To warrant a new trial, the district court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act is of such a nature that if it had been offered and admitted at the trial, it probably would have produced a substantially different result. See *State v. Buckman, supra*.

FACTS

On June 24, 1984, police and emergency personnel were dispatched to El-Tabech's home. The paramedic who entered the home first saw El-Tabech seated on the floor, rocking back and forth and pointing to the back of the house. Lynn El-Tabech, El-Tabech's wife, was found lying on a bed with a white terry cloth bathrobe belt tied so tightly around her neck that it had to be cut off with scissors. Both the condition and temperature of the victim's body indicated that she had not been dead for very long.

During the trial, circumstantial evidence was produced which indicated that El-Tabech had killed his wife. A neighbor testified to hearing a long argument between the couple on the day of the murder. A member of El-Tabech's church testified that El-Tabech had called him numerous times on the day of the murder. El-Tabech sounded upset and wanted to talk about problems he was having with his wife. El-Tabech told the man that El-Tabech's wife was leaving him.

A waitress testified that she waited on El-Tabech and his wife the day of the murder and that the couple had argued loudly. Another neighbor's testimony placed El-Tabech at the scene of the crime during the estimated time of death. The victim's mother and sister testified that El-Tabech was controlling of his wife's behavior and that she often did not favor the attention that he bestowed upon her.

At trial, Dr. Reena Roy testified regarding tests that had been performed on physical evidence gathered from the crime scene. Bloodstains on a pillowcase and the robe the victim was wearing were found to be consistent with the victim's blood. A tuft of hair was found in the knot of the belt used to kill the victim. Roy testified that the seven hairs in the tuft were consistent with the

victim's hair. An additional hair had fallen from the belt when the evidence was gathered. Roy testified that this hair could not be identified as belonging to either El-Tabech or the victim.

El-Tabech was convicted of first degree murder and use of a deadly weapon to commit a felony. See *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987). He was sentenced to life imprisonment for the murder conviction and 20 years' imprisonment for the use of a deadly weapon conviction, with the sentences to run consecutively. We affirmed the convictions and sentences. *Id.*

In *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990), we addressed El-Tabech's motion for postconviction relief on the ground that his convictions were unconstitutional because he was not afforded effective assistance of counsel. We found no merit to his arguments.

El-Tabech next brought a motion pursuant to Nebraska's postconviction statutes seeking to compel state-funded DNA testing. In *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000), we affirmed the district court's denial of this motion, holding that there was no recourse then available by which a prisoner alleging actual innocence could bring a claim after the time period had run for bringing a motion for new trial based on newly discovered evidence. We further held that there was no statutory means by which a prisoner could compel state-funded DNA testing at that time.

In 2001, the Legislature enacted the DNA Testing Act, which permits a person in custody, at any time after conviction, to request DNA testing of certain biological material. El-Tabech subsequently filed a motion to compel the testing of evidence pursuant to the DNA Testing Act.

An evidentiary hearing was held in the Lancaster County District Court on December 17, 2002. At the hearing, testimony was adduced from Roy regarding the tests that had been performed on the physical evidence found at the crime scene. The district court then ordered DNA testing of 29 pieces of evidence, including the seven hairs found in the knot made from the bathrobe belt that was used to strangle the victim. Also tested was the hair that had fallen off the belt when the evidence was gathered at the crime scene.

On February 26, 2004, a hearing was held concerning the results of the testing. After the hearing, but prior to the filing of a motion to vacate or set aside the judgment or a motion for new trial, the district court issued an order stating that it viewed "this stage of the proceeding as a Motion Vacate [sic] and Set Aside the Judgment, or, in the alternative a Motion for New Trial."

The district court held that the test results warranted neither an order vacating and setting aside the judgment nor an order granting a new trial. El-Tabech timely perfected an appeal.

ASSIGNMENT OF ERROR

El-Tabech assigns as error the district court's failure to find the new DNA evidence sufficient to set aside his convictions and grant him a new trial.

ANALYSIS

In this case, we examine a decision made by the district court pursuant to § 29-4120 of the DNA Testing Act, which provides in part:

> (1) Notwithstanding any other provision of law, a person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgment requesting forensic DNA testing of any biological material that:
>
> (a) Is related to the investigation or prosecution that resulted in such judgment;
>
> (b) Is in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition; and
>
> (c) Was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results.

Section 29-4123 provides guidance for dealing with the results of such testing:

> (2) Upon receipt of the results of such testing, any party may request a hearing before the court when such results exonerate or exculpate the person. Following such hearing, the court may, on its own motion or upon the motion of any

> party, vacate and set aside the judgment and release the person from custody based upon final testing results exonerating or exculpating the person.
>
> (3) If the court does not grant the relief contained in subsection (2) of this section, any party may file a motion for a new trial under sections 29-2101 to 29-2103.

[3,4] In *State v. Buckman*, 267 Neb. 505, 518, 675 N.W.2d 372, 383 (2004), we set out the procedural framework for seeking relief pursuant to the DNA Testing Act:

> First, a movant may obtain DNA testing if, inter alia, the testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced. See § 29-4120(5). Second, the court may vacate and set aside the judgment in circumstances where the DNA testing results are either completely exonerative or highly exculpatory—when the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged. See, § 29-4123(2); [*State v.*] *Bronson*, [267 Neb. 103, 672 N.W.2d 244 (2003)]. This requires a finding that guilt cannot be sustained because the evidence is doubtful in character and completely lacking in probative value. Third, in other circumstances where the evidence is merely exculpatory, the court may order a new trial if the newly discovered exculpatory DNA evidence is of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result. See, §§ 29-4123(3) and 29-2101(6); *Bronson, supra*.

El-Tabech admits that the DNA test results in the case at bar do not exonerate him. As such, he does not argue that the district court erred in denying him the relief afforded by § 29-4123(2). Instead, he contends that the results warrant a new trial pursuant to Neb. Rev. Stat. § 29-2101(6) (Cum. Supp. 2004) (newly discovered exculpatory DNA evidence obtained under DNA Testing Act). El-Tabech asserts that the language of § 29-2101, when read in pari materia, warrants that a new trial should be granted when there is a basis to believe that the DNA test results "could reasonably have produced a different result." Brief for appellant at 15.

El-Tabech argues that the test results with respect to the seven hairs found in the knot of the belt used to murder the victim dramatically change the nature of the circumstantial case against him. He contends that because the State's expert testified at trial that the seven hairs came from the victim, but the testing showed that one of these hairs could not be identified as belonging to either the victim or El-Tabech, some other person was obviously present at the time of the murder. He claims that had he known at the time of trial that one of the hairs belonged to neither him nor the victim, the defense strategies and arguments would clearly have been different.

[5] In the case at bar, the issue is whether the DNA test results, if admitted at trial, probably would have produced a substantially different result. The DNA Testing Act permits the testing of relevant biological material and provides the means by which a person in custody may seek relief based upon newly discovered exculpatory DNA test results obtained after the statutory time period for requesting a new trial based upon newly discovered evidence has expired.

In *State v. Bronson*, 267 Neb. 103, 112-13, 672 N.W.2d 244, 251-52 (2003), we stated:

> We have not previously reviewed a district court's ruling on a motion for new trial under § 29-2101(6) based on evidence obtained pursuant to the DNA Testing Act. We therefore take this opportunity to address the proof required to succeed on such a motion and the standard of review an appellate court should apply to the trial court's ruling on a motion for new trial under § 29-2101(6).
>
> With respect to the trial court's consideration of a motion for new trial based on newly discovered evidence, we have stated in a similar context under § 29-2101(5) that where a motion for new trial is based on newly discovered evidence, such " ' "evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result.". . . ' " *State v. Boppre*, 243 Neb. 908, 924, 503 N.W.2d 526, 536 (1993). We have further stated that "[a] motion for new trial based on newly discovered evidence 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. Bjorklund*, 258 Neb. 432, 496, 604 N.W.2d 169, 220 (2000). We determine that the standards just quoted are applicable to motions for new trial pursuant to § 29-2101(6) based on newly discovered evidence obtained under the DNA Testing Act.

El-Tabech claims that the defendant's burden of proof in a motion for new trial based on newly discovered DNA evidence is too strict. In support of this contention, he points out that this standard is higher than the burden of proof for certain constitutional violations, such as ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). El-Tabech asserted at oral arguments before this court that he should have succeeded on his request for a new trial if the test results would have been material to the defense at trial. This argument fails to consider the rationale behind the requirement of a higher burden of proof for granting relief based upon newly discovered evidence as opposed to a claim of ineffective assistance of counsel.

[6] An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*.

A defendant who requests a new trial based upon newly discovered evidence faces a higher standard. Such a request is not based upon a claim that the defendant did not receive a fair trial or that a fundamental right was violated. Fundamental rights under the Constitution are not implicated in such a motion.

> The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. . . . An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower.

Strickland v. Washington, 466 U.S. at 694.

In considering a motion for new trial based upon newly discovered evidence pursuant to either § 29-2101(5) or (6), we apply a higher standard in order to promote the finality of the judgment based upon the presumption that the defendant received a fair trial and no fundamental rights were violated. In *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004), we restated the standard to be applied to motions pursuant to § 29-2101(6). In doing so, we rejected the defendant's argument that this standard was too restrictive and that a movant should be entitled to have his conviction vacated and set aside if the results of DNA testing showed a reasonable probability that the result of the proceeding would have been different had the DNA evidence been available at trial.

The proper standard for reviewing motions for new trial pursuant to § 29-2101(6) is the same as the standard for reviewing a motion for new trial based upon newly discovered evidence pursuant to § 29-2101(5). To warrant a new trial, the district court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act is of such a nature that if it had been offered and admitted at the trial, it probably would have produced a substantially different result. See *State v. Buckman, supra*. A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act is addressed to the discretion of the district court, and unless an abuse of discretion is shown, the court's determination will not be disturbed. *Id.*

Applying the standard of review for motions for new trial pursuant to § 29-2101(6) to the case at bar, it is clear that the district court did not abuse its discretion in denying El-Tabech's request for a new trial. The district court ordered that DNA testing be conducted on 29 pieces of evidence, including the seven hairs found in the knot made by the bathrobe belt used to strangle the victim, El-Tabech's wife. Also tested was a hair that had fallen off the belt when evidence was gathered at the crime scene.

In its order, the district court commented on the results of the testing:

> [Twenty six] hairs from various locations were subjected to DNA testing. Seven of the hairs submitted had insufficient material to conduct a test. Eighteen of the hairs belonged either to the defendant or the victim. One hair that fell from

> the belt that was tied around the victim's neck could not be identified at trial, but DNA testing established that it belonged to the defendant. One of the seven hairs in the knot in the belt was found through DNA testing to be neither the defendant's nor the victim's. At trial it was thought that all seven belonged to either the defendant or victim. Three items containing blood stains were submitted for DNA testing. All blood stains were determined to come from the victim.

The district court noted that the evidence relating to the hairs found at the crime scene was so insignificant that it was not even mentioned in this court's discussion of the facts on direct appeal in *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987). Regarding the hair that was found to belong to neither El-Tabech nor the victim, the district court held that, at a minimum, because the hair was found bound in the knot, the hair was present before the murder.

El-Tabech argues that the results of the DNA testing dramatically change the nature of the circumstantial case against him. He contends that because the testing showed that one of the hairs from the knot in the belt could not be identified as belonging to either the victim or El-Tabech, some other person was obviously present at the time of the killing. He claims that the defense strategies and arguments clearly would have been different had he known of these results.

The results of the DNA testing revealed two new facts: (1) one of the seven hairs found in the knot in the belt belonged to neither the victim nor El-Tabech and (2) the hair that fell from the belt during the gathering of evidence belonged to El-Tabech. However, this new evidence does not establish that a substantially different result probably would have been produced had these facts been presented at trial.

The State's expert testified at trial that the hair which fell from the belt could not be identified as coming from either the victim or El-Tabech. Thus, the jury was presented with a hair of unknown origin that had originated, but later fallen, from the belt used to strangle the victim. The results of the DNA testing placed a hair of unknown origin in the knot in the belt, rather than falling from the belt during the gathering of evidence. We cannot say that had the jury known that a hair of unknown origin was in the knot,

the evidence probably would have produced a substantially different result.

The evidence presented at trial can be summarized as follows: A neighbor placed El-Tabech at the scene of the crime during the estimated time of his wife's murder. When authorities arrived at the scene, El-Tabech was sitting on the floor and apparently had not attempted to remove the belt that was used to strangle his wife. Another neighbor testified to hearing a long argument between the couple on the day of the murder. A member of El-Tabech's church testified that El-Tabech had called him numerous times on the day of the murder. El-Tabech sounded upset and wanted to talk about problems he was having with his wife. El-Tabech told the man that El-Tabech's wife was leaving him. A waitress testified that she had waited on El-Tabech and his wife the day of the murder and that the couple argued loudly.

It cannot be said that the evidence from the DNA testing probably would have produced a substantially different result at trial. As such, the district court did not abuse its discretion in denying El-Tabech's request for a new trial.

CONCLUSION

The newly discovered DNA evidence is not of such a nature that it probably would have produced a substantially different result if it had been offered and admitted at trial. The district court did not abuse its discretion in concluding that El-Tabech was not entitled to relief pursuant to the DNA Testing Act. For the reasons stated above, the judgment of the district court is affirmed.

AFFIRMED.

IN RE GUARDIANSHIP OF ROBERT D., A MINOR. LISA M., APPELLEE, V. PATRICK D. AND KATHRYN D., APPELLEES, AND ROBERT D., APPELLANT.

696 N.W.2d 461

Filed May 20, 2005. No. S-04-973.

1. **Guardians and Conservators: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record.

2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Rules of Evidence: Appeal and Error.** Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion.
4. **Minors: Witnesses: Appeal and Error.** Whether a child witness should be permitted to testify is committed to the discretion of the trial court.
5. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
6. **Child Custody: Parental Rights.** Under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers to the parent-child relationship and the preferences of the child.
7. **Constitutional Law: Parental Rights: Presumptions.** Absent circumstances which terminate a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child.
8. **Parental Rights: Guardians and Conservators: Presumptions.** In guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of the child are served by reuniting the minor child with his or her parent.
9. **Parental Rights: Guardians and Conservators: Proof.** An individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.
10. **Parental Rights.** Parental rights may be forfeited by a substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.
11. **Guardians and Conservators.** Guardianships are designed to temporarily relieve parents of the rigors of raising a child.
12. **Parental Rights: Guardians and Conservators: Proof.** The nature of a guardianship makes it particularly inappropriate to establish the forfeiture of parental rights by solely focusing on a parent's failure to discharge the duties of parental care and protection. There must also be clear and convincing evidence of substantial, continuous, and repeated neglect of a child. This may be established by the complete indifference of a parent for a child's welfare over a long period of time.
13. **Trial: Witnesses: Testimony.** The credibility of witnesses and the weight to be given their testimony are for the trier of fact.
14. **Attorneys at Law: Minors.** Whether to appoint an attorney to represent a minor child pursuant to Neb. Rev. Stat. § 30-2616(c) (Reissue 1995) is a matter entrusted to the discretion of the trial court.
15. **Guardians Ad Litem.** A guardian ad litem's duties are to investigate the facts and learn where the welfare of his or her ward lies and to report these facts to the appointing court.

16. **Guardians Ad Litem: Attorneys at Law.** A guardian ad litem may be an attorney, but an attorney who performs the functions of a guardian ad litem does not act as an attorney and is not to participate in the trial in an adversarial fashion such as calling or examining witnesses or filing pleadings and briefs.
17. **Guardians Ad Litem: Attorneys as Law: Minors.** An attorney appointed under Neb. Rev. Stat. § 30-2616(c) (Reissue 1995) is an advocate for the minor child and is not a guardian ad litem. The court-appointed attorney shall act as the attorney for the minor child, but shall not testify in the proceedings.

Appeal from the County Court for Box Butte County: JAMES T. HANSEN, Judge. Affirmed.

Michael T. Varn for appellant.

Brenda L. Bartels, of Douglas, Kelly, Ostdiek, Bartels & Neilan, P.C., for appellee Lisa M.

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

GERRARD, J.

NATURE OF CASE

Robert D., a minor child, by and through appointed counsel, appeals from the order of the county court terminating the guardianship of Patrick D. and Kathryn D., his maternal grandparents, and ordering Robert returned to the custody of Lisa M., his biological mother. The issues presented in this appeal are whether the court erred in concluding that Lisa had not forfeited her superior parental right to custody of Robert, refusing to permit Robert to testify at the guardianship termination hearing, and failing to appoint counsel to represent Robert until after entry of the order terminating the guardianship. We find no reversible error and affirm the judgment of the county court.

BACKGROUND

PROCEDURAL HISTORY

Robert was born on April 28, 1990. Lisa was 16 years old at the time of Robert's birth. On May 3, Patrick and Kathryn filed a petition in the county court for appointment of a guardian for Robert. Specifically, Patrick and Kathryn sought to be appointed coguardians for Robert. The petition alleged that "it is very important that the co-guardians be appointed because of the

necessity of immediately having said minor covered for medical insurance on the medical insurance" of Patrick and Kathryn. Lisa also signed the petition, affirming that the allegations in the petition were true. Robert's biological father is not mentioned in these filings, and his identity is not relevant to this appeal.

On May 31, 1990, the county court entered an order appointing Patrick and Kathryn coguardians of Robert. The order provided that "[a]ll parental rights of custody over the minor have been terminated or suspended by circumstances or prior court order." The basis for this provision is not apparent from the record, and the parties agree that no formal or legal termination of Lisa's parental rights took place.

On May 4, 2004, Lisa filed a motion to terminate Patrick and Kathryn's guardianship of Robert. The motion alleged that Lisa had been misled into signing the guardianship, believing it was simply for insurance reasons. The motion further alleged that Patrick and Kathryn had promised to terminate Robert's guardianship on numerous occasions, but had failed to do so, and refused to allow Robert to spend time with Lisa and her family. Lisa alleged that Robert was not receiving proper care from Patrick and Kathryn and that it was in Robert's best interests that the guardianship be terminated.

In response, Patrick and Kathryn denied Lisa's allegation that she had been misled into signing the consent to the guardianship. They also denied promising to terminate the guardianship. They alleged that Lisa had been afforded "reasonable visitation" and that Robert was satisfied with the frequency of visitation Lisa had been permitted. They alleged that Robert did not want the guardianship terminated and did not wish to live with Lisa.

On July 16, 2004, the matter came on for hearing. The evidence adduced at the hearing will be summarized below. On July 29, the court entered an order terminating Patrick and Kathryn's guardianship. The court found that Lisa did not understand her consent to the guardianship to be a termination or suspension of her parental rights. The court found that at the time the guardianship was ordered, Lisa, Patrick, and Kathryn understood that the purpose of the guardianship was to provide health insurance for Robert. The court concluded that the guardianship order may have been voidable, but was not void.

However, the court also found no evidence that Lisa was unfit to be a parent, noting that she was a fit and proper parent to four other children, Robert's half-siblings. The court further determined that Lisa had not forfeited her parental rights to custody, finding that Lisa

> was at all times willing and able to be a mother to Robert . . . . Unfortunately, Patrick and Kathryn . . . decided they would be better parents than their own daughter, and refused to return Robert . . . to Lisa . . . . Unfortunately, such a decision has estranged Robert . . . from his own mother, but even more unfortunately, has prevented Robert from enjoying a childhood with his half brothers, and all the benefits that memories of a childhood shared with four brothers would provide.

Citing *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004), the court concluded that "[a]bsent proof of unfitness or forfeiture [of] custody rights, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent." Thus, the court terminated the guardianship and ordered Robert's reunification with Lisa.

Hearing Evidence

Lisa testified that she had been living for 9 years in Alliance, Nebraska, with her husband of 12 years, Randy M., and their four sons. Lisa stated that at the time of Robert's birth, she was living in Alliance with Patrick and Kathryn. Lisa testified that when she signed the consent to guardianship in 1990, she had been told that it was to cover Robert's medical costs, and she only found out later that she had signed guardianship papers. At the time, Lisa was not employed, and her parents had medical insurance available for Robert.

Lisa continued to live with her parents until she married in June 1992. Robert stayed with Patrick and Kathryn during Lisa and Randy's honeymoon, and when they returned, Robert moved to Scottsbluff, Nebraska, with Lisa and Randy. Robert then moved with Lisa and Randy to North Platte, Nebraska. Lisa testified that in 1993, her grandfather was ill and wanted to spend time with Robert. On June 7, 1993, Patrick and Kathryn visited Lisa and

Randy in North Platte, and Robert went with Patrick and Kathryn to their home in Alliance. Lisa said that even at that point, she did not understand that Patrick and Kathryn were Robert's guardians. Lisa and Randy stayed in North Platte for roughly 1½ years, and then they moved back to Alliance.

Lisa stated that she became aware of the legal effect of the guardianship only after her grandfather's death, when she asked Kathryn to pack Robert's belongings so he could return to Lisa's home. Lisa said that Kathryn told her, at that point, that Lisa could not take Robert because of the guardianship.

Kathryn testified that the guardianship had been fully explained to Lisa before it was ordered and that Lisa indicated she understood. Patrick also testified that the guardianship had been explained to Lisa. Kathryn denied any discussion of insurance with Lisa. Kathryn explained that she did not understand the effect of the guardianship at the time that Lisa was married and felt it was important for Robert to be with Lisa. Kathryn said she had understood the appointment of "co-guardians" to mean that she, Patrick, and Lisa would all take care of Robert together. After she and Patrick had picked Robert up in North Platte, however, they had the guardianship documents examined by a lawyer, who, according to Kathryn, told Kathryn and Patrick that they were Robert's legal guardians and that Robert needed to stay with them. Patrick said that his understanding from the outset had been that he and Kathryn would be the caretakers for Robert.

Lisa testified that after moving back to Alliance, she had a great deal of normal family interaction with Robert. She testified that they had been shopping on many occasions and that she purchased clothes for him to start preschool. Lisa admitted that she had not provided her parents with money to support Robert, but also said that they had not requested any support. Lisa stated that Robert spent holidays with her family. Lisa testified that they had interacted with Robert through school activities, attending Robert's band concerts and school programs. Lisa testified at length regarding the activities and games she and Randy played with Robert and their other children. Lisa said:

> I have tried to be involved in every part of his life. I wanted to be there for the first day of preschool, didn't know when it was. I wanted to be there for the first day of kindergarten,

> didn't know when it was. I have tried very hard to keep in touch with him, let him know how his brothers are doing, let him know how things are going with the family.

Lisa explained that Kathryn had prevented her from attending Robert's parent-teacher conferences and that Robert's school refused to provide Lisa with information about Robert because of the guardianship.

Lisa said that she had become estranged from her parents about 6 months before the hearing, after another family custody dispute, between two of Lisa's siblings. Lisa said that as a result, she had not been able to spend a lot of time with Robert. Lisa testified regarding several specific instances in which she was denied visitation with Robert. Lisa said that since she filed her motion to terminate the guardianship, she had been unable to visit with Robert beyond the court-ordered visitation. She also said that when she tried to telephone her parents for more visitation, she "seem[ed] to get a machine." Lisa testified at length regarding her concerns that Patrick and Kathryn were not properly caring for Robert.

Kathryn agreed that Lisa had been allowed to visit liberally with Robert until the last few months before the hearing. Kathryn testified that the family situation had deteriorated because of charges she said Lisa had filed against Patrick. However, Kathryn stated that she had not thought there had been a problem with visitation. Kathryn said that on some occasions, as Robert had become older, he had chosen not to visit on the occasions Lisa had requested, and that Patrick and Kathryn felt that at Robert's age, they should honor his wishes. Kathryn testified that she had never forbidden contact between Lisa and Robert and that Lisa had always "been more than welcome." Kathryn claimed that Lisa had not frequently sought information about what was going on with Robert or when his school events were.

Lisa testified that she had not asked the court to terminate the guardianship sooner because she had talked to Patrick "[m]any times over the years" and had believed his assurances that he would have the guardianship terminated. Lisa said that it was her understanding that Kathryn opposed terminating the guardianship. Randy testified that he had been present when Patrick had told Lisa that Patrick would terminate the guardianship and that

Patrick had also made statements to Randy to the same effect. Randy said that Patrick had indicated a willingness to terminate the guardianship, but that Patrick always said he would " 'have to check with Kathy.' "

Kathryn claimed, however, that Lisa had not asked about Robert's return since Lisa and Randy were first married. Kathryn said that at that time, they did not know much about Randy, and that she and Patrick needed to make sure that the marriage would last. Patrick testified that Lisa had asked about terminating the guardianship, "five or six years ago maybe." Patrick said he told Lisa that he would consider it, but that he never promised to end the guardianship.

Lisa also said that she felt uncomfortable challenging her parents, because she had a strong relationship with her family, and that she had felt she would be causing problems if she sought to have the guardianship terminated. Lisa explained that it took her 11 years to challenge her parents because she had trusted them. She said that she wanted to parent Robert all along, but had "come to the reality that Mom and Dad are not going to do this upon my request." Lisa also explained that it had been only recently that she had obtained the money to hire an attorney to pursue the matter. Randy said that they had waited 11 years because they had tried to work things out peacefully with Patrick and Kathryn and that "the last thing [Lisa] wanted to do" was have to go to court and "cause any hurt to her parents."

Representation of Robert

Prior to the hearing, on June 1, 2004, Patrick and Kathryn filed a motion for the court to consider the appointment of an attorney to represent Robert's interests. The motion alleged that Robert, then age 14, "has stated to counsel that he objects to the termination of the guardianship, and the interests of the minor may be best represented by counsel specifically appointed to represent the minor." The court appointed a guardian ad litem for Robert prior to the hearing on Lisa's motion.

At the beginning of the hearing, the guardian ad litem sought clarification as to what his role would be. The guardian ad litem said that "[a]s guardian ad litem, typically I would not ask questions . . ." but that "[o]n the other hand, [Robert] is 14 and I could

have been appointed as attorney for him." In response, the court stated that "the guardian ad litem should also perform the duties of counsel for the juvenile and to express and advocate for his desires, so if that would require that you do some questioning, we'll have you do some questioning."

At the hearing, counsel for both sides indicated that they intended to question Robert. However, the court found no relevancy in Robert's testimony, as the only issue to be determined at the hearing was whether Lisa's parental rights had been forfeited. Over Patrick and Kathryn's objection, the court refused to permit Robert to testify. The guardian ad litem also indicated that he believed Robert's preferences were relevant to the issues presented and made an offer of proof that Robert preferred to remain with Patrick and Kathryn.

After entering the order terminating the guardianship, on August 24, 2004, the court entered an order appointing different counsel to represent Robert directly, as opposed to as a guardian ad litem. Through that counsel, Robert appeals from the order terminating his guardianship.

ASSIGNMENTS OF ERROR

Robert assigns that the court erred in (1) determining that Lisa had not forfeited her rights to custody of Robert by substantial, continuous, and repeated neglect of Robert and a failure to discharge the duties of parental care and protection; (2) refusing to either interview Robert to determine his wishes or allow him to testify at the hearing; and (3) failing to appoint an attorney to represent Robert until after the hearing on the motion to terminate the guardianship and after the court entered its order terminating the guardianship.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3-5] Because the exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat. § 27-401 (Reissue 1995), the trial court's decision will not be reversed absent an abuse of discretion. *In re Estate of Jeffrey B., supra.* Whether a child witness should be permitted to testify is also committed to the discretion of the trial court. See, *Beran v. Beran*, 234 Neb. 296, 450 N.W.2d 688 (1990); *Krohn v. Krohn*, 217 Neb. 158, 347 N.W.2d 869 (1984); *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

ANALYSIS

[6,7] This is a proceeding by a biological parent, Lisa, to terminate a guardianship with respect to her child, Robert. Under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers to the parent-child relationship and the preferences of the child. *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). Absent circumstances which terminate a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child. *Id.*

[8,9] Consequently, in guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of the child are served by reuniting the minor child with his or her parent. *Id.* In other words, an individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. *Id.* Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent. *Id.*

Forfeiture of Parental Rights

[10] Robert first argues that the evidence presented at the hearing established that Lisa forfeited her parental rights. Generally, parental rights may be forfeited by a substantial, continuous, and

repeated neglect of a child and a failure to discharge the duties of parental care and protection. *Id.*

[11,12] However, guardianships are designed to temporarily relieve parents of the rigors of raising a child. *Id.* Thus, the nature of a guardianship makes it particularly inappropriate to establish the forfeiture of parental rights by solely focusing on a parent's failure to discharge the duties of parental care and protection. There must also be clear and convincing evidence of substantial, continuous, and repeated neglect of a child. *Id.* This may be established by the complete indifference of a parent for a child's welfare over a long period of time. See *id.*

The record, as summarized above, does not establish such neglect or indifference. Although there was some conflict in the testimony, the record establishes beyond dispute that Lisa made substantial and repeated efforts to maintain a relationship with Robert throughout the guardianship. Compare *id.* The county court's determination that Lisa did not forfeit her parental rights is supported by competent evidence.

[13] The primary concern in this case is not the level of interest Lisa maintained in Robert, but the length of time that the guardianship was permitted to continue before Lisa sought Robert's return. The length of a guardianship is not irrelevant to a determination of neglect or indifference, and there may be circumstances in which duration and disinterest combine to produce clear and convincing evidence of substantial, continuous, and repeated neglect. However, such circumstances are not present here. Lisa explained the reasons that Patrick and Kathryn's guardianship was allowed to persist, and the county court, having heard and observed the witnesses, concluded that Lisa was a willing parent whose wishes were frustrated by Patrick and Kathryn. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). Here, the court credited Lisa's testimony with respect to her delay in challenging the guardianship, and the court's determination was not arbitrary, capricious, or unreasonable.

Testimony of Minor Child

Robert next argues that the court erred in refusing to interview him or permit him to testify at the hearing. Robert relies on the

general principle that in determining custody arrangements, one of the factors a court should consider is the desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning. Neb. Rev. Stat. § 42-364(2)(b) (Reissue 2004). While the wishes of a child are not controlling in the determination of custody, if a child is of sufficient age and has expressed an intelligent preference, the child's preference is entitled to consideration. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

However, this is not a custody dispute between two parents. Rather, as previously noted, this is a guardianship termination proceeding involving a biological parent, and under the parental preference principle, "a parent's natural right to the custody of his or her children trumps the interest of strangers to the parent-child relationship *and the preferences of the child.*" (Emphasis supplied.) *In re Guardianship of D.J.*, 268 Neb. 239, 244, 682 N.W.2d 238, 243-44 (2004). Furthermore, as discussed above, the issue to be decided in this proceeding was whether Lisa had forfeited her parental rights. The county court did not err in determining that Robert's preferences about where to live were not relevant to the issues before the court at the hearing on Lisa's motion to terminate the guardianship.

Robert cites *State ex rel. Cochrane v. Blanco*, 177 Neb. 149, 128 N.W.2d 615 (1964), for the proposition that a child's wishes are relevant in a guardianship termination proceeding. That case did not involve the termination of a guardianship, but was a habeas corpus action brought by the plaintiff, a biological mother, against her own mother, the defendant, for custody of the plaintiff's two biological children. The children had been raised by the defendant since they were infants, and were 15 and 11 years of age at the time we issued our opinion. In that opinion, we discussed the wishes of the two children in reaching our conclusion that the district court had erred in awarding the plaintiff custody of the children. See *id*.

However, our discussion of the wishes of the children was relevant in that case, insofar as we had determined, as a preliminary matter, that the plaintiff had forfeited her preferential right to the custody of her biological children through persistent neglect, and

that she was not a fit and proper custodian for the children. Once it had been established that the plaintiff had forfeited her superior right, the issue before us was custody, to be determined by reference to the best interests of the children. The wishes of the children were relevant to that determination. In the instant case, however, the county court concluded that Lisa had not forfeited her superior parental right, and we have already determined that conclusion is supported by competent evidence. Thus, in this case, unlike *State ex rel. Cochrane, supra*, there is no issue presented to which Robert's preferences are relevant.

It should be noted that Robert's argument, and Patrick and Kathryn's argument in the trial court, is that Robert's testimony should have been allowed so that he could express his preferences about where to live. Obviously, there may be circumstances in which a minor child is competent to offer testimony relevant to parental unfitness or forfeiture of parental rights. However, in this case, the sole basis for which Robert's testimony was offered was to express his desire to live with Patrick and Kathryn. While Robert's desire to explain his wishes is understandable, his preferences were simply not relevant to the legal issues before the court. The court did not abuse its discretion in precluding his testimony.

Representation of Minor Child

[14] In his final assignment of error, Robert argues that he should have been appointed counsel before the hearing on, and disposition of, Lisa's motion to terminate the guardianship. Section 30-2616(c) provides that if, at any time in guardianship removal proceedings, the court determines that the interests of the ward are, or may be, inadequately represented, the court may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is 14 or more years of age. We have stated that the appointment of a guardian ad litem for a minor child is a matter within the discretion of the trial court. See *Robinson v. Robinson*, 236 Neb. 879, 464 N.W.2d 193 (1991). Similarly, whether to appoint an attorney to represent a minor child pursuant to § 30-2616(c) is also a matter entrusted to the discretion of the trial court.

We find no prejudicial error to be present in this case. There is no evidence in the record to suggest that Robert's interests were

inadequately represented by the parties and the guardian ad litem, nor does Robert's appellate brief explain how independent representation for Robert would have affected these proceedings. Simply stated, Robert has not offered any argument showing what, if anything, an attorney representing him would have done to add to the hearing. In the absence of any evidence supporting the appointment of an attorney pursuant to § 30-2616(c), and any showing of prejudice resulting from the failure to make such an appointment, we find no prejudicial abuse of discretion.

[15-17] We do note, although it is not expressly discussed by the parties, that the court erred in suggesting to the guardian ad litem that he "should also perform the duties of counsel for the juvenile and to express and advocate for his desires, so if that would require that you do some questioning, we'll have you do some questioning." A guardian ad litem's duties are to investigate the facts and learn where the welfare of his or her ward lies and to report these facts to the appointing court. *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998). A guardian ad litem may be an attorney, but an attorney who performs the functions of a guardian ad litem does not act as an attorney and is not to participate in the trial in an adversarial fashion such as calling or examining witnesses or filing pleadings and briefs. *Id*. In contrast, an attorney appointed under § 30-2616(c) is an advocate for the minor child and is not a guardian ad litem. Cf. *Betz, supra*. The court-appointed attorney shall act as the attorney for the minor child, but shall not testify in the proceedings. See *id*. Consequently, the court erred in suggesting the guardian ad litem could serve both as guardian ad litem and an advocate for Robert.

However, the record affirmatively demonstrates that no prejudice resulted from this erroneous suggestion. The guardian ad litem's participation in these proceedings was limited to supporting Patrick and Kathryn's offer of proof with respect to Robert's proffered testimony, testifying as a witness who had interviewed Robert and the parties, and a brief closing statement urging the court to continue the guardianship. While the guardian ad litem was placed in a difficult position by the trial court's erroneous suggestion that the guardian ad litem perform inconsistent functions during the hearing, see *Betz, supra*, the record does not suggest that any of the parties were prejudiced by the error. See

In re Interest of Kantril P. & Chenelle P., 257 Neb. 450, 598 N.W.2d 729 (1999). Thus, while these inconsistent roles prevented the guardian ad litem from acting as a substitute for counsel appointed pursuant to § 30-2616(c), for the reasons stated above, we find no reversible error.

CONCLUSION

The county court's determination that Lisa did not forfeit her parental rights is supported by competent evidence. The county court did not abuse its discretion by not permitting Robert to testify, and did not prejudicially abuse its discretion by not appointing counsel for Robert pursuant to § 30-2616(c). The judgment of the county court, terminating Patrick and Kathryn's guardianship over Robert, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNY WAYNE GASS, APPELLANT.

697 N.W.2d 245

Filed May 20, 2005. No. S-04-1105.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Sentences.** The imposition of an indeterminate sentence, even where the maximum term is life imprisonment, requires that the minimum term be affirmatively stated. When a flat sentence of "life imprisonment" is imposed and no minimum sentence is stated, by operation of law, the minimum sentence is the minimum imposed by law under the statute.
3. **Sentences: Time.** A sentence validly imposed takes effect from the time it is pronounced.
4. **Sentences.** When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed.
5. **Sentences: Judges: Records.** The circumstances under which a judge may correct an inadvertent mispronouncement of a sentence are limited to those instances in which it is clear that the defendant has not yet left the courtroom; it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended; and no written notation of the inadvertently mispronounced sentence was made in the records of the court.
6. **Sentences.** Pursuant to Neb. Rev. Stat. § 83-1,106(1) (Reissue 1999), a court must give credit for time served on a charge when a prison sentence is imposed for that charge.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Order vacated, and cause remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, Andrea D. Snowden, and Sarah P. Newell, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Kenny Wayne Gass pled no contest to second degree murder in the district court for Lancaster County. On September 1, 2004, the court entered an order sentencing Gass to imprisonment "for a period of life." Later that day and contrary to the sentence initially imposed, the court entered an order nunc pro tunc stating that the sentence was "for a period of not less than nor more than life." The next day, the court filed an amended order of commitment reflecting the language of the order nunc pro tunc. Gass appeals, claiming that the terms of the amended order of commitment are inconsistent with the sentence imposed. Gass' argument has merit. Accordingly, we vacate the amended order of commitment and remand the cause with directions.

STATEMENT OF FACTS

On November 26, 2003, the State filed an information charging Gass with first degree murder and use of a weapon to commit a felony in connection with the September 2003 death of James R. Hagan. Pursuant to a plea agreement, on July 6, 2004, Gass pled no contest to the reduced charge of second degree murder, and the use of a weapon charge was dropped. The court accepted Gass' plea and found him guilty.

A sentencing hearing was held on September 1, 2004. The hearing began at 1:36 p.m. The court stated the facts of the case and the various factors considered in sentencing. The court concluded its remarks by stating on the record:

> It is therefore the judgment and the sentence of the Court that you, Kenny W. Gass, be and hereby are ordered committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services *for a period of life*, no part of which shall be in solitary confinement except for violation of prison rules. You shall pay the costs of this action.
>
> You should be and hereby are remanded to the custody of the Nebraska Department of Correctional Services for execution of sentence, a commitment is to issue accordingly.
>
> This sentence is to be served consecutive to any other sentence imposed against you.

(Emphasis supplied.) The court then stated that the matter was concluded and adjourned the hearing at 2:02 p.m.

An order of sentence was filed at 2:31 p.m. on September 1, 2004, which stated in part:

> IT IS, THEREFORE, the judgment and sentence of the court, that the defendant Kenny Wayne Gass be, and hereby is, ordered committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services *for a period of life*, no part of which shall be in solitary confinement, except for violation of prison rules. The defendant shall pay the costs of this prosecution.

(Emphasis supplied.) There is no dispute that a commitment order providing for the sentence as recited above was issued.

Thereafter, at 3:48 p.m. on September 1, 2004, Gass, Gass' attorney, and the State's attorney appeared, and the court went back on the record. The court stated that "there appeared to have been some confusion" regarding the sentence pronounced. The court further acknowledged that an issue existed under *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000). The court stated its intent had been that Gass "be sentenced for a period of not less than nor more than life." The court also stated for the record that "I had signed an order of sentence that had on it life, that the Lancaster County Clerk's Office had issued a commitment, that . . . Gass had left the courtroom." The court continued that notwithstanding these facts, "I'm sure from reading the record and from the fact that I did not give him any credit for time served that the intent was to be life to life." The court stated that it would issue an order nunc pro tunc and direct that an

order of commitment consistent with the order nunc pro tunc be issued.

Gass' attorney objected to the proceeding. Gass' attorney offered that it was not clear to him what the minimum sentence was at the time of the sentencing and asked that Gass receive credit for the time in custody. The court stated that it would not give Gass credit for time in custody because it intended to give him a life to life sentence. Court was adjourned at 3:52 p.m.

At 3:54 p.m., on September 1, 2004, an order of sentence nunc pro tunc was entered stating in part:

> IT IS, THEREFORE, the judgment and sentence of the court, that the defendant Kenny Wayne Gass be, and hereby is, ordered committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services *for a period of not less than nor more than life*, no part of which shall be in solitary confinement, except for violation of prison rules. The defendant shall pay the costs of this prosecution.

(Emphasis supplied.)

The next day, September 2, 2004, at 2:54 p.m., an "Amended Commitment" providing that Gass was ordered committed "for a period of not less than, nor more than Life" was filed. Gass appeals.

ASSIGNMENT OF ERROR

Gass asserts that the district court erred in entering the "amended commitment" order because such order contained sentencing terms inconsistent with the original order of sentence.

STANDARD OF REVIEW

[1] This appeal presents questions of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Jonusas, ante* p. 644, 694 N.W.2d 651 (2005).

ANALYSIS

Gass argues that based on the precedent of *Schnabel, supra*, the amended order of commitment entered by the district court was in error because it contained sentencing terms inconsistent with the original order of sentence that was pronounced in court, reduced to a written order, and reflected in the original order of

commitment. In response, the State urges this court to reconsider our holding in *Schnabel* and affirm the order nunc pro tunc regarding sentencing and to approve the amended order of commitment. We agree with Gass that *Schnabel* controls the outcome of this case, and we decline the State's suggestion to reconsider our holding in that case. We conclude that the amended order of commitment must be vacated.

[2] At the sentencing hearing, the court sentenced Gass to imprisonment "for a period of life." No minimum term was affirmatively stated. The imposition of an indeterminate sentence, even where the maximum term is life imprisonment, requires that the minimum term be affirmatively stated. *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000). When a flat sentence of "life imprisonment" is imposed and no minimum sentence is stated, by operation of law, the minimum sentence is the minimum imposed by law under the statute. *Id*.

Gass was convicted of second degree murder, which is a Class IB felony. Neb. Rev. Stat. § 28-304(2) (Reissue 1995). Under Neb. Rev. Stat. § 28-105 (Cum. Supp. 2004), the minimum penalty for a Class IB felony is 20 years' imprisonment. Therefore, the court's pronouncement in this case of a flat sentence of imprisonment "for a period of life" effectively imposed a maximum term of life imprisonment and by operation of law a minimum term (for parole eligibility purposes) of 20 years' imprisonment. See *Schnabel, supra*. The amended order of commitment states that the minimum term of Gass' sentence is life imprisonment, and in regard to the minimum term, the amended order of commitment is inconsistent with the sentence actually imposed by the court.

The court in this case attempted to rectify what it described as "some confusion" regarding Gass' sentence by calling the parties back into court and entering an order nunc pro tunc which stated that Gass' sentence of imprisonment was "for a period of not less than nor more than life." However, as a matter of law, the court's efforts were ineffective in changing the previously imposed sentence. *Schnabel, supra*.

[3-5] In *Schnabel*, we stated:

> A sentence validly imposed takes effect from the time it is pronounced. *State v. Carlson*, 227 Neb. 503, 418 N.W.2d

> 561 (1988); *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981). When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999), *cert. denied* 526 U.S. 1162, 119 S. Ct. 2056, 144 L. Ed. 2d 222; *State v. Brewer*, 190 Neb. 667, 212 N.W.2d 90 (1973). Any attempt to do so is of no effect, and the original sentence remains in force. *Id*. The circumstances under which a judge may correct an inadvertent mispronouncement of a sentence are limited to those instances in which it is clear that the defendant has not yet left the courtroom; it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended; and no written notation of the inadvertently mispronounced sentence was made in the records of the court. *State v. Foster*, 239 Neb. 598, 476 N.W.2d 923 (1991).

260 Neb. at 623, 618 N.W.2d at 703.

In the hearing that started at 3:48 p.m. on September 1, 2004, the district court acknowledged that after it had previously pronounced a sentence of imprisonment "for a period of life," it "had signed an order of sentence that had on it life, that the Lancaster County Clerk's Office had issued a commitment, [and] that . . . Gass had left the courtroom." The court stated that contrary to the original sentence pronounced, its intent had been a sentence of "life to life."

The circumstances under which a judge may correct an inadvertent mispronouncement of sentence are limited, and the circumstances of this case do not fall within the category which permits correction. As the court stated when the parties appeared later on September 1, 2004, the defendant had left the courtroom and a written notation of the original sentence had been made in the records of the court. Therefore, the court's statement that Gass' sentence ought to be "for a period of not less than nor more than life" and the corresponding order nunc pro tunc were inconsistent with the terms of the original sentence and were not effective to change the sentence already imposed. The amended

commitment order, which reflects the language of the order nunc pro tunc, does not reflect the sentence actually imposed, and the amended commitment order must be vacated.

[6] Finally, we note that both the State and Gass ask in their briefs that if the amended commitment is vacated, then the cause be remanded with directions to the district court to apply a credit for time served. Pursuant to Neb. Rev. Stat. § 83-1,106(1) (Reissue 1999), a court must give credit for time served on a charge when a prison sentence is imposed for that charge. See *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004). In this case, the sentence originally pronounced is the sentence imposed in this case. Because the sentence in this case is 20 years to life, pursuant to § 83-1,106(1), credit is to be given. We therefore direct the district court on remand to apply the appropriate credit for time served.

CONCLUSION

We conclude that the district court erred by entering the amended order of commitment because the sentencing terms set forth in that order were inconsistent with the sentence actually imposed by the court. The amended order of commitment is vacated, and the cause is remanded to the district court with directions to enter an order of commitment that is consistent with this opinion. The district court is further directed to apply an appropriate credit for time served.

ORDER VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
DAVID C. HEMBERTT, APPELLANT.

696 N.W.2d 473

Filed May 20, 2005. No. S-04-1124.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Hearsay.** The admission of hearsay is controlled by the Nebraska Evidence Rules.

3. **Constitutional Law: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause, and reviews the underlying factual determinations for clear error.
4. **Rules of Evidence: Hearsay.** For a statement to qualify as an excited utterance, the following criteria must be met: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event.
5. **Rules of Evidence: Hearsay: Time.** The key requirement for an excited utterance is spontaneity, which requires a showing the statements were made without time for conscious reflection.
6. **Rules of Evidence: Hearsay.** The underlying theory of the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterance free of conscious fabrication.
7. ____: ____. The true test in spontaneous exclamations is not when the exclamation was made, but whether under the circumstances of the particular exclamation, the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue.
8. **Rules of Evidence: Hearsay: Time.** To be excited utterances, statements need not be made contemporaneously with the exciting cause but may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated.
9. **Constitutional Law.** The analysis of the right to confrontation under Neb. Const. art. I, § 11, is the same as that under the Sixth Amendment to the U.S. Constitution.
10. **Constitutional Law: Trial: Rules of Evidence: Hearsay.** Where testimonial statements are at issue, the Confrontation Clause demands that such hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination.
11. **Constitutional Law: Hearsay.** The initial step in a Confrontation Clause analysis is to determine whether the statements at issue were testimonial in nature.
12. **Constitutional Law: Police Officers and Sheriffs.** Statements taken by police officers in the course of interrogations are testimonial for Confrontation Clause purposes.
13. ____: ____. Police interrogation, for Confrontation Clause purposes, requires some kind of structured police questioning, intended to elicit information for use in a contemplated prosecution.
14. **Constitutional Law: Evidence: Intent.** The inquiry under the Confrontation Clause is whether, under the circumstances, the declarant intended to bear testimony against the accused. The determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial.
15. ____: ____: ____. Whether a statement is testimonial for Confrontation Clause purposes depends on the purpose or expectation of the declarant in making the statement, and the circumstances surrounding the statement illuminate the purpose or expectation of the declarant.

Appeal from the District Court for Douglas County, GERALD E. MORAN, Judge, on appeal thereto from the County Court for Douglas County, EDNA R. ATKINS, Judge. Judgment of District Court affirmed.

Thomas C. Riley, Douglas County Public Defender, Joseph Kehm, and, on brief, Horacio J. Wheelock for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

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

GERRARD, J.

NATURE OF CASE

The defendant, David C. Hembertt, was convicted in the county court of assault and battery, based in part on the testimony of an Omaha police officer regarding statements made by the alleged victim when police arrived at the scene after the assault. The alleged victim did not testify at trial. The issues presented in this appeal are whether the officer's testimony as to the alleged victim's statements was properly admitted into evidence under the excited utterance exception to the hearsay rule and, if so, whether the statements were "testimonial" within the meaning of the Confrontation Clause standards explained in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

BACKGROUND

At approximately 10 a.m. on April 15, 2004, John Sherman, a police officer for the city of Omaha, was on routine patrol and received an emergency call from 911 dispatching him to an Omaha residence to check on the well-being of a resident. Sherman and another officer arrived at the residence about 3 to 5 minutes after receiving the call, but were unable to get inside. A man then pulled up in front of the residence and told police he had made the 911 emergency call.

A few seconds later, a woman "came running" out of the residence. Over continuing hearsay and Confrontation Clause objections, Sherman testified at trial that the woman was "crying hysterical, trembling. She began to identify herself as the — as the residence — resident there and that she had — that she had been assaulted." The woman went directly to the man who had made the emergency call, "crying and pointing to the house saying . . . he's inside. He's upstairs." Sherman testified that he observed bruises on the woman's face and body.

Sherman testified that before police asked any questions, the woman "began to explain the story that he had been attacking her, head butting her and that he had threatened her with a knife." The woman explained that "they had gotten into an argument. That he was somewhat accusing her of sleeping with another man. And as a result he started to beat her, head butted her I believe she said, threw her across a counter and up against the wall and threatened her with a knife." The woman said the incident had happened "[m]oments prior to [the officers'] arrival."

Sherman stated that they did not allow the woman to go into any more detail about the assault at that time, because they were concerned about locating the alleged assailant. Sherman and the other officer entered the residence, located the alleged assailant, and arrested him. Sherman identified Hembertt at trial as the man they arrested. A steel switchblade knife was found underneath the bed upon which Hembertt was lying.

After Hembertt was arrested, Sherman went back to interview the alleged victim. At trial, however, the county court sustained Hembertt's hearsay and Confrontation Clause objections to Sherman's testimony regarding this later questioning of the alleged victim.

Hembertt testified at trial in his own defense. Hembertt admitted knowing the alleged victim, who Hembertt testified was his girl friend. Hembertt testified that she had gotten a black eye in a fight with an emergency room nurse about a week before the alleged assault, but that he had not seen her other bruises and did not know what caused them. Hembertt denied assaulting the alleged victim.

Following a bench trial in the county court, Hembertt was convicted of assault and battery in violation of Omaha Mun. Code, ch. 20, art. IV, § 20-61 (1980), and sentenced to 90 days in jail. An appeal bond was set, and Hembertt appealed. The district court affirmed the judgment of the county court.

ASSIGNMENTS OF ERROR

Hembertt assigns that (1) the district court erred in not finding that the county court erred when it overruled his hearsay objections to Sherman's testimony and (2) even if the alleged victim's statements were properly admitted under the excited utterance hearsay exception, those statements should have been barred

pursuant to the Confrontation Clause of the Sixth Amendment to the U.S. Constitution.

STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. King, ante* p. 326, 693 N.W.2d 250 (2005). The admission of hearsay is controlled by the Nebraska Evidence Rules. State v. Pruett, 263 Neb. 99, 638 N.W.2d 809 (2002). See *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

[3] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause, and reviews the underlying factual determinations for clear error. See, *U.S. v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005); *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000), *overruled on other grounds, Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

ANALYSIS

Excited Utterance

We first consider Hembertt's argument that the trial court erred in overruling his hearsay objection to Sherman's testimony. Under Neb. Rev. Stat. § 27-801(3) (Reissue 1995), hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003). Hearsay is not admissible except as provided by the rules of evidence or by other rules adopted by the statutes of the State of Nebraska or by the discovery rules of this court. Neb. Rev. Stat. § 27-802 (Cum. Supp. 2004); *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995). Sherman's testimony in this case, with respect to the statements made at the scene by the victim, clearly contains hearsay, but it was admitted pursuant to the excited utterance exception to the hearsay rule. Neb. Rev. Stat. § 27-803(1) (Cum. Supp. 2004) provides that even when the declarant is available as a witness, the hearsay rule does not exclude "[a] statement relating to a startling

event or condition made while the declarant was under the stress of excitement caused by the event or condition."

[4,5] For a statement to qualify as an excited utterance, the following criteria must be met: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000). The key requirement is spontaneity, which requires a showing the statements were made without time for conscious reflection. *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993), *abrogated on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996). Hembertt does not contest the trial court's finding that there was, in this case, a startling event to which the statements at issue related. Hembertt argues that the statements were not spontaneous.

[6-8] The underlying theory of the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterance free of conscious fabrication. *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990). The true test in spontaneous exclamations is not when the exclamation was made, but whether under the circumstances of the particular exclamation, the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue. *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993), quoting 6 John H. Wigmore, Evidence in Trials at Common Law § 1745 (James H. Chadbourn rev. 1976). Accord *Tlamka, supra*. Statements need not be made contemporaneously with the exciting cause but may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated. *Jacob, supra*, quoting 6 Wigmore, *supra*, § 1750.

The record in this case clearly establishes the element of spontaneity necessary for the declarant's statements to be an excited utterance. According to Sherman's testimony, the woman said that the assault had occurred moments prior to the officers' arrival and that her statement was volunteered. Assuming Sherman's testimony to be correct, as we do on appeal, there had not been time for the exciting influence to have been dissipated. See *Jacob, supra*. Given Sherman's testimony, the trial court did not err in

concluding that foundation for the excited utterance exception to the hearsay rule had been established.

Hembertt relies on *State v. Sullivan*, 236 Neb. 344, 461 N.W.2d 84 (1990), in which we found that a statement that a robber had driven a particular model of vehicle was not an excited utterance because it was made in response to a specific suggestion from a police officer. Hembertt claims that the statements at issue in the instant case were also made in response to police questioning. However, Hembertt's claim is not supported by the record. Hembertt's appellate brief quotes the following colloquy from the State's direct examination of Sherman:

> Q. . . . When [the alleged victim] initially came out to speak with [the 911 caller] and yourselves, did you inquire about — or inquire further into the nature of the call?
>
> A. Yes, we did.

According to Hembertt, this colloquy shows that the statements were made under police interrogation. Hembertt claims that "it is undeniable that [the declarant's] statements were made in direct response to Officer Sherman's inquiry into the 'nature of the call.' Indeed, [she] made her statements only after being invited to do so by Officer Sherman." Brief for appellant at 10.

However, Hembertt fails to acknowledge the testimony immediately following that colloquy:

> Q. Okay. And was she volunteering information or were you asking her questions? How did — how did it — how did it start?
>
> A. She was volunteering information.

Sherman later specifically agreed that the declarant's testimony at this time "was not in response to a question that [he] or another officer asked." In fact, the declarant's later statements, made in response to police interrogation, were excluded from evidence by the trial court. Hembertt's claim that the statements at issue here were made in response to police questioning is contradicted by the record. When asked, Sherman specifically testified that the declarant's statements were made before any questions were asked.

Hembertt also argues that later testimony establishes that the declarant's statements were made in response to questioning. Hembertt refers to testimony in which Sherman stated that "one of our first questions was are there any weapons in the house. And

she responded that yes there was. He had threatened — threatened me with a knife." It is not entirely clear from the record, however, whether this exchange occurred before or after the initial statements made when the declarant emerged from the home.

Furthermore, even if a question regarding weapons in the house were asked before the declarant's statements, such a question would not implicate the reasoning we relied upon in *State v. Sullivan*, 236 Neb. 344, 461 N.W.2d 84 (1990). In *Sullivan*, the investigating officer made a specific suggestion of a type of vehicle, prompting the declarant's response. Because the declarant in that case identified the vehicle only after a particular model was suggested by the officer, we concluded that the statement had been made after conscious reflection. See *id*. However, under the circumstances of this case, asking the declarant whether there were weapons in the house would not undermine the conclusion that the declarant was still speaking under the stress of nervous excitement and shock produced by the act in issue. See *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

The trial court correctly determined that appropriate foundation was present for Sherman's testimony to be allowed under the excited utterance exception to the hearsay rule. His first assignment of error is without merit.

Confrontation Clause

[9] The Confrontation Clause, U.S. Const. amend. VI, provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Neb. Const. art. I, § 11, provides, in relevant part: "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ." We have held that the analysis under article I, § 11, is the same as that under the Sixth Amendment to the U.S. Constitution. *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004).

[10,11] Where "testimonial" statements are at issue, the Confrontation Clause demands that such hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination. *Vaught, supra*, citing *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Thus, our initial step is to determine whether

the statements at issue in the present case were testimonial in nature. See *id*. The U.S. Supreme Court in *Crawford* declined to provide a comprehensive definition of "testimonial," but stated that the term applied at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. *Vaught, supra*. And, although the U.S. Supreme Court has not fully defined "testimonial," it did provide three formulations of the core class of testimonial statements.

> "In the first, testimonial statements consist of 'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.' . . . The second formulation described testimonial statements as consisting of 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' . . . Finally, the third explained that testimonial statements are those 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' . . . While the Court declined to settle on a single formulation, it noted that, '[w]hatever else the term [testimonial] covers, it applies . . . to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. These are the modern abuses at which the Confrontation Clause was directed.' "

Vaught, 268 Neb. at 325, 682 N.W.2d at 291, quoting *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004), *cert. denied* 543 U.S. 1093, 125 S. Ct. 971, 160 L. Ed. 2d 905 (2005).

[12] The U.S. Supreme Court in *Crawford* further expounded upon the scope of "testimonial" statements by explaining the history underlying the common-law right of confrontation, specifically with reference to police interrogation. In *Crawford*, the declarant made a statement while in police custody regarding an incident in which the defendant, her husband, had allegedly stabbed the victim. The defendant admitted the incident but claimed self-defense; his wife, who was present, did not support the self-defense claim. When the wife was unavailable to testify

at trial, her statement was admitted as a statement against penal interest. Thus, the Court considered whether statements made during formal police interrogation were "testimonial" for purposes of Confrontation Clause analysis.

> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. Cobham's examination was unsworn, see 1 Jardine, Criminal Trials, at 430, yet Raleigh's trial has long been thought a paradigmatic confrontation violation, see, *e.g., Campbell*, 30 S. C. L., at 130. Under the Marian statutes, witnesses were typically put on oath, but suspects were not. See 2 Hale, Pleas of the Crown, at 52. Yet [several authorities] went out of their way to caution that such unsworn confessions were not admissible against anyone but the confessor. . . .
>
> That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. See 1 Stephen, Criminal Law of England, at 221; Langbein, Prosecuting Crime in the Renaissance, at 34-45. England did not have a professional police force until the 19th century, see 1 Stephen, *supra*, at 194-200, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.
>
> In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.

(Emphasis in original.) *Crawford v. Washington*, 541 U.S. 36, 52-53, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Furthermore, the Court clarified that the term "interrogation" was used in its

colloquial, rather than any technical legal, sense. *Id*. "Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case." 541 U.S. at 53 n.4. We note, for clarity's sake, that whether particular evidence is "testimonial," for Confrontation Clause purposes, may be quite different from whether it is "testimonial" as that word is used in other contexts. Compare, e.g., *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000).

[13] Given the Court's reasoning in *Crawford*, and the underlying facts of the case, other courts to have subsequently addressed the subject have concluded that "police interrogation," within the meaning of *Crawford*, requires some kind of structured police questioning, intended to elicit information for use in a contemplated prosecution. See *State v. Alvarez*, 210 Ariz. 24, 107 P.3d 350 (Ariz. App. 2005). See, e.g., *Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004); *Jenkins v. State*, 278 Ga. 598, 604 S.E.2d 789 (2004); *State v. Barnes*, 854 A.2d 208 (Me. 2004); *People v. Coleman*, 16 A.D.3d 254, 791 N.Y.S.2d 112 (2005); *State v. Staten*, 364 S.C. 7, 610 S.E.2d 823 (S.C. App. 2005); *People v. Kilday*, 123 Cal. App. 4th 406, 20 Cal. Rtpr. 3d 161 (2004), *review granted* 105 P.3d 114, 23 Cal. Rptr. 3d 693 (2005); *Hammon v. State*, 809 N.E.2d 945 (Ind. App. 2004).

[14] The inquiry is whether, under the circumstances, the declarant intended to bear testimony against the accused. The determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial. *U.S. v. Saget*, 377 F.3d 223 (2d Cir. 2004), *cert. denied* 543 U.S. 1079, 125 S. Ct. 938, 160 L. Ed. 2d 821 (2005). See, also, *U.S. v. Cromer*, 389 F.3d 662 (6th Cir. 2004); *Staten, supra*; *Lopez v. State*, 888 So. 2d 693 (Fla. App. 2004); *People v. Vigil*, 104 P.3d 258 (Colo. App. 2004), *cert. granted* No. 04SC532, 2004 WL 2926003 (Colo. Dec. 20, 2004); *State v. Forrest*, 164 N.C. App. 272, 596 S.E.2d 22 (2004); *People v. Cervantes*, 118 Cal. App. 4th 162, 12 Cal. Rptr. 3d 774 (2004). Thus, some excited utterances are testimonial and others are not, depending upon the circumstances in which the particular statement was made. *Stancil v. U.S.*, 866 A.2d 799 (D.C. 2005). See, also, *Staten, supra*; *Lopez, supra*; *Kilday, supra*; *State v. Orndorff*, 122 Wash. App. 781, 95 P.3d 406 (2004); *Forrest,*

supra. Under *Crawford*, statements obtained during police interrogations are testimonial fundamentally because police officers who obtain a statement during an interrogation are performing investigative and evidence-producing functions formerly handled by justices of the peace. *Kilday, supra*. Extension of this rationale indicates that a statement made at or near the scene of a crime may be an excited utterance, yet may also be testimonial under *Crawford* if obtained through questioning by a police officer acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution. *Kilday, supra*.

[15] The underlying assumption in these cases is that a declarant responding to police questioning, structured and conducted for the purpose of producing evidence in anticipation of a potential criminal prosecution, should reasonably anticipate his or her testimony being used against the accused. See *Saget, supra*. Cf. *Alvarez, supra*. As the Court noted in *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), "testimony" is " 'made for the purpose of establishing or proving some fact.' . . . An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." In other words, whether a statement is testimonial depends on the purpose or expectation of the declarant in making the statement, and the circumstances surrounding the making of the statement illuminate the purpose or expectation of the declarant.

Considered in that framework, the statements at issue in this case were not "testimonial" within the meaning of *Crawford*. The statements at issue on appeal, if they occurred in response to any questioning at all, certainly did not occur in the context of structured police questioning. When police arrived at the scene, the declarant was frightened and the area and suspect were unsecured. Compare, e.g., *Leavitt v. Arave*, 383 F.3d 809 (9th Cir. 2004); *Stancil, supra*; *People v. Kilday*, 123 Cal. App. 4th 406, 20 Cal. Rptr. 3d 161 (2004), *review granted* 105 P.3d 114, 23 Cal. Rptr. 3d 693 (2005). Police who respond to emergency calls for help and ask preliminary questions to ascertain whether the victim, other civilians, or the police themselves are in danger are not obtaining information for the purpose of making a case against a suspect. *Stancil, supra*. See, also, *Mungo v. Duncan*, 393 F.3d 327

(2d Cir. 2004); *People v. Coleman*, 16 A.D.3d 254, 791 N.Y.S.2d 112 (2005); *Key v. State*, No. 12-04-00030-CR, 2005 WL 467167 (Tex. App. Feb. 28, 2005); *Kilday, supra*; *Hammon v. State*, 809 N.E.2d 945 (Ind. App. 2004). The statements at issue in this case were not made in anticipation of eventual prosecution, but were made to assist in securing the scene and apprehending the suspect. We agree with the trial court's determination that the statements were not testimonial.

This conclusion, while based on the facts of this case, is consistent with the reasoning and conclusions of several courts to have considered similar circumstances. Courts have almost uniformly held that statements made to police officers responding to an emergency call for help were, at the initial stage of the encounter, not testimonial, because they were intended to help officers assess the situation and secure the scene. See, e.g., *Mungo, supra*; *Leavitt, supra*; *Stancil v. U.S.*, 866 A.2d 799 (D.C. 2005); *State v. Barnes*, 854 A.2d 208 (Me. 2004); *Key, supra*; *People v. King*, No. 02CA0201, 2005 WL 170727 (Colo. App. Jan. 27, 2005); *People v. Corella*, 122 Cal. App. 4th 461, 18 Cal. Rptr. 3d 770 (2004); *Rogers v. State*, 814 N.E.2d 695 (Ind. App. 2004); *State v. Forrest*, 164 N.C. App. 272, 596 S.E.2d 22 (2004). But see *Lopez v. State*, 888 So. 2d 693 (Fla. App. 2004).

The facts of *Kilday, supra*, present an excellent illustration of how the principles of *Crawford* operate under circumstances similar to those presented here. In *Kilday*, police were called to a hotel by the hotel manager's daughter, after the manager asked a resident (the declarant) about an injury the manager observed on her body, and the declarant admitted she had been intentionally burned by her live-in boyfriend (the defendant). Police officers arrived and encountered the declarant in the lobby, upset, frightened, and reluctant to speak to the officers. She told the police that she had been beaten by the defendant on a number of occasions, including that day. Because of the declarant's reticence to speak, a female detective was summoned, who met the declarant in the lobby and asked the declarant more questions about her visible injuries. Finally, after the defendant was arrested outside the hotel, the detective conducted a tape-recorded interview with the declarant in the declarant's hotel room. *Id.*

Applying *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the California Court of Appeals concluded that the third and second statements were testimonial, but the first was not. Considering the statements in reverse order, the court explained that the third statement, taken in an interview in the declarant's hotel room, was substantially similar to the custodial statement at issue in *Crawford*. The second statement was testimonial, according to the court, because the detective was acting in an investigatorial capacity in anticipation of an eventual criminal prosecution and because at that time, the area had been secured and the police had assessed and resolved any exigencies. The court also noted that before questioning the declarant, the detective had learned what was going on from the police officers who had initially responded; this allowed the detective to conduct a more purposeful and focused questioning. The court stated that where a different officer had been summoned to the scene to question the victim, focus had clearly shifted from securing a scene to the production of evidence. See *People v. Kilday*, 123 Cal. App. 4th 406, 20 Cal. Rptr. 3d 161 (2004), *review granted* 105 P.3d 114, 23 Cal. Rptr. 3d 693 (2005).

The first statement, however, was found to not be testimonial. When the statement was made, the officers were not aware of the nature of the crime at issue or the identity of the alleged assailant, whether the defendant was on or near the premises, whether he was armed or dangerous, or whether the declarant needed medical attention. The court declined to adopt a blanket rule that all statements obtained by police officers responding to emergency calls were nontestimonial; rather, the court stated that the determination whether the statement is testimonial was a case-specific, fact-intensive inquiry, centering around the principles of *Crawford* we have discussed above. Since the officers in *Kilday* were, when the first statement was made, still principally in the process of securing and assessing the scene, the California court concluded that the statement elicited was not testimonial. See *id*.

Similarly, the statements at issue in this case were not testimonial, because they were made while officers had barely begun the process of assessing and securing the scene. The trial court drew an entirely appropriate distinction between those statements

and Sherman's testimony regarding later statements made by the declarant in response to interrogation, which were excluded from evidence. The trial court did not err in concluding that the statements at issue in this appeal were not testimonial statements within the meaning of *Crawford*.

Because the U.S. Supreme Court specifically referred to testimonial statements in its holding in *Crawford*, the effect of the Confrontation Clause on the admission of nontestimonial hearsay statements post-*Crawford* is unclear. See *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004), citing *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Court made no explicit statement regarding nontestimonial statements but did suggest that either such statements required no Confrontation Clause scrutiny or that prior standards developed under *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), *overruled, Crawford, supra*, or its progeny still applied to nontestimonial hearsay evidence. See *Vaught, supra*.

However, we need not answer that question in this case because, even under the standards developed under *Roberts, supra*, the nontestimonial hearsay at issue in this case would be admissible. In *Roberts*, the U.S. Supreme Court determined that when a witness is unavailable for cross-examination, his or her statements are admissible only if they bear adequate indicia of reliability. Reliability can be inferred, without more, in a case in which the evidence falls within a firmly rooted hearsay exception. *Vaught, supra*. The hearsay exception for excited utterances is firmly rooted. See, *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992); *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990). Consequently, this nontestimonial hearsay is admissible regardless of whether it is subject to Confrontation Clause scrutiny.

The trial court correctly overruled Hembertt's Confrontation Clause objection to the nontestimonial hearsay statements at issue in this appeal. We reject Hembertt's second and final assignment of error.

CONCLUSION

The county court properly determined that Sherman's testimony regarding statements made by the alleged victim were properly admissible under the excited utterance exception to the

hearsay rule, and were not barred by the Confrontation Clause. The district court correctly affirmed the judgment of the county court. The district court's judgment is affirmed.

AFFIRMED.

WASTE CONNECTIONS OF NEBRASKA, INC., A DELAWARE CORPORATION, DOING BUSINESS AS MIDWEST REFUSE AND RECYCLING SERVICE, INC., AND BUTLER COUNTY LANDFILL, INC., A NEBRASKA CORPORATION, APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A CITY OF THE PRIMARY CLASS OF THE STATE OF NEBRASKA, APPELLEE.

697 N.W.2d 256

Filed May 27, 2005. No. S-03-1356.

1. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; 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. **Constitutional Law: Ordinances: Appeal and Error.** The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
3. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.
4. **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.
5. **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.
6. **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.
7. **Constitutional Law: Discrimination: States.** The dormant Commerce Clause is the negative implication of the Commerce Clause. Under the dormant Commerce Clause, states may not enact laws that discriminate against or unduly burden interstate commerce.
8. **Constitutional Law: Political Subdivisions: Discrimination: States.** The dormant Commerce Clause denies states, and their political subdivisions, the power to unjustifiably discriminate or burden the interstate flow of articles of commerce.
9. **Constitutional Law: Ordinances: States.** The equal treatment of in-state and out-of-state haulers under an ordinance is not a burden on interstate commerce; rather, it is a

burden on intrastate commerce, which is not protected under the dormant Commerce Clause.

10. **Equal Protection: Statutes.** Equal protection guarantees that similar persons will be dealt with similarly by the state, but does not foreclose the state from classifying persons or from differentiating one class from another when enacting legislation.
11. **Equal Protection.** The Equal Protection Clause simply keeps governmental decision-makers from treating differently persons who are in all relevant aspects alike.
12. **Equal Protection: Statutes.** In an equal protection challenge, when a fundamental right or suspect classification is not involved, the act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose.
13. **Equal Protection: Statutes: Proof.** The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause.
14. **Constitutional Law: Taxation.** The uniformity and proportionality requirements of Neb. Const. art. VIII, § 1, do not apply to excise taxes.
15. **Taxation: Words and Phrases.** An excise tax is defined as a tax imposed on the manufacture, sale, or use of goods, or on an occupation or activity.
16. **Actions: Pleadings: Proof.** There is a fundamental principle that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue.
17. **Actions: Proof.** The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery.

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

Stephen D. Mossman and J.L. Spray, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellants.

Dana W. Roper, Lincoln City Attorney, Margaret Blatchford, and William F. Austin, of Erickson & Sederstrom, P.C., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Waste Connections of Nebraska, Inc. (Waste Connections), and Butler County Landfill, Inc. (collectively the appellants), sought declaratory judgment and injunctive relief and challenged the constitutionality of an occupation tax imposed by the City of Lincoln on licensed haulers of solid waste. The district court denied the appellants' motion for injunction. Thereafter, the appellants filed an amended verified petition, which set forth an

additional allegation that the city had judicially admitted that the occupation tax did not apply to the appellants under an exception to the tax because a portion of their waste was destined for interstate commerce. The appellants then filed a second motion for injunction, which was denied by the district court. The district court dismissed with prejudice all of the appellants' theories of recovery. The appellants filed an appeal, and we granted their motion to bypass the Nebraska Court of Appeals.

BACKGROUND

Waste Connections is a Delaware corporation authorized to do business in the State of Nebraska. Waste Connections does business in the city as Midwest Refuse and Recycling Service, Inc., a licensed solid waste hauler which controls an estimated 20 percent of Lincoln's solid waste. Waste Connections also operates two solid waste landfills in Nebraska: Butler County Landfill, which is located outside David City, and G & P Landfill, which is located outside Milford. The appellants allege that of the approximately 39 licensed solid waste haulers servicing Lincoln, Waste Connections is the only one not owned by residents of Lincoln or Lancaster County. The appellants claim that Waste Connections is also the only licensed hauler in the Lincoln solid waste market that does not regularly take Lincoln-generated waste to the Lincoln-operated public landfill, commonly referred to as the "Bluff Road Landfill." Instead, Waste Connections hauls Lincoln-generated waste to the Butler County Landfill and to the G & P Landfill. According to the appellants, these facilities charge less than the $17-per-ton disposal fee charged at the Bluff Road Landfill.

In 1992, the Nebraska Legislature enacted the Integrated Solid Waste Management Act (the Act). See Neb. Rev. Stat. § 13-2001 et seq. (Reissue 1997 & Cum. Supp. 2004). The Act set waste reduction and recycling goals, banned selected materials from landfills, and required local jurisdictions to prepare comprehensive solid waste management plans. In response to the Act, the city, through its comprehensive solid waste management plan, established programs for the collection and processing of banned materials. The city also initiated a countywide recycling program and a household hazardous waste collection

program. Historically, these programs have been funded in part by the gate fees from the Bluff Road Landfill.

The city acknowledges that Waste Connections' deportation of waste outside the city negatively affected the revenues collected by the Bluff Road Landfill and, therefore, revenue used to fund the city's comprehensive solid waste management program. In response, the city sought a mechanism to ensure that its waste management programs continued to be offered in the city. The city states that it contemplated the adoption of a flow control ordinance, which would have ensured that all waste generated within the jurisdiction would be directed to the Bluff Road Landfill, but recognized that such ordinances had not been received favorably by the U.S. Supreme Court. Therefore, the city instead adopted an occupation tax, which would fund the city's various waste collection programs, and reduced the tipping fee at the Bluff Road Landfill from $17 to $10. According to the city, the purpose of the tipping fee reduction was so that the tipping fee would reflect the actual cost of the landfill operation and not the subsidies for the various collection programs.

On March 17, 2003, Lincoln enacted ordinance No. 18149 and resolution No. A-82000. Ordinance No. 18149 amended Lincoln Mun. Code § 8.32 (1991) relating to solid wastes. Among other things, ordinance No. 18149 eliminated the previous annual occupation tax of $100 per refuse vehicle and established in lieu thereof an occupation tax of $7 per ton on all refuse collected within corporate limits of the city or any refuse deposited at the public sanitary landfills. Under § 5(d)(1) of ordinance No. 18149, the occupation tax is not imposed on refuse destined for deposit at any location outside the state. Resolution No. A-82000, in turn, reduced the tipping fees at the Bluff Road Landfill from $17 per ton to $10 per ton. Both measures were effective June 1, 2003.

Thereafter, the appellants instituted the present action. The appellants sought declaratory judgment pursuant to Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995 & Cum. Supp. 2004) and a temporary and permanent injunction pursuant to Neb. Rev. Stat. § 25-1062 et seq. (Reissue 1995 & Cum. Supp. 2004) on the bases that ordinance No. 18149 violates the dormant Commerce Clause and the 14th Amendment and that the occupation tax is

not uniform, in violation of art. VIII, § 1, of the Nebraska Constitution, and is confiscatory.

Shortly following the filing of the appellants' verified complaint, the district court held a temporary injunction hearing. Following this hearing, the district court entered its first order. In this order, the district court found that the purpose of the ordinance was to raise revenue, not regulate flow; that the occupation tax did not violate the Commerce Clause; that the categories in the ordinance are "logical and reasonable"; that the occupation tax is not confiscatory; and that the ordinance is constitutional and authorized by statute.

The appellants then filed a verified amended complaint in which they set forth the additional allegation that the city had judicially admitted that waste destined for material recovery facilities is exempt from the occupation tax. Material recovery facilities are facilities which sort out garbage and place the recyclables from the garbage into the stream of commerce. As alleged by the appellants, the Butler County Landfill is a material recovery facility and, therefore, waste destined for the facility is exempt from the tax; thus, there is no basis for waste destined for that facility to be weighed prior to leaving the city limits.

The appellants then filed a second motion for temporary injunction on the verified amended complaint. A hearing was held on this motion, and the district court entered its second order. In that order, the court held that the new allegation contained in the appellants' verified amended petition was without merit and that the appellants had not sufficiently shown irreparable injury entitling them to injunctive relief. The district court also held in the second order that under the "balance test" set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), the burden imposed on the plaintiffs is not clearly excessive in relation to the putative local benefit of raising revenue. Subsequently, the district court entered its third order in which it dismissed with prejudice all theories of recovery in the appellants' verified amended petition. The appellants timely appealed, and we granted their motion to bypass the Court of Appeals pursuant to Neb. Ct. R. of Prac. 2B (rev. 2002) and Neb. Rev. Stat. § 24-1106(2) (Reissue 1995).

ASSIGNMENTS OF ERROR

The appellants assign, restated and consolidated, that the district court erred in concluding that (1) ordinance No. 18149 did not violate the dormant Commerce Clause of the U.S. Constitution; (2) ordinance No. 18149 did not violate the Equal Protection Clauses of the U.S. and Nebraska Constitutions; (3) ordinance No. 18149 is statutorily authorized; (4) ordinance No. 18149 did not contain unreasonable classifications in violation of art. VIII, § 1, of the Nebraska Constitution; and (4) the occupation tax contained in ordinance No. 18149 is reasonable and not a confiscatory fee.

STANDARD OF REVIEW

[1] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; 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. *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004).

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

ANALYSIS

Relying on various federal cases, the appellants argue on appeal that the occupation tax imposed by the ordinance is actually a fee, not a tax. The appellants also argue that the district court erred in determining that ordinance No. 18149 is constitutional. They claim that the ordinance violates the dormant Commerce Clause in that it is discriminatory in both purpose and effect. Applying the two-tiered analysis adopted by the U.S. Supreme Court, the appellants claim that the ordinance is subject to the "strictest scrutiny" because it discriminates against interstate commerce. Brief for appellants at 21. Consequently, the burden falls on the city to demonstrate that all other alternatives to the ordinance are ineffective, a burden the appellants maintain the city cannot meet. See *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 114 S. Ct. 1345,

128 L. Ed. 2d 13 (1994). The appellants further claim that the ordinance violates their equal protection rights because it treats licensed waste haulers such as Waste Connections differently than other haulers. For example, the ordinance does not require that the occupation tax be paid by homeowners who haul refuse from their residence to the public sanitary landfills, individuals hauling or conveying building rubbish or demolition, or individuals hauling lawn waste. The appellants maintain that there exists no rational basis for the creation of this distinction. Finally, the appellants argue that the ordinance is not authorized by statute because it is not uniform, which violates the Nebraska Constitution, and that the occupation tax is confiscatory.

The city argues that the district court properly dismissed the appellants' theories of recovery. It maintains that contrary to the appellants' contentions, the levy imposed by ordinance No. 18149 is a true and valid tax. It further claims that because the issue is the constitutionality of a tax, the appropriate dormant Commerce Clause test to apply is the four-part analysis found in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). Under that test, a court looks at whether (1) the tax is applied to an activity with a substantial nexus with the taxing state, (2) the tax is fairly apportioned, (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly related to the services provided by the state. The city claims that if the tax meets this test, as the city maintains it does, the tax is deemed valid and the court need not undertake a balancing of benefits and burdens of the tax.

Butler County Landfill Standing

The city contends that Butler County Landfill lacks standing to bring the present appeal. We disagree.

[3,4] Standing is the legal or equitable right, title, or interest in the subject matter of the controversy. *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004). It is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Id*. Either a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding. *In re Trust Created by Del Castillo*, 268 Neb. 671, 686 N.W.2d 900 (2004).

[5,6] 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. *County of Sarpy v. City of Gretna, supra*. 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. *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002).

The ordinance imposes an occupation tax of $7 on each ton of refuse collected by a refuse hauler within the corporate limits of the city. The appellants allege that the imposition of this tax makes it financially unfeasible for Waste Connections to continue dumping its refuse at the Butler County Landfill, thereby reducing Butler County Landfill's revenues. We conclude that the appellants have alleged an injury sufficient to give Butler County Landfill standing in the present action. See *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003) (holding that imminent loss of business as result of enforcement of contested state constitutional amendment satisfied injury-in-fact requirement of standing).

Dormant Commerce Clause

[7,8] The appellants claim that the district court erred in determining that ordinance No. 18149 does not violate the dormant Commerce Clause. The Commerce Clause grants Congress the authority to regulate commerce. U.S. Const. art. I, § 8, cl. 3. The dormant Commerce Clause is the negative implication of the Commerce Clause. Under the dormant Commerce Clause, states may not enact laws that discriminate against or unduly burden interstate commerce. *South Dakota Farm Bureau, Inc. v. Hazeltine, supra* (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992)). The concern of the dormant Commerce Clause is the raising of barriers by states against the free flow of interstate commerce. Therefore, the clause denies states, and their political subdivisions, the power to unjustifiably discriminate or burden the interstate flow of articles of commerce. See, *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 114 S. Ct. 1345, 128

L. Ed. 2d 13 (1994); *Blue Circle Cement v. Board of County Com'rs*, 27 F.3d 1499 (10th Cir. 1994). In the present case, the ordinance does not burden interstate commerce, and therefore, it does not violate the dormant Commerce Clause.

Ordinance No. 18149 states in pertinent part:

> (a) There is hereby imposed an occupation tax of $7.00 on each ton of refuse collected by a refuse hauler within the corporate limits of the City of Lincoln, and a tax of $7.00 on each ton of refuse collected by a refuse hauler outside the corporate limits of the City of Lincoln and deposited in the public sanitary landfills as designated in Section 8.32.040 of the Lincoln Municipal Code. The occupation taxes authorized herein shall be used exclusively for funding solid waste management programs, including the payment of principal and interest on revenue bonds issued by the City of Lincoln.
>
> . . . .
>
> (c) All refuse collected by refuse haulers within the corporate limits, whether destined for deposit in the public sanitary landfills as designated in Section 8.32.040 or for deposit elsewhere, shall, before leaving the corporate limits of the City of Lincoln, be weighed at the scales located at the public sanitary landfill at 56th Street and Bluff Road or at such other scales approved by the Director of Public Works and Utilities. The refuse hauler shall, at that time, advise the sanitary landfill operator or his designated representative of the amount of such tonnage destined for deposit outside the State of Nebraska. Any refuse not being deposited at the public sanitary landfills designated under Section 8.32.040, whether destined for deposit inside or outside the State of Nebraska, shall be weighed and the driver of the refuse vehicle shall be provided a certificate of weight which shall be displayed upon demand to any police officer of the City of Lincoln.
>
> (d) The occupation tax provided herein shall not be imposed upon (1) refuse destined for deposit at any location outside the State of Nebraska, or (2) building rubbish or demolition debris lawfully being deposited in the 48th Street public sanitary landfill.

[9] The ordinance imposes an occupation tax of $7 per ton on all haulers operating within the city limits without regard to a hauler's locality. Thus, a hauler from another state pays the same tax as a hauler from Nebraska if waste collected within the city limits is destined for deposit within Nebraska. Similarly, if the waste is destined for deposit outside Nebraska, neither a hauler from Nebraska nor a hauler from any other state is required to pay the tax. This equal treatment of in-state and out-of-state haulers under an ordinance is not a burden on interstate commerce; rather, it is a burden on intrastate commerce, which is not protected under the dormant Commerce Clause. We therefore determine that the ordinance does not violate the dormant Commerce Clause.

Equal Protection

The appellants claim that the district court erred in failing to find that the ordinance unconstitutionally violates the Equal Protection Clauses of the U.S. Constitution and the Nebraska Constitution. The appellants contend that the ordinance violates equal protection because it treats licensed waste haulers differently than homeowners who haul refuse from their residence to the public sanitary landfills, individuals hauling or conveying building rubbish or demolition, and individuals hauling lawn waste.

[10,11] Equal protection guarantees that similar persons will be dealt with similarly by the state, but does not foreclose the state from classifying persons or from differentiating one class from another when enacting legislation. *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995). The clause simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike. *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000).

[12,13] In an equal protection challenge, when a fundamental right or suspect classification is not involved, the act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose. *Gas 'N Shop v. City of Kearney, supra*. The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003).

The appellants claim that there is no rational basis for failing to charge an occupation tax to all haulers of waste within the city limits. The city's brief claims there is a rational basis for exempting individuals who haul their refuse to landfills because these individuals are not "refuse haulers" as set forth in the ordinance. Brief for appellee at 22. A further rational basis is that the city wants to encourage households to bring their trash to the landfill as opposed to illegal dumping along the roadside. As for exempting building rubbish and demolition debris, this refuse can be deposited only at the 48th Street public landfill, where it is beneficial as a fill. The city, therefore, has provided a rational basis even though it was not its burden to do so. The appellants, on the other hand, have failed to offer any evidence that the tax is not rationally related to the city's purposes of imposing a tax. Consequently, the appellants have not met their burden of showing that the ordinance violates equal protection.

UNIFORMITY

The appellants further claim that the ordinance is not statutorily authorized because the occupation tax is not uniform.

[14,15] Neb. Const. art. VIII, § 1, provides as follows:

> The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. . . . Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises . . . . Taxes other than property taxes may be authorized by law.

In *State v. Galyen*, 221 Neb. 497, 378 N.W.2d 182 (1985), we held that the uniformity and proportionality requirements of Neb. Const. art. VIII, § 1, do not apply to excise taxes. An excise tax is defined as a "tax imposed on the manufacture, sale, or use of goods . . . or on an occupation or activity." Black's Law Dictionary 605 (8th ed. 2004). See *State v. Galyen, supra*.

The "occupation tax" in the present case is imposed on all licensed haulers who wish to haul refuse within the city limits. As such, it is an excise tax, not a fee as alleged by the appellants, and is not subject to the uniformity and proportionality requirement of the Nebraska Constitution. See *Licking v. Hays Lumber Co.*, 146 Neb. 240, 19 N.W.2d 148 (1945) (holding tax imposed as annual charge upon right to continue corporate existence is excise tax).

CONFISCATORY

In *Hoyt Bros. v. City of Lincoln*, 130 Neb. 79, 263 N.W. 898 (1936), the undisputed evidence was that Lincoln was charging the plaintiff's peddlers a monthly license fee of $15 and a monthly occupation tax of $40, for a total of $55 per month. The evidence further showed that each peddler's average earnings was only $2 per day. This court held that the ordinances approving these charges, as applicable to the plaintiff, were confiscatory and amounted to a prohibition to transact business in Lincoln. This court noted that if the license fee and occupation tax were enforced, "[p]rofit, the incentive to private enterprise, will be gone." *Hoyt Bros. v. City of Lincoln*, 130 Neb. at 81, 263 N.W. at 899.

Another instructive case is *Petersen Baking Co. v. City of Fremont*, 119 Neb. 212, 228 N.W. 256 (1929). In *Petersen Baking Co.*, we held that where the net profit of a bakery was $420 per year, and the tax imposed by Fremont was $300, the incentive to sell and deliver bread in Fremont would be destroyed, amounting to an illegal prohibition of the right to do so.

[16,17] Since it is the appellants' contention that the occupation tax is confiscatory, it is the appellants' burden to prove this allegation. It is a fundamental principle that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue. *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991). The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery. *Id.*; *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996).

The appellants have failed to put forth any evidence establishing that they are unable to carry on their business as a result of the occupation tax. Because they have failed to meet their burden of proof, we determine that the appellants' final claim is without merit.

CONCLUSION

For the reasons set forth in this opinion, we affirm the district court's denial of the appellants' requests for injunctive relief.

AFFIRMED.

KERI LEA EMERY, APPELLEE, V. ROBBIE EXTON MOFFETT, APPELLANT.

697 N.W.2d 249

Filed May 27, 2005. No. S-04-225.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Child Support.** There is no precise mathematical formula for calculating child support when subsequent children are involved; the calculation is left to the discretion of the court as long as the court considers the obligations to both families and the income of the other parent of the subsequent children.
3. **Child Support: Appeal and Error.** Whether a child support order should be retroactive is entrusted to the discretion of the trial court and will be affirmed absent an abuse of discretion.
4. **Modification of Decree: Child Support: Time.** Absent equities to the contrary, modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification.
5. **Child Support.** In the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent cannot pay retroactive support and still meet current obligations.
6. **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.
7. **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.
8. **Attorney Fees: Evidence: Appeal and Error.** Evidence concerning the time required for preparation and trial of a case and customary charges is needed to meaningfully review an award of attorney fees.
9. **Modification of Decree: Taxation.** A tax dependency exemption is nearly identical in nature to an award of child support or alimony.
10. **Child Support: Taxation: Presumptions.** The general rule is that a custodial parent is presumptively entitled to the federal tax exemption for a dependent child. But, a court may exercise its equitable powers to allocate the exemption to a noncustodial parent.
11. **Child Support: Taxation: Appeal and Error.** An award of a dependency exemption is reviewed de novo to determine whether the trial court abused its discretion.

Appeal from the District Court for Douglas County: J. RUSSELL DERR, Judge. Affirmed in part, and in part reversed.

James R. Kozel for appellant.

Richard J. Henkenius for appellee.

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

CONNOLLY, J.

Robbie Exton Moffett appeals the district court's order increasing his child support obligation, ordering the increase retroactive to the date of the application, and awarding the dependency exemption and attorney fees to the appellee, Keri Lea Emery. On appeal, Moffett contends that the district court abused its discretion when it (1) incorrectly calculated child support because it failed to adequately consider his obligation to three subsequent children, (2) made the increase in child support retroactive because he is unable to pay the retroactive award, (3) awarded attorney fees to Emery, and (4) allowed Emery to keep the dependency exemption. We affirm the district court's support calculation but reverse the award of retroactive support and attorney fees.

BACKGROUND

Moffett and Emery's marriage was dissolved in 1992; the couple had one child, Shaunessy Robyn Emery, born July 21, 1987, and Emery was awarded custody. The court ordered Moffett to pay $228 per month in child support. Because the award of retroactive support hinges on accusations that Moffett delayed the proceedings, we set out the pertinent dates. In June 1999, the Nebraska Health and Human Services System notified Emery that it would refer the original support order to the authorized attorney for possible modification because the child support guidelines indicated a 10-percent or greater increase from the current support amount. Moffett also received a copy of the letter. Emery, however, did not file an application for modification at that time.

Approximately 32 months later, in February 2002, Emery applied for a modification of child support. On February 21, Moffett entered a voluntary appearance and waived service of summons. In July, Moffett filed a notice that he served discovery responses. Although the record is not clear, some time between July and September, the case was dismissed by the court, but was reinstated after a joint stipulation was filed.

On February 26, 2003, a referee held a hearing. At the hearing, both parties presented evidence about their incomes. The evidence showed that Moffett had a monthly net income of $2,043 and average living expenses of $2,829 and that he was married and had three children, ages 5, 2, and 1. He testified that his wife did not work because of the high cost of childcare. The record also shows that Moffett does not have any investments or savings.

The referee calculated support by determining the support obligations for the three subsequent children at $884 and then deducting that amount from Moffett's income before calculating support for Shaunessy. This resulted in $369.56 per month for Shaunessy's support. The referee determined that Moffett had not acted in bad faith and that Moffett could not afford to pay retroactive support. Therefore, the referee did not make support retroactive to the date of the application for modification. The referee also did not award attorney fees.

Emery filed exceptions to the referee's report. Citing to *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998), the district court determined support by using a joint custody support calculation for the three subsequent children. The court stated that using the joint support figure took into consideration that a family living together has fewer expenses than parents who are maintaining two homes. As a result, the court subtracted only $404.05 from Moffett's income and calculated support for Shaunessy at $475.90 per month.

The court also ordered retroactive support. The court stated that had the application been filed several years before, there would have been a significant increase in support, and that Moffett had failed to timely respond to discovery demands. The record contains a notice that answers to discovery requests were filed, but does not include a motion to compel or other information about delays. The court also awarded attorney fees. The record, however, does not contain evidence of the amount of time Emery's attorney spent on the case or the charges for his services. Instead, the only evidence is Emery's attorney's oral unsworn statement at the hearing on the motion for new trial that Emery expended around $2,800. Finally, the court ordered that Moffett pay the retroactive support and fees after Shaunessy reached the age of majority by paying 19 additional installments of $300.53.

The court did not address the dependency exemption, which Emery had previously been awarded; but nothing in the record shows that Moffett asked the court to award him the exemption.

Moffett moved for a new trial, contending that the court erred in its support calculations, retroactive award, and award of attorney fees. At the hearing on the motion, Moffett's attorney conceded that it would be difficult to argue that attorney fees were not warranted in the case. The attorney did not, however, waive the issue. The court denied the motion, and Moffett appeals.

ASSIGNMENTS OF ERROR

Moffett assigns, rephrased, that the district court erred by (1) incorrectly calculating support, (2) making the support retroactive, (3) ordering support after the age of majority, (4) awarding attorney fees to Emery, and (5) not awarding him the dependency exemption.

STANDARD OF REVIEW

[1] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003).

ANALYSIS

Calculation of Child Support

Moffett argues that the district court should have followed the referee's recommendation when it calculated support. However, relying on *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998), Emery argues that the referee improperly calculated support and that the district court correctly determined the amount of child support.

In *Prochaska*, the Nebraska Court of Appeals held that when determining a support obligation involving children from a subsequent marriage, the support for each child should be determined after a deduction for support to the subsequent family. In *Prochaska*, the trial court calculated a deviation from the guidelines by first using the guidelines to determine the support obligation for the subsequent child and then deducted that amount

from the parent's income before calculating support for the children from the previous marriage. The Court of Appeals held that such a method improperly provided a benefit to the parent's current family at the expense of the other family. The court then recalculated support using "interdependent arithmetic," with little explanation of the method used. *Id.* at 308, 573 N.W.2d at 781.

[2] We addressed *Prochaska* and the method of considering subsequent children when calculating support in *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001). In *Brooks*, we determined that there is no precise mathematical formula for calculating child support when subsequent children are involved. We determined that the calculation is left to the discretion of the court as long as the court considered the obligations to both families and the income of the other parent of the subsequent children. Thus, we held the trial court has discretion to choose if and how to calculate the deviation, but must do so in a manner that does not benefit one family at the expense of the other.

The referee calculated support using the method that was disapproved of in *Prochaska*. Here, the district court recalculated support using a joint custody calculation for support for Moffett's three subsequent children in order to consider the obligation to both families without benefiting one family over the other. The court noted several ways it could perform the calculation and chose a method that it found most equitable under the circumstances. Because the court calculated support in an interdependent manner that considered the obligation to both families, the court did not abuse its discretion.

Retroactive Support

Moffett argues that because he cannot afford to pay a retroactive order and did not act in bad faith, the district court erred in ordering the support to be retroactive.

[3-5] Whether a child support order should be retroactive is entrusted to the discretion of the trial court and will be affirmed absent an abuse of discretion. See *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). Absent equities to the contrary, modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification. *Noonan v. Noonan*, 261 Neb. 552, 624

N.W.2d 314 (2001). But circumstances may exist when a noncustodial parent cannot afford to pay retroactive support. *Riggs v. Riggs, supra*. The Court of Appeals has addressed that issue and held that in the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent cannot pay retroactive support and still meet current obligations. *Cooper v. Cooper*, 8 Neb. App. 532, 598 N.W.2d 474 (1999).

Here, the record shows that Moffett's average living expenses exceed his monthly income. Thus, the record shows that he cannot afford to pay retroactive support and still meet his current obligations. The district court noted a delay in response to discovery requests when it ordered retroactive support, but the record does not contain evidence that Moffett delayed the proceedings. Instead, the record supports the conclusion that Emery did not promptly pursue the action.

It appears that the court recognized that Moffett could not afford to pay retroactive support but delayed payment until after Shaunessy reached the age of majority. But here, the support was not previously ordered and forcing payment after the age of majority obscures the fact that under the present circumstances, Moffett cannot afford retroactive support. Accordingly, we determine that because Moffett cannot afford to pay retroactive support and meet current obligations and because the record does not show that he acted in bad faith, the district court abused its discretion when it awarded retroactive support.

Attorney Fees

Moffett next contends that the court erred when it awarded Emery attorney fees of $1,000. He argues that the record lacks evidence to allow a meaningful review.

[6,7] 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. *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002).

[8] The Court of Appeals has held that evidence concerning the time required for preparation and trial of the case and customary charges is needed to meaningfully review an award of attorney fees. *Mace v. Mace*, 9 Neb. App. 270, 610 N.W.2d 436 (2000). We agree. Without a stipulation or evidence, an award appears arbitrary and leaves us with nothing in the record to allow for meaningful review. See *id*. We further note that adducing such evidence is not onerous. Because there is no evidence in the record to support the fee award, we reverse the award of attorney fees.

Dependency Exemption

Moffett contends that the court should have awarded him the dependency exemption for Shaunessy. However, he did not ask the district court to award him the exemption but contends that we should award it to him through our de novo review on appeal.

[9-11] A tax dependency exemption is nearly identical in nature to an award of child support or alimony. See *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991). We have stated that the general rule is that a custodial parent is presumptively entitled to the federal tax exemption for a dependent child. See, I.R.C. § 152(e) (2000); *Hall v. Hall, supra*. But, we have also held that a court may exercise its equitable powers to allocate the exemption to a noncustodial parent. *Hall v. Hall, supra*. An award of a dependency exemption is reviewed de novo to determine whether the trial court abused its discretion. See *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

Here, the custodial parent, Emery, has previously taken the dependency exemption. Nothing in our review of the record convinces us that the district court abused its discretion by not changing that. Accordingly, we determine that this assignment of error is without merit.

CONCLUSION

The district court did not abuse its discretion when calculating support, and we affirm the award. We also affirm the award of the dependency exemption to Emery. However, the court did abuse

its discretion when it ordered retroactive support and awarded attorney fees. Accordingly, we affirm in part, and in part reverse.

AFFIRMED IN PART, AND IN PART REVERSED.

JASON BLAIR, APPELLANT AND CROSS-APPELLEE, V. STATE FARM INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

DALE E. PRICKETT, PERSONAL REPRESENTATIVE OF THE ESTATE OF TRACI A. PRICKETT, DECEASED, APPELLANT AND CROSS-APPELLEE, V. STATE FARM INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

DANIEL R. KOST, SR., PERSONAL REPRESENTATIVE OF THE ESTATE OF DANIEL R. KOST, JR., DECEASED, APPELLANT AND CROSS-APPELLEE, V. STATE FARM INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

697 N.W.2d 266

Filed May 27, 2005. Nos. S-04-280, S-04-308, S-04-325.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **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. **Insurance: Contracts: Motor Vehicles: States.** Under Neb. Rev. Stat. § 44-6408 (Reissue 2004), when an insurer delivers, issues for delivery, or renews an automobile liability policy, the policy must provide underinsured motorist coverage if Nebraska is the state where the insured intends to keep the vehicle most often compared to any other state during the policy period.

Appeals from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded for further proceedings.

Jeff Lapin, of Friedman Law Offices, for appellant Jason Blair.

Robert F. Bartle, of Bartle & Geier Law Firm, for appellant Dale E. Prickett.

William D. Sutter, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellant Daniel R. Kost, Sr.

Cathy S. Trent, Stephen L. Ahl, and Melanie J. Whittamore-Mantzios, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

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

CONNOLLY, J.

After running a red light, an underinsured driver struck Marcelle A. DeWitt's vehicle. Jason Blair, the driver of DeWitt's vehicle, was injured, and Daniel R. Kost, Jr., and Traci A. Prickett, passengers in the vehicle, were killed. The automobile liability policy that insured DeWitt's vehicle, issued by State Farm Insurance Company (State Farm), did not provide underinsured motorist (UIM) coverage. But Blair and the personal representatives of the estates of Kost and Prickett (collectively the appellants) sued State Farm, alleging that Neb. Rev. Stat. § 44-6408 (Reissue 2004) required the policy to provide such coverage. Section 44-6408(1) requires an automobile liability insurance policy to provide UIM coverage if the policy is "delivered, issued for delivery, or renewed with respect to any motor vehicle principally garaged in [Nebraska]." The district court granted summary judgment for State Farm.

We hold that under § 44-6408, when an insurer delivers, issues for delivery, or renews an automobile liability policy, the policy must provide UIM coverage if Nebraska is the state where the insured intends to keep the vehicle most often compared to any other state during the policy period. Because a fact question exists whether—when her parents renewed the policy—Nebraska was the state where DeWitt intended to keep her vehicle most often compared to any other state during the policy period, we remand the cause for further proceedings.

BACKGROUND

DeWitt is a resident of Wyoming, but attended college in Nebraska from 1997 to 2000. In December 1999, DeWitt loaned her vehicle to her boyfriend. Her boyfriend went to a dance club

with Blair, Kost, and Prickett. After leaving the club, DeWitt's boyfriend decided that he had drunk too much to drive safely and asked Blair to drive DeWitt's vehicle. Blair agreed. As they were proceeding through an intersection, the driver of another vehicle, who was fleeing police, ran a red light and crashed into DeWitt's vehicle. Kost and Prickett were killed, and Blair suffered serious injuries. We note that DeWitt's boyfriend was also injured in the collision, but is not a party to this appeal.

At the time of the collision, State Farm provided automobile liability insurance to DeWitt under a policy issued to her parents, who live in Wyoming. According to the parties, Wyoming, unlike Nebraska, does not require UIM coverage, and it is undisputed that the State Farm policy did not expressly provide for UIM coverage.

Following the collision, the negligent driver's insurer paid the appellants the limits of the driver's policy. But according to the appellants, this did not completely compensate them for their injuries. So, each commenced actions against State Farm. In support of their claims, the appellants relied on § 44-6408. They alleged that DeWitt's vehicle was principally garaged in Nebraska and that as a result, State Farm was required to provide UIM coverage.

Movement of Vehicle

Because the focus of the dispute is on where DeWitt's vehicle was principally garaged, it is necessary to review where DeWitt spent time and where her vehicle was located in 1999. As noted, DeWitt attended college in Nebraska from 1997 to 2000. She estimated that while attending college, she would typically spend 200 days per year in Nebraska. The only periods when she was not in Nebraska were holidays and summers.

During the spring of 1999, DeWitt purchased the vehicle in Lincoln, Nebraska. She did not register her vehicle in Nebraska. But according to DeWitt, in May 1999, after purchasing the vehicle, her mother informed the family's State Farm insurance agent that DeWitt was using the vehicle in Nebraska. DeWitt testified that she believed her mother had filled out a form sent to the family by State Farm.

In June 1999, DeWitt's family renewed the insurance policy. The declarations page sent to them at the time of renewal states

that the policy period was from June 17, 1999, to February 10, 2000.

At the time of the renewal, neither DeWitt nor the vehicle was in Nebraska. Instead, DeWitt had the vehicle with her in New York, where she worked as a nanny over her 1999 summer break. DeWitt did not know if anyone had notified State Farm that the vehicle would be in New York during the summer of 1999. When the nanny job ended, DeWitt returned to Nebraska for the fall 1999 semester. She remained in Nebraska until December 2000.

District Court's Grant of Summary Judgment

State Farm moved for summary judgment in each case. The cases were consolidated for the purposes of the motion.

In support of its motion, State Farm made two arguments. First, it argued that under § 44-6408, the place where a vehicle is principally garaged is the same as the insured's domicile, and that because DeWitt was domiciled in Wyoming, Nebraska law did not require that the policy provide UIM coverage. Second, State Farm argued that in the alternative, the place where DeWitt's vehicle was principally garaged was the place it was being kept at the time that the policy was renewed. According to State Farm, because the vehicle was in New York when the policy was renewed, New York was the place it was principally garaged and therefore, State Farm was not required to provide UIM coverage.

Initially, the court denied summary judgment. But after State Farm moved for reconsideration, the court adopted State Farm's second argument and granted it summary judgment.

ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in granting summary judgment to State Farm.

On cross-appeal, State Farm assigns that the district court erred in failing to conclude that a vehicle is principally garaged in the same place as the insured's domicile.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that

may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Dworak v. Farmers Ins. Exch., ante* p. 386, 693 N.W.2d 522 (2005).

[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. *Destiny 98 TD v. Miodowski, ante* p. 427, 693 N.W.2d 278 (2005).

ANALYSIS

We first note that the case does not require us to resolve a conflict between the law of Nebraska and the law of Wyoming. The parties agree that Nebraska law, specifically § 44-6408, controls whether State Farm was required to provide UIM coverage. Thus, we turn to that statute.

Section 44-6408 provides:

> (1) No policy insuring against liability imposed by law for bodily injury, sickness, disease, or death suffered by a natural person arising out of the ownership, operation, maintenance, or use of a motor vehicle within the United States, its territories or possessions, or Canada *shall be delivered, issued for delivery, or renewed with respect to any motor vehicle principally garaged in this state* unless coverage is provided for the protection of persons insured who are legally entitled to recover compensatory damages for bodily injury, sickness, disease, or death from . . . (b) the owner or operator of an underinsured motor vehicle in limits of twenty-five thousand dollars because of bodily injury, sickness, disease, or death of one person in any one accident and, subject to such limit for one person, fifty thousand dollars because of bodily injury, sickness, disease, or death of two or more persons in any one accident.

(Emphasis supplied.) Whether § 44-6408 required State Farm to provide UIM coverage turns on how to interpret and apply the term "principally garaged."

"Principally Garaged" as Place of Named Insured's Domicile

We begin by considering State Farm's cross-appeal. It argues that we should treat a vehicle as being principally garaged in the

same place as the named insured's domicile. This rule, however, is not consistent with the language of the statute. In choosing to make the UIM coverage requirement depend on where the "motor vehicle" is "principally garaged," the Legislature chose terms which placed the focus of the inquiry on the vehicle's location. But if we adopted State Farm's argument, the focus would not be on the location of the vehicle, but instead on the insured's physical presence and his or her intent to remain in that place. See *In re Estate of Craven*, 265 Neb. 41, 45, 654 N.W.2d 196, 199 (2002) ("domicile is obtained only through a person's physical presence accompanied by the present intention to remain indefinitely at a location or by the present intention to make a location the person's permanent or fixed home"). We cannot read a meaning into a statute that is not there, *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004), and thus, we do not adopt State Farm's domicile argument.

"Principally Garaged" as State Where Insured Intends to Keep Vehicle Most Often During Policy Period

Instead of focusing on the named insured's domicile, we read "principally garaged" to mean where a vehicle is "primarily or chiefly kept." *Chalef v. Ryerson*, 277 N.J. Super. 22, 27, 648 A.2d 1139, 1141 (1994). In other words, a vehicle is principally garaged in the place where it is kept most often. This is consistent with the plain meaning of the words "principally" and "garaged."

Although the term "principally garaged" is not difficult to define, it is difficult to apply in a temporal context. To determine where a vehicle is kept most often, one must establish a defined period of time and then determine the place that the vehicle was located more often than any other place during that time period. The difficulty with § 44-6408 is that it does not clearly specify what defined period should be used to make this calculation.

The trial court concluded that the period for determining whether a vehicle is principally garaged in Nebraska is the period during which the policy was delivered, issued for delivery, or renewed. Here, the last of these three events was the policy's renewal in June 1999. Because it is undisputed that during this period, DeWitt had the vehicle with her in New York, the court concluded that State Farm was not required to provide UIM coverage and granted it summary judgment.

In contrast to the district court's interpretation, the appellants argue that the period to be used in determining where a vehicle is principally garaged is the period during which the policy will be in effect, i.e., the policy period. Thus, according to them, if an insurer delivers, issues for delivery, or renews a policy on a vehicle that the insured intends to keep in Nebraska most often compared to any other state during the policy period, the policy must contain UIM coverage. They argue that a fact question exists whether—when DeWitt's parents renewed the policy—Nebraska was the state where she intended to keep her vehicle most often compared to any other state during the policy period.

We believe that the appellants' argument is the better position because under the district court's reading of § 44-6408, the UIM coverage requirement hinges on happenstance. Two examples demonstrate this point. First, suppose that a resident of Nebraska drives to Wyoming for a 2-week vacation. During that 2-week vacation, the Nebraska resident renews her automobile liability policy. Under the district court's interpretation of § 44-6408, the policy would not be required to contain UIM coverage because during the period when the policy was renewed, the Nebraska resident kept the vehicle exclusively in Wyoming. This would be the result even if the insured intended to keep her vehicle in Nebraska for the remaining 50 weeks during which the policy would be in effect.

Second, assume a resident of Wyoming vacations in Nebraska for 2 weeks and renews her insurance during this period. Under the district court's interpretation of § 44-6408, the policy would be required to provide UIM coverage even if the insured intended to keep her vehicle in Wyoming for the remaining 50 weeks of the policy period. We doubt the Legislature intended to adopt a law which would cause such erratic results. See *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 883, 636 N.W.2d 372, 376 (2001) ("appellate court will, if possible, try to avoid a statutory construction which would lead to absurd results").

[3] The appellants' interpretation of § 44-6408, in contrast to the district court's interpretation, results in a system more likely to reflect the legitimate expectations of both insureds and insurers. Instead of focusing on the location of the vehicle at the exact moment the policy is delivered, issued, or renewed, it focuses on

what state the vehicle will be kept most often during the policy period. If the insured intends to keep the vehicle in Nebraska more often than in any other state, then the policy must comply with the UIM requirement. Therefore, we hold that under § 44-6408, when an insurer delivers, issues for delivery, or renews an automobile liability policy, the policy must provide UIM coverage if Nebraska is the state where the insured intends to keep the vehicle most often compared to any other state during the policy period. Consequently, the district court's grant of summary judgment to State Farm was based on an incorrect interpretation of § 44-6408.

RESOLUTION

Next, we must decide whether the grant of summary judgment can be justified under our interpretation of § 44-6408. The State Farm policy was renewed in June 1999. The policy states the policy period was from June 17, 1999, to February 10, 2000. Thus, summary judgment for State Farm cannot be justified if there is some evidence showing that—at the time the policy was renewed—Nebraska was the state where DeWitt intended to keep her vehicle most often compared to any other state during the policy period. That evidence exists. DeWitt's deposition testimony suggests that at the time the policy was renewed, she intended to spend most of the time during the policy period attending college in Nebraska and that while doing so, she would keep the vehicle with her. Therefore, the court erred in granting summary judgment to State Farm.

CONCLUSION

We reverse the district court's grant of summary judgment to State Farm and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GERRARD and STEPHAN, JJ., not participating.

WRIGHT, J., concurring in the result.

I concur in the result. Neb. Rev. Stat. § 44-6408(1) (Reissue 2004) makes reference to "any motor vehicle principally garaged in this state." As the majority has stated, the term "principally garaged" is not difficult to define, but it makes the application of § 44-6408 difficult.

The requirement for underinsured motor vehicle coverage should be based upon where the vehicle is principally *operated* rather than where it is principally *garaged*, because it is the operation of the vehicle that creates the need for underinsured motor vehicle coverage.

KERI L. CHASE, APPELLEE, V. BEVERLY NETH, DIRECTOR OF THE NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

697 N.W.2d 675

Filed May 27, 2005. No. S-04-501.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **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.
5. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
6. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
7. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
8. **Constitutional Law: Search and Seizure.** The provisions of both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect against unreasonable seizures.
9. **Constitutional Law: Search and Seizure: Evidence.** Inasmuch as the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, the exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect.
10. ____: ____: ____. Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure.

11. **Constitutional Law: Administrative Law: Motor Vehicles: Licenses and Permits: Revocation.** The Fourth Amendment exclusionary rule is inapplicable to administrative license revocation proceedings, except as it may apply indirectly through Neb. Rev. Stat. § 60-498.02(4)(a) (Supp. 2003).
12. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Blood, Breath, and Urine Tests.** Administrative license revocation is a civil remedy with a nonpunitive purpose. Administrative license revocation serves different purposes when it is imposed for refusal to submit to a chemical test. In the context of failing a chemical test, the purpose of administrative license revocation is limited to protecting public health and safety. In the context of refusal to submit to a chemical test, administrative license revocation both protects public health and safety and facilitates the gathering of evidence, which is yet another nonpunitive purpose.
13. **Motor Vehicles: Licenses and Permits: Revocation: Due Process.** Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the 14th Amendment.
14. **Administrative Law: Motor Vehicles: Licenses and Permits: Due Process.** Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.
15. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Reversed and remanded for further proceedings.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellant.

Russel L. Jones, of Jones Law Office, for appellee.

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

STEPHAN, J.

The district court for Lincoln County held that Neb. Rev. Stat. § 60-498.01 (Supp. 2003), which is part of the Nebraska administrative license revocation (ALR) procedure, violates due process rights when applied to persons who refuse to submit to a chemical test of their breath or blood because it does not allow such persons to raise Fourth Amendment challenges at the ALR hearing. The Department of Motor Vehicles filed this timely appeal. Based

upon our independent review, we reverse, and remand for further proceedings.

BACKGROUND

At approximately 1:20 a.m. on November 8, 2003, Nebraska State Patrol Trooper Matthew Naughtin observed a vehicle traveling on U.S. Highway 83 in Lincoln County, Nebraska, without its headlights illuminated. Naughtin stopped the vehicle, which was operated by Keri L. Chase. Naughtin observed that Chase seemed confused, and he detected the odor of alcohol. Naughtin asked Chase for her license, registration, and proof of insurance, but she was unable to produce these documents from among other documents in her purse. Naughtin then asked Chase to exit her vehicle and walk back to his patrol unit. Once inside the patrol unit, Naughtin again detected the odor of alcohol as Chase spoke to him.

Naughtin asked Chase if she had been drinking, and she replied that she had three " 'Grand Marniers boom boom boom.' " Naughtin administered several field sobriety tests, which Chase was unable to perform successfully. Naughtin then attempted to administer a preliminary breath test; Chase refused, despite Naughtin's explanation that refusal to take the test constituted a separate offense. At that point, Naughtin arrested Chase for driving under the influence (DUI) and transported her to the Great Plains Regional Medical Center in North Platte, Nebraska. He requested that she submit a blood sample for alcohol testing, again advising her that refusal to submit to the test was a separate chargeable offense. According to Naughtin, Chase refused to give a blood sample for the test.

Chase did not testify at the ALR hearing, but offered her affidavit stating that she refused to take the blood test because she had worked in the health care industry and knew there was a risk in taking blood samples. Chase averred that she wanted to verify the credentials of the person drawing the blood and verify that the person was using proper procedures. She averred that she was not given an opportunity to speak with the person because Naughtin just assumed she was refusing the blood test and that if she had been satisfied with the procedure and the credentials, she would have submitted to the test.

At the conclusion of the evidence, Chase's counsel argued to the hearing officer that her refusal to take the blood test was reasonable. In the alternative, counsel argued that because there was no evidence presented that Chase was driving a motor vehicle at a time when headlights would be required by Nebraska law, there was no reasonable suspicion to stop the vehicle.

On December 22, 2003, the hearing officer issued an order finding that Naughtin's initial stop of Chase's vehicle was reasonable; that Naughtin had probable cause to believe Chase had been operating a motor vehicle under the influence of alcohol, based on his observations of her physical condition, her performance on the field sobriety tests, and her admission that she had been drinking; and that a reasonable person in the position of Naughtin would believe that Chase had refused the chemical test. The hearing officer thus recommended that Chase's license be revoked. On December 23, the director of the Department of Motor Vehicles formally adopted the order of the hearing officer, and Chase's license was revoked for a period of 1 year. See Neb. Rev. Stat. § 60-498.02 (Supp. 2003).

Chase appealed to the district court, pursuant to the Administrative Procedure Act. In an order entered on March 26, 2004, the district court reversed, based upon its determination that Chase's right to due process was violated because the ALR statutes did not permit her to directly or indirectly challenge the validity of her arrest. The district court based its decision on "a logical extension of the rationale" contained in *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). The Department filed this timely appeal, as well as a notice of constitutional question pursuant to Neb. Ct. R. of Prac. 9E (rev. 2001).

ASSIGNMENT OF ERROR

The Department's sole assignment of error is that the district court erred in finding § 60-498.01 unconstitutional as it applies to cases where the motorist refuses to submit to a chemical test.

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for

errors appearing on the record. *Hass v. Neth, supra*; *American Legion v. Nebraska Liquor Control Comm.*, 265 Neb. 112, 655 N.W.2d 38 (2003). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Hass v. Neth, supra*; *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003).

[4] 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. *Hass v. Neth, supra*.

ANALYSIS

Applicable Statutes

At the time of Chase's arrest on November 8, 2003, Neb. Rev. Stat. § 60-6,197(1) (Supp. 2003) provided:

> Any person who operates or has in his or her actual physical control a motor vehicle in this state shall be deemed to have given his or her consent to submit to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in such blood, breath, or urine.

Refusal to submit to such testing subjects the motorist to criminal prosecution as well as to ALR procedures. § 60-6,197(3) and (4). Regarding the latter, § 60-498.01(2) provided in relevant part:

> If a person arrested pursuant to section 60-6,197 refuses to submit to the chemical test of blood, breath, or urine required by that section . . . the arresting peace officer . . . shall verbally serve notice to the arrested person of the intention to immediately confiscate and revoke the operator's license of such person and that the revocation will be automatic thirty days after the date of arrest unless a petition for hearing is filed within ten days after the date of arrest . . . . The arresting peace officer shall within ten days

> forward to the director a sworn report stating (a) that the person was arrested . . . and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person refused to submit to the required test.

Section 60-498.01(6)(c) provided that if an ALR revocation hearing was requested in such a situation, the issues under dispute were limited to:

> (A) Did the peace officer have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of section 60-6,196 or a city or village ordinance enacted pursuant to such section; and
>
> (B) Did the person refuse to submit to or fail to complete a chemical test after being requested to do so by the peace officer[.]

Although the hearing officer in this case addressed the validity of the traffic stop which preceded Chase's arrest and her refusal to submit to alcohol testing, neither party argues that the hearing officer was permitted or required to do so under § 60-498.01(6)(c). We conclude that he was not.

This statutory restriction of the scope of the ALR hearing also applies to the circumstance in which a motorist submits to a chemical test of blood or breath which discloses an alcohol concentration greater than the lawful limit. *Id.*; *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). In that instance, however, the relevant statutes also provide for dismissal of the ALR proceeding or reinstatement of a license administratively revoked if there is no criminal prosecution for DUI or if such charges are dismissed or the defendant found not guilty after trial. § 60-498.02(4)(a). Thus, administrative revocation for DUI is contingent upon a successful prosecution of the motorist in a criminal DUI proceeding in which Fourth Amendment issues may be raised. *Hass v. Neth, supra*. We noted in *Hass* that because the Fourth Amendment exclusionary rule could prevent a conviction in a criminal case, it would also "indirectly [determine] the outcome of the ALR proceeding." 265 Neb. at 327, 657 N.W.2d at 20. Thus, we framed the issue presented in *Hass* as "not based on the 4th Amendment," but, rather, "whether 14th Amendment due process is violated by excluding 4th Amendment issues from the ALR proceeding and reserving those issues for the criminal DUI proceeding." 265 Neb.

at 327, 657 N.W.2d at 20. We concluded that there was no due process violation.

There is no similar statutory linkage between an ALR and a criminal proceeding based upon a motorist's refusal to submit to chemical testing. The statutes permit an ALR in this circumstance regardless of whether criminal charges are filed or successfully prosecuted. As a result of an amendment to § 60-498.01, which became operative on October 1, 2003, the State is no longer required by statute to establish the validity of the arrest in order to obtain an ALR. 2003 Neb. Laws, L.B. 209. Cf. *Young v. Neth*, 263 Neb. 20, 24, 637 N.W.2d 884, 888 (2002) (holding previous version of statute required ALR to be based on "valid arrest"). Thus, the issue presented in this case is whether 14th Amendment due process is violated by the complete exclusion of 4th Amendment issues from the ALR proceedings. Resolution of that issue necessarily requires that we determine whether the Fourth Amendment exclusionary rule applies to a civil ALR proceeding, an issue which we identified but were not required to reach in *Hass*.

[5-7] In considering the constitutionality of the statutes at issue in this case, we are guided by certain well-established principles and presumptions. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Hass v. Neth, supra*; *State ex rel. Stenberg v. Omaha Expo. & Racing*, 263 Neb. 991, 644 N.W.2d 563 (2002). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Hass v. Neth, supra*; *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50 (1997). The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *Hass v. Neth, supra*; *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

Applicability of Exclusionary Rule

[8-10] The provisions of both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect against unreasonable seizures. *State v. Allen, ante* p. 69, 690 N.W.2d 582 (2005); *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000). The U.S. Supreme Court has held that the "wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself." *United States*

v. Leon, 468 U.S. 897, 906, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), quoting *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974). Inasmuch as the "Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands," the exclusionary rule "operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona v. Evans*, 514 U.S. 1, 10, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995). Under the exclusionary rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *United States v. Calandra*, 414 U.S. at 347. See *State v. Allen, supra*.

A seizure occurred when Naughtin stopped the vehicle operated by Chase and requested that she produce her license, registration, and proof of insurance. See, *State v. Allen, supra*; *State v. Burdette, supra*. Chase contends that the traffic stop was an unreasonable seizure because Naughtin did not have legal grounds to initiate the stop and that all subsequent proceedings are thus invalidated by the exclusionary rule. She argues that the ALR statutes are unconstitutional as applied to her because they do not permit her to raise this defense. The State argues that the Fourth Amendment exclusionary rule does not apply to civil ALR proceedings and that therefore, the ALR statutes cannot be held unconstitutional as applied to motorists who refuse to give consent to alcohol testing.

In *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976), the U.S. Supreme Court considered whether the exclusionary rule could be applied in a federal civil tax proceeding to exclude evidence seized by state officers pursuant to a defective search warrant. The Court noted that it had never previously applied the rule "to exclude evidence from a civil proceeding, federal or state." 428 U.S. at 447. It recognized that the " 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.' " 428 U.S. at 446, quoting *United States v. Calandra, supra*. It further stated that " 'in sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.' " 428

U.S. at 446. Declining to extend the exclusionary rule to the federal civil proceeding, the Court in *Janis* reasoned that the extension of the rule would hamper the enforcement of admittedly valid laws and would render unavailable concededly relevant and reliable evidence. It determined that there was no need for a deterrent in the civil context because law enforcement is already " 'punished' " by the exclusion of the evidence in a criminal trial. 428 U.S. at 448. The Court stated, "In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion." 428 U.S. at 454. Applying this same general balancing test, the Court has similarly refused to expand the applicability of the exclusionary rule beyond criminal trials. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984) (exclusionary rule not applicable to civil deportation proceeding); *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) (exclusionary rule not applicable to federal grand jury proceeding). But see *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965) (exclusionary rule applied to civil forfeiture proceeding where forfeiture was penalty for criminal offense).

A majority of state courts considering the issue has held that the Fourth Amendment exclusionary rule is inapplicable to ALR proceedings. See, generally, Annot., 23 A.L.R.5th 108 (1994). In most instances, courts have applied the balancing test articulated in *Janis*. For example, in *Tornabene v. Bonine ex rel. Highway Dept.*, 203 Ariz. 326, 54 P.3d 355 (Ariz. App. 2002), the court reasoned that because evidence obtained in violation of the Fourth Amendment would be inadmissible in a criminal proceeding, application of the rule in a civil license suspension proceeding would have only a marginal deterrent effect on police conduct. In addition, the court reasoned that applying the exclusionary rule in the administrative context would unnecessarily complicate the system and exclude otherwise reliable evidence that the motorist was driving while intoxicated. Addressing the lower court's finding that not applying the exclusionary rule to ALR proceedings " 'would allow the State virtually the unlimited

right to stop citizens and force them to take a breathaly[z]er test for any reason or for no reason at all,' " the court stated:

> First, law enforcement officers are only required to have a reasonable, articulable suspicion of criminal activity, not the higher standard of probable cause, before making an investigatory stop. . . . Second, the [applicable Arizona] statute plainly requires that law enforcement officers have "reasonable grounds to believe" that a motorist was driving or in actual physical control of a motor vehicle while under the influence of alcohol or drugs before requesting that the motorist submit to testing. . . . Finally, we find it unlikely that law enforcement officers, lacking any reasonable suspicion of DUI, will assign scarce resources to randomly stop motorists on the chance that the officers will develop reasonable grounds to permit them to request the motorist to submit to testing.

(Citations omitted.) *Tornabene v. Bonine ex rel. Highway Dept.*, 203 Ariz. at 336, 54 P.3d at 365. Other courts have similarly concluded that in a civil ALR contest, the marginal deterrent effect of the exclusionary rule is outweighed by the substantial societal cost of losing reliable information used to remove intoxicated drivers from the highways. *State v. Brabson*, 976 S.W.2d 182 (Tex. Crim. App. 1998); *Powell v. Secretary of State*, 614 A.2d 1303 (Me. 1992); *Green v. Director of Revenue*, 745 S.W.2d 818 (Mo. App. 1988); *Glass v. Commonwealth, Dept. of Transp., Bur. of T. S.*, 460 Pa. 362, 333 A.2d 768 (1975). Other courts reaching the same result have noted that the ALR statutes at issue did not require the State to establish the validity of the arrest. *Jacobs v. Director, Div. of Motor Vehicles*, 149 N.H. 502, 823 A.2d 752 (2003); *Beavers v. State, Dep't of Mtr. Vehicles*, 109 Nev. 435, 851 P.2d 432 (1993).

There is also a minority view on this issue. In *State v. Lussier*, 171 Vt. 19, 23, 757 A.2d 1017, 1020 (2000), the court concluded that the Vermont Legislature "assumed that a constitutional stop would be a necessary predicate" to a finding of reasonable grounds for suspicion of DUI under Vermont's ALR statutes. The court applied a balancing test similar to that used in *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976), but concluded that the deterrent effect of the exclusionary rule "is

just as necessary to deter unlawful police conduct in the context of civil suspension proceedings as it is in related criminal [DUI] proceedings." 171 Vt. at 32, 757 A.2d at 1026. See, also, *People v. Krueger*, 208 Ill. App. 3d 897, 567 N.E.2d 717, 153 Ill. Dec. 759 (1991) (statutory language required application of exclusionary rule in civil ALR proceeding); *Pooler v. MVD*, 306 Or. 47, 755 P.2d 701 (1988) (same); *Olson v. Com'r of Public Safety*, 371 N.W.2d 552 (Minn. 1985) (assuming without rationale that exclusionary rule applied in civil ALR proceeding).

[11,12] We adopt the majority view and hold that the Fourth Amendment exclusionary rule is inapplicable to ALR proceedings, except as it may apply indirectly through § 60-498.02(4)(a). See *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). As noted, the statutes in effect at the time of Chase's arrest do not require the State to establish the validity of the arrest, that requirement having been specifically removed from the statutes by the 2003 amendments. Unlike the statutory scheme before us in *Hass*, which operated as a form of statutory exclusionary rule, the Legislature did not provide that an ALR for refusal to submit to a chemical test was dependent upon a successful criminal prosecution for that offense. We have held that an ALR is a civil remedy with a nonpunitive purpose and that

> [a]dministrative license revocation serves different purposes when it is imposed for refusal to submit to a chemical test. In the context of failing a chemical test, the purpose of administrative license revocation is limited to protecting public health and safety. In the context of refusal to submit to a chemical test, administrative license revocation both protects public health and safety and facilitates the gathering of evidence, which is yet another nonpunitive purpose.

State v. Howell, 254 Neb. 247, 256, 575 N.W.2d 861, 867 (1998). See, also, *Schindler v. Department of Motor Vehicles*, 256 Neb. 782, 593 N.W.2d 295 (1999). We agree with those courts which have concluded that extension of the exclusionary rule to this type of civil proceeding would accomplish little in terms of deterring improper police conduct, given the applicability of the rule in criminal proceedings. We also agree that any marginal deterrent value would be outweighed by the public health and

safety interests which the ALR statutes are intended to protect. Thus, we conclude that the absence of a statutory procedure for challenging the validity of the traffic stop on Fourth Amendment grounds does not render the ALR statutes unconstitutional as applied to motorists who refuse to submit to a chemical test of alcohol concentration.

Due Process

[13] The remaining question is whether the provisions of the ALR statutes pertaining to refusal to submit satisfy Chase's right to due process. The first step in this analysis is to identify a property or liberty interest entitled to due process protections. *Hass v. Neth, supra*; *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the 14th Amendment. *Id*.

[14,15] Once it is determined that due process applies, the question remains what process is due. *Id*. Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id*. Thus, before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. *Id*. In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id*.

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the U.S. Supreme Court set forth three factors to be considered in resolving an inquiry into the specific dictates of due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the

fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The private interest at issue in this case is the driver's interest in continued possession of a motor vehicle operator's license. A driver's interest in his or her driving privileges is significant in today's society, as the loss of a driver's license may entail economic hardship and personal inconvenience. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *Marshall v. Wimes, supra*. The second factor to be considered under the *Mathews* analysis is the risk of an erroneous determination and the value, if any, of alternative procedures. In *Hass*, this involved the risk of the revocation of a driver's license despite the existence of a potentially valid Fourth Amendment challenge to the driver's arrest. *Hass v. Neth, supra*. Here, the nature of risk is substantially different because the Fourth Amendment exclusionary rule does not apply and there is no statutory correlation between an ALR and a criminal prosecution for refusal to submit. In this context, we must consider the risk that a license could be administratively revoked despite the existence of a potentially valid statutory defense. Because the current statutory scheme gives the motorist a reasonable time and opportunity to present evidence regarding the accusations and any potential statutory defense, we conclude that this risk is slight, if it exists at all. The third and final factor to be considered in a *Mathews* analysis is the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Hass v. Neth, supra*. Here, one governmental interest is the same as that articulated in *Hass*: a "substantial governmental interest in protecting public health and safety by removing drunken drivers from the highways." 265 Neb. at 329, 657 N.W.2d at 21. In addition, the government has an interest in enforcement of its implied consent law so as to facilitate the gathering of evidence necessary to identify those motorists who are under the influence and thus pose a risk to public health and safety. See *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). Considering each of these factors, we conclude that the administrative hearing and judicial review provisions of § 60-498.01 provided Chase with meaningful notice and an opportunity to be heard, and thus fully comport with due process. See *Mathews v. Eldridge, supra*.

CONCLUSION

For the reasons set forth above, we conclude the district court erred in determining that the absence of a statutory procedure to challenge a motorist's arrest in an ALR case based upon postarrest refusal to submit constitutes a denial of due process and that the applicable ALR statutes satisfied Chase's right to due process. The judgment of the district court is therefore reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. DONALD P. SANDERS, APPELLANT.

697 N.W.2d 657

Filed May 27, 2005. No. S-04-581.

1. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
2. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant.
4. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
5. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. An abuse of

discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.

6. **Constitutional Law: Statutes.** A facial challenge is a challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face.
7. **Constitutional Law: Juries: Discrimination: Proof.** In order to establish a prima facie violation of the fair-cross-section requirement under the Sixth Amendment, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.
8. **Statutes: Intent.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
9. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Rev. Stat. § 27-401 (Reissue 1995) and prejudice under Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion.
10. **Jury Instructions: Appeal and Error.** The failure to object to instructions after they have been submitted to counsel for review or to offer more specific instructions if counsel feels the court-tendered instructions are not sufficiently specific will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice.
11. **Jury Instructions.** In giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.
12. **Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Shawn Elliott, and Andrea Snowden for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Following a jury trial in the district court for Lancaster County, Donald P. Sanders was convicted of first degree sexual assault and procuring alcohol for a minor. Sanders was sentenced to 5 years' probation on the sexual assault conviction and 90 days in jail and a $500 fine on the alcohol conviction. Prior to trial, Sanders challenged the jury selection process in Lancaster County. The court overruled Sanders' jury selection challenge. During the course of the proceedings, Sanders unsuccessfully raised issues relating to the admission of evidence. Following trial, Sanders filed a motion for new trial, which was denied. On appeal, Sanders challenges the correctness of the jury instructions and various rulings. We affirm.

STATEMENT OF FACTS

On September 12, 2002, the State filed an information charging Sanders with first degree sexual assault and procuring alcohol for a minor. The statute pertaining to procuring alcohol is found at Neb. Rev. Stat. § 53-180 (Reissue 2004), and the first degree sexual assault statute is found at Neb. Rev. Stat. § 28-319 (Reissue 1995). Section 28-319(1) provides as follows:

> Any person who subjects another person to sexual penetration (a) without consent of the victim, or (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, or (c) when the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree.

The charges in this case grew out of an incident which occurred between Sanders and the alleged victim, J.F., on July 7, 2002. In the charge relating to first degree sexual assault, the State alleged in the information that Sanders did "subject [J.F.] to sexual penetration without the consent of the victim" or "knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct."

Prior to trial, Sanders filed a motion in limine requesting, inter alia, that the State be prohibited from offering evidence concerning "whether the alleged victim suffered any injuries as a result

of the commission of the alleged offense, and any opinion that said injuries are inconsistent with a consensual sexual act." In particular, Sanders objected to expected testimony by Jill Ross, a nurse who had examined J.F. after the alleged assault. Following a hearing, the trial court denied Sanders' motion to the extent it requested that Ross "not be permitted to testify about observations she made of injuries to the alleged victim" but granted the motion to the extent it sought "to prevent . . . Ross from rendering any opinion about the cause or source of the injuries."

Also prior to trial, on April 7, 2003, Sanders filed a motion entitled "Motion for a Hearing on Whether § 25-1628 is Constitutional." Neb. Rev. Stat. § 25-1628 (Reissue 1995) generally provides for the manner in which jury lists are assembled from voter registration lists and motor vehicle operator lists. At the time this motion was filed, no trial date had been set and jury selection had not begun. Trial eventually began on January 20, 2004.

In the April 7, 2003, motion, Sanders requested "a hearing to determine whether the manner in which the composition of a jury venire is determined by Neb. Rev. Stat. § 25-1628 is constitutional." Sanders, who is African-American, generally claimed that African-Americans were underrepresented on juries. In the motion, Sanders referenced The Nebraska Minority and Justice Task Force Final Report, State Justice Inst. (2003), as support for his motion. He also asserted that he had "a constitutional right to a jury which is comprised of a fair cross section of the community." Sanders requested a hearing on his motion. On April 9, the court held a hearing on various motions including Sanders' "Motion for a Hearing on Whether § 25-1628 is Constitutional." The court ordered an evidentiary hearing on the motion and set a schedule for discovery.

On April 18, 2003, Sanders filed a "Supplemental Motion to Discover," in which he requested access to (1) the current jury pool list for Lancaster County and the pool lists for 2000 through 2002; (2) practice, policies, and regulations governing the manner in which a jury pool is created for any jury convened in the district court; and (3) jury pool questionnaire forms maintained by the jury commissioner for all individuals called for jury service in 2000 through 2003. On May 21, the court ruled on the discovery motion. The court noted that Neb. Rev. Stat. § 25-1635 (Reissue

1995) made it unlawful for the jury commissioner and court officers to disclose the identity of jurors without court order and that good cause must be shown to warrant such disclosure. The court concluded that while there was good cause for disclosure of the master jury list, there was not good cause to disclose the identity of jurors in individual cases. The court reasoned that

> if there is no significant difference in the racial makeup of the Master Jury Pool compared to the racial make up of [Lancaster] county, and the methods used to select the jury venire for a particular case are random at each step, the result will satisfy the requirements of due process even though a particular jury venire, or even several jury venire [sic], may not be representative of the racial make up of the community.

The court therefore stated that before good cause could be established to disclose the identity of jurors, "there must be a showing that either the Master Jury Pool is not representative, or that one of the steps taken to select a jury venire in a particular case is not random."

On May 30, 2003, Sanders filed a motion entitled "Motion Pursuant to Neb. Rev. Stat. § 25-1637." Neb. Rev. Stat. § 25-1637 (Reissue 1995) generally provides that a party may move to stay proceedings, or quash the entire jury panel or seek other relief based on a substantial failure to comply with the statutory jury selection processes "in selecting the grand or petit jury." In the May 30 motion, Sanders again asserted that The Nebraska Minority and Justice Task Force Final Report presented a legitimate issue as to whether or not minorities are underrepresented on juries, and he therefore requested a hearing to determine whether Lancaster County's system of selecting juries violated his statutory rights.

A hearing on Sanders' jury challenges was held on October 14, 2003. Evidence at the hearing generally indicated the following regarding the jury selection process used in Lancaster County: Each year, a master jury list is prepared by the jury commissioner by electronically combining the voter registration list of Lancaster County with the drivers' license records for Lancaster County maintained by the Department of Motor Vehicles (DMV). Duplicate names are identified and eliminated. The remaining

names make up the master jury list. The race of the driver is not contained in the data communicated by the DMV to the jury commissioner, and race is not contained in voter registration records. Each juror on the master jury list is assigned a unique juror number. Thereafter, the jury commissioner, in the presence of a district judge, selects a random digit from 0 to 9, literally by drawing a piece of paper from a hat. The jury commissioner then directs the county information services division to compile a smaller list composed of those persons whose unique juror number ends in the digit selected from the hat. This list is called the annual jury list and is the group from which jurors are selected for the term year. About a month before a jury term is to begin, the jury commissioner requests from the information services division the names of approximately 700 randomly selected jurors from the annual list. Questionnaires designed to determine if the selected persons statutorily qualify for jury duty are then sent to those persons. The trial court found that 25 to 50 names are eliminated from the jury term panel due to inaccurate addresses. Others are eliminated because of specific exclusions permitted by statute. About a week prior to trial, the jury commissioner requests the information services division to again electronically randomly select the jury venire for a particular trial. The jurors selected are then ordered to appear on the first day of trial.

Following the hearing on Sanders' jury-related motions, the court on October 27, 2003, overruled Sanders' motion to declare § 25-1628 unconstitutional and his motion pursuant to § 25-1637. The court noted evidence which showed that pursuant to 2000 census data, the percentage of persons over age 18 in Lancaster County who were nonwhite was 8.5 percent. Evidence also showed that while race could not be determined for 24 percent of those on the master jury list for Lancaster County, of those who could be identified, 7.5 percent were nonwhite. Sanders' expert testified that if all the persons on the master jury list whose race could not be identified were white, the percentages would not change significantly. The court concluded that Sanders had not presented evidence that the list was not reasonably representative of the total population of Lancaster County. The court further concluded that there was no evidence to suggest anything other than random selection of jurors from the master jury list for jury trials

and that Sanders could not show any aspect of the selection process that had a racial bias. The court therefore rejected Sanders' motions, concluding that based on the evidence presented by Sanders, "the court cannot find that NEB. REV. STAT. §25-1628 is unconstitutional or that the jury commissioner has failed to follow the statutes in the preparation of the juries in this county."

Trial began on January 20, 2004. J.F. testified at trial that at the time of the incident, she was 20 years old and was a student at the University of Nebraska. J.F. worked at the same nightclub as Sanders, and J.F. thought that Sanders was the manager of the club and her supervisor. Prior to July 7, 2002, Sanders and J.F. had a friendly working relationship but not a romantic or sexual relationship. Sanders had on occasion given J.F. rides home from work because J.F. did not have a car. J.F. testified that at the time of the incident, she was not interested in having any relationship with Sanders other than the working relationship they had.

After the nightclub closed at 1 a.m. on July 7, 2002, J.F. worked with other employees cleaning and doing other typical postclosing tasks. When the work was finished, J.F. was preparing to leave with a coworker when Sanders asked her to stay so that he could teach her to tend bar. The coworker left after Sanders told him that Sanders could give J.F. a ride home. J.F. and Sanders remained in the bar talking, and Sanders showed her how to mix drinks. J.F. recalled consuming only one full drink. J.F. did not recall what happened after she finished her drink. She remembered nothing until she awoke later that morning on the floor of the bar wearing nothing other than a shirt; her pants, underwear, and shoes were off. She saw Sanders sleeping on a sofa, and he was also naked from the waist down. J.F. felt pain in her vaginal area, and because of the pain, she thought she had been sexually penetrated. She had not felt the pain prior to that morning.

J.F. got dressed and left the club. She called another employee to pick her up and take her home. J.F. also called a friend who met her at her apartment, and after J.F. told him what had happened, he called the police to report a sexual assault. The police arrived and questioned J.F. and took her to a hospital. J.F. concluded her direct testimony by stating that she had never wanted to engage in sexual intercourse with Sanders and that she did not give her consent on July 7, 2002. On cross-examination, J.F. acknowledged

that while testifying at her deposition, she had said that because she did not remember the time during which the alleged assault occurred, it was possible that she consented but that she did not think she would have.

At the hospital, J.F. was examined by Ross. Ross testified at trial regarding her training and experience as a nurse and testified that she had received specialized training as a sexual assault nurse examiner. Ross testified that in her examination of J.F., she found various abrasions, redness, and bruising in the vaginal area. Toward the end of the examination, at approximately 3 p.m., Ross took a blood specimen from J.F.

The forensic chemist who tested J.F.'s blood testified that her blood alcohol level was .10 grams per hundred milliliters. The chemist also tested J.F.'s urine and the contents of drinking glasses that had been taken from the nightclub. The chemist testified that no drugs could be found in either sample. He testified that a urine test is the best way to test for the presence of a "date rape" drug, such as "GHB" or "Rohypnol," but that no such drugs were found in J.F.'s urine sample.

Sanders unsuccessfully moved to dismiss the sexual assault charge at the end of the State's case, and he thereafter testified in his defense at trial. Sanders testified that he worked as a disk jockey at the nightclub and managed marketing for the club. Sanders testified that in the early hours of July 7, 2002, he taught J.F. how to mix various drinks. Depending on how the drinks turned out, they would either share them or throw them out. He estimated that they shared two to six drinks. Sanders admitted that he knew that J.F. was under 21. Sanders testified that J.F. appeared to be enjoying herself; that in addition to mixing drinks, he played some music and J.F. occasionally danced to the music; and that they ate some snack food. According to Sanders, between 6 and 6:30 a.m., the two ended up in a seating area of the nightclub. J.F. sat on his lap, and they talked. They began to kiss and hug, and eventually they attempted to have consensual sexual intercourse. He testified, however, that he was not fully able to penetrate J.F. because he was having difficulty maintaining an erection. They cuddled and talked for some time afterward, and when J.F. got up to use the restroom, he fell asleep on the couch. By the time he woke up, J.F. had left. On cross-examination, Sanders

admitted that he had penetrated J.F. and that such testimony was contrary to what he had originally told police investigators. He attributed his original denial to nervousness and embarrassment over being required to discuss the situation, including his inability to maintain an erection during the encounter.

Sanders moved for "directed verdict" at the close of his defense. The motion was overruled. The jury was instructed, and the case was submitted to the jury. On January 23, 2004, the jury returned verdicts finding Sanders guilty of first degree sexual assault and procuring alcohol for a minor. Sanders moved for the court to reject the verdicts as being the result of racial bias. The court took the motion under advisement and scheduled a hearing for January 27. At the hearing, the court indicated that it considered the motion to be a renewed motion to dismiss and announced that after reviewing the record, the court found no evidence of racial bias and therefore accepted the verdicts and found Sanders guilty on both counts.

Sanders filed a motion for new trial. In ruling on the motion for new trial, the court considered the issue of whether the jury instruction regarding the elements of first degree sexual assault was erroneous. The court concluded that the instruction was not erroneous and overruled Sanders' motion for new trial. The court subsequently sentenced Sanders to 5 years' probation on the first degree sexual assault conviction and to a jail sentence of 90 days and a fine of $500 on the conviction for procuring alcohol for a minor. Sanders appeals.

ASSIGNMENTS OF ERROR

Sanders asserts that the district court erred in (1) denying him access to information regarding individuals called for jury service as part of his challenge to the jury selection process; (2) denying his challenges to the jury selection process; (3) permitting testimony by Ross when the State had not established foundation or relevance for such testimony; (4) instructing the jury to consider the "without consent" element of first degree sexual assault; (5) failing to instruct the jury that the State must prove that J.F. suffered from a "significant abnormality," such as severe intoxication, and that Sanders knew of such "abnormality"; (6) "failing to direct a verdict" in Sanders' favor at the close of the

State's case on the charge of first degree sexual assault; and (7) imposing an excessive sentence on his conviction for procuring alcohol for a minor.

STANDARDS OF REVIEW

[1] 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. 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. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id.*

[3] In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant. *Wisinski, supra.*

[4] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004).

[5] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004). An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *Id.*

ANALYSIS

Jury Challenge.

In his first two assignments of error, Sanders asserts that the district court erred in denying him access to information regarding individuals called for jury service and in ultimately denying his challenges to the jury selection process. As noted below, Sanders' challenge to the constitutionality of § 25-1628 must be deemed a facial challenge. Further, his challenge under § 25-1637 is properly limited to the manner in which the jury selection process was carried out as reflected in his case. We conclude that Sanders failed to establish any constitutional violation or any failure to follow statutes in the jury selection process and that therefore, the district court did not err in denying his challenges. We further conclude that the district court did not err in denying Sanders access to additional juror information because Sanders did not demonstrate that such information was necessary for evaluation of his challenges.

[6] We have described a facial challenge as a "challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face." *State v. Hynek*, 263 Neb. 310, 315, 640 N.W.2d 1, 6 (2002). A facial challenge is contrasted to a challenge to a statute "as applied" to the individual. See, e.g., *Van, supra*; *State v. VanAckeren*, 263 Neb. 222, 639 N.W.2d 112 (2002). At the time Sanders challenged the constitutionality of § 25-1628, no trial date had been set, and it was uncertain which master jury list would eventually be applied to his trial. The master jury list compiled pursuant to the manner prescribed in § 25-1628 had not in fact been applied to Sanders, and therefore, the proper consideration of Sanders' motion challenging the constitutionality of § 25-1628 is limited to a facial challenge.

Regarding Sanders' facial challenge to the constitutionality of § 25-1628, we note that this court has previously rejected a challenge to § 25-1628 and the general statutory scheme for jury selection. *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992). *Garza* involved the statute under review pursuant to which voter registration and licensed driver lists serve as the source for the master jury list. In *Garza*, we stated that " '[i]t is difficult to conceive of a fairer or more practical method of selecting jurors than that used in Nebraska.' " 241 Neb. at 954, 492 N.W.2d at 46-47,

quoting with approval *State v. Gutierrez*, 187 Neb. 383, 191 N.W.2d 164 (1971).

[7] We read Sanders' constitutional challenge to § 25-1628 as an assertion that the statute violates the fair-cross-section requirement under the Sixth Amendment. See, *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979); *Garza, supra*. In *Duren*, the U.S. Supreme Court observed that in order to establish a prima facie violation of the fair-cross-section requirement under the Sixth Amendment as to venires, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. The U.S. Supreme Court described "systematic exclusion" as exclusion "inherent in the particular jury-selection process utilized." 439 U.S. at 366.

Duren involved a constitutional challenge to venires from which juries were selected, whereas Sanders' challenge in this case is a challenge to § 25-1628 and the method of preparing master jury lists. As courts elsewhere have done, we logically extend and apply the fair-cross-section concepts of *Duren* to Sanders' challenge to the preparation of the master jury list pursuant to § 25-1628. See, similarly, *State v. Cienfuegos*, 144 Wash. 2d 222, 25 P.3d 1011 (2001) (applying *Duren* standards in challenge to master jury list); *People v. Currie*, 87 Cal App. 4th 225, 104 Cal. Rptr. 2d 430 (2001) (applying *Duren* standards and stating that Sixth Amendment rights apply at every stage of jury selection process, including compilation of master list of potential jurors and selection of venires from that list). Contrary to Sanders' claims that minorities were underrepresented, the evidence showed that minorities on the master list were fairly represented in relation to the community. In addition, the evidence presented regarding Lancaster County's procedures for calling jurors from the master jury list failed to show exclusion of minorities much less "systematic exclusion." Sanders' evidence did not show that § 25-1628 violated the fair-cross-section requirement of the Sixth Amendment or that there is "no valid application" of § 25-1628.

We conclude that the court did not err in rejecting Sanders' constitutional challenge to § 25-1628.

Sanders also asserted a challenge under § 25-1637. Section 25-1637(1) provides:

> A party may move to stay the proceedings, to quash the entire panel, or for other appropriate relief on the ground of substantial failure to comply with Chapter 25, article 16, in selecting the grand or petit jury. Such motion shall be made within seven days after the moving party discovered or by the exercise of diligence could have discovered the grounds for such motion, and in any event before the petit jury is sworn to try the case.

[8] By its term, § 25-1637(1) provides that a party may move for various forms of relief based on a failure to comply with chapter 25, article 16, of the Nebraska Revised Statutes, where such failure manifests itself in connection with "selecting the grand or petit jury." It is a familiar canon of statutory construction that in construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004). Given the presence of the phrase "in selecting the grand or petit jury," we determine that a motion brought by a party under § 25-1637(1) must be triggered by a perceived failure to comply with chapter 25, article 16, as evidenced by the selection of a particular grand or petit jury. There is no indication of the use of a grand jury in this case and the specific jury which ultimately heard this case was not yet in the process of being selected when Sanders filed his motion. As such, Sanders' motion made under § 25-1637 was premature. Therefore, we conclude that the court did not err in rejecting Sanders' challenge under § 25-1637.

Sanders also asserts that the district court erred in denying his request for discovery of additional information regarding jurors called for jury service. The district court in this case concluded that pursuant to § 25-1635, such information could not be disclosed except for good cause and that good cause had not been demonstrated. The district court did not err in these determinations.

Section 25-1635 provides as follows:

> It shall be unlawful for a jury commissioner or the officer in charge of the election records, or any clerk or deputy thereof, or any person who may obtain access to any record showing the names of persons drawn to serve as grand or petit jurors to disclose to any person, except to other officers in carrying out official duties or as herein provided, the name of any person so drawn or to permit any person to examine such record or to make a list of such names, except under order of the court. The application for such an order shall be filed in the form of a motion in the office of the clerk of the district court, containing the signature and residence of the applicant or his [or her] attorney and stating all the grounds on which the request for such order is based. Such order shall not be made except for good cause shown in open court and it shall be spread upon the journal of the court. Any person violating any of the provisions of this section shall be guilty of a Class IV felony. Notwithstanding the foregoing provisions of this section, the judge or judges in any district may, in his [or her] or their discretion, provide by express order for the disclosure of the names of persons drawn from the revised key number list for actual service as grand or petit jurors.

We agree with the district court that Sanders' request for discovery in this case can be considered an application for an order requiring disclosure of potential juror names under § 25-1635. We also agree that such an order shall not be made except for good cause shown. We note for completeness that § 25-1635 elsewhere provides that "the judge or judges in any district may, in his [or her] or their discretion, provide by express order for the disclosure of the names of persons drawn from the revised key number list for actual service as grand or petit jurors." However, because Sanders requested the information pursuant to the first portion of § 25-1635, the present case is controlled by the first portion of the statute wherein good cause must be shown and not under the last portion of § 25-1635 wherein judges may provide for disclosure in their discretion.

Section 25-1628 is limited to preparation of the master jury list, and therefore Sanders' constitutional challenge to § 25-1628 was limited to preparation of the master jury list. It follows that

production of the additional information Sanders sought concerning jury selection procedures after the compilation of the master jury list was not warranted. We further note that whether or not the requested information would be relevant to a proper challenge under § 25-1637, as discussed above, Sanders' motion made under § 25-1637 was premature, and therefore good cause for discovery was not shown. We conclude that the court did not err in rejecting Sanders' request under § 25-1635 for discovery of additional information regarding jurors called for service.

Testimony of Nurse Ross.

Sanders asserts that the district court erred in admitting certain testimony of Ross over his objections on grounds of foundation and relevance. We determine that the court did not err in admitting Ross' testimony.

Ross was the nurse who examined J.F. on the afternoon following the alleged assault. Ross testified at trial regarding her qualifications as a nurse and her specialized training as a sexual assault nurse examiner. She also testified regarding her examination of J.F. and her observations, which included abrasions, redness, and bruising in J.F.'s vaginal area. Prior to trial, Sanders filed a motion in limine in which he sought to prevent the State from offering evidence regarding, inter alia, "whether the alleged victim suffered any injuries as a result of the commission of the alleged offense, and any opinion that said injuries are inconsistent with a consensual sexual act." Sanders asserted that Ross, whose testimony the State intended to offer, lacked sufficient qualification to render an opinion, and in addition, that such evidence was not relevant. The court granted Sanders' motion in limine to the extent it sought "to prevent . . . Ross from rendering any opinion about the cause or source of the injuries." The court denied the motion in limine to the extent it requested that Ross "not be permitted to testify about observations she made of injuries to the alleged victim."

During Ross' testimony at trial, Sanders made certain objections which the court sustained based on its previous order on the motion in limine. The court overruled other objections and allowed Ross to testify regarding her observations of injuries to J.F.'s vaginal area. Ross did not opine regarding the cause of J.F.'s injuries.

Sanders argues on appeal that none of Ross' testimony regarding injuries to J.F. should have been allowed. He argues that the only relevant purpose for such testimony was to establish the element of penetration and that because he admitted in a pretrial statement that penetration had occurred, there was no reason to introduce such evidence and that the evidence served only to inflame the jury. We do not agree.

[9] The exercise of judicial discretion is implicit in determinations of relevancy under Neb. Rev. Stat. § 27-401 (Reissue 1995) and prejudice under Neb. Rev. Stat. § 27-403 (Reissue 1995), and a trial court's decision regarding them will not be reversed absent an abuse of discretion. *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003). We determine that the court did not abuse its discretion in admitting Ross' testimony.

A review of the record shows that Ross' observations regarding the injuries to J.F.'s vaginal area were relevant to the issue of whether penetration had occurred. Because Sanders' pretrial statements were indefinite as to whether penetration had occurred, when the State presented its case, it could not be certain whether Sanders would testify or, if he testified, whether Sanders would admit to penetration. The State needed to prove penetration as an element of first degree sexual assault, and Ross' testimony was relevant to that issue. Further, Ross' observations were conveyed in a professional manner without opinion and cannot be said to have been prejudicial as understood under § 27-403. We conclude that the court did not abuse its discretion in determining that Ross' testimony was relevant and allowing its admission.

Instruction Regarding "Without Consent."

Sanders asserts that the district court erred in instructing the jury that it could consider whether Sanders subjected J.F. to sexual penetration "without consent." Sanders claims there was insufficient evidence to support this instruction. We conclude that there was sufficient evidence to support the instruction and that the court did not err in giving the instruction.

In instruction No. 4, the court instructed the jury on the elements of first degree sexual assault as follows:

> Regarding the crime of First Degree Sexual Assault, the State must prove beyond a reasonable doubt that . . . Sanders:

> 1. subjected [J.F.] to sexual penetration; and
> 2. did so on or about July 7, 2002, in Lancaster County, Nebraska; and
> 3. did so either:
> a. without the consent of [J.F.]; or
> b. at a time when . . . Sanders knew or should have known that [J.F.] was incapable of resisting or appraising the nature of . . . Sanders' conduct.

Although Sanders raised no objection to instruction No. 4 at the jury instruction conference, during the hearing on Sanders' motion for new trial, the issue of whether there was sufficient evidence to instruct on "without consent" was considered. In its order denying the motion for new trial, the court noted that on direct examination, J.F. had testified that she did not consent, but that on cross-examination, she acknowledged that she had stated at an earlier deposition that because she did not remember the actual incident, it was possible she consented, but that she did not think she would have consented. The court concluded that, considering all the evidence,

> a reasonable jury could have concluded that [J.F.'s] indication that it was possible she consented was referring to the period of time that she does not remember, rather than a period of conscious recollection. *That would leave standing her statement on direct examination that she did not consent to sexual intercourse with the defendant.* Viewed in this light, there is sufficient evidence to warrant an instruction on the consent alternative.

(Emphasis supplied.)

Sanders failed to object to instruction No. 4, including the "without consent" language. 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. Haltom*, 264 Neb. 976, 653 N.W.2d 232 (2002). Sanders argues that despite his failure to object to the instruction, it was plain error for the court to instruct on the "without consent" language. He argues that there was insufficient evidence to merit the instruction because J.F. conceded that she might have consented and that because J.F. did not remember the

time during which penetration occurred, she could not unequivocally testify that she had not consented.

Upon review of the record, we do not find plain error indicative of a probable miscarriage of justice in the court's giving of instruction No. 4, including the "without consent" language. As the court noted in denying the motion for new trial, J.F. testified on direct examination that she did not consent. Although on cross-examination J.F. acknowledged that in a deposition she had stated that she might have consented, such testimony did not nullify her direct testimony. Instead, the matter became an issue of J.F.'s credibility, and the jury could consider the cross-examination testimony in determining the credibility of J.F.'s direct testimony that she did not consent. Despite the cross-examination, J.F.'s direct testimony provided evidence from which the jury could have concluded that J.F. did not consent. Therefore, we conclude that the issue of consent was appropriately presented to the jury and that the court did not commit plain error by instructing on the "without consent" element.

Failure to Instruct Jury Regarding "Significant Abnormality."

Sanders asserts that the court committed plain error by failing to instruct the jury that the State was required to prove as an element of first degree sexual assault that "the alleged victim suffered from a significant abnormality, such as severe intoxication or other substantial mental or physical impairment" and that "the accused had knowledge of such abnormality." We conclude that the court did not err in failing to so instruct the jury.

Referring to *State v. Rossbach*, 264 Neb. 563, 650 N.W.2d 242 (2002), Sanders argues that the court was required to give an instruction including the language quoted above. In *Rossbach*, we determined that the State had presented sufficient evidence at a preliminary hearing to bind the defendant over for trial on two counts of first degree sexual assault. In *Rossbach*, we stated that the issue in that case was "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)." 264 Neb. at 570, 650 N.W.2d at 248-49. We stated that "[u]nder § 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." 264 Neb. at 572, 650 N.W.2d at 250.

Sanders argues that based on *Rossbach*, the instructions in this case were insufficient because they did not explicitly set forth that the State must prove (1) that J.F. was suffering from a severe abnormality, such as severe intoxication or other substantial mental or physical impairment, and (2) that Sanders had knowledge of such severe abnormality. In instruction No. 4, quoted above, the court used the language of the statute to instruct that Sanders could be found guilty of first degree sexual assault if he subjected J.F. to sexual penetration "at a time when . . . Sanders knew or should have known that [J.F.] was incapable of resisting or appraising the nature of . . . Sanders' conduct."

[10] Sanders did not object to instruction No. 4 and did not request an instruction including the *Rossbach* language he now argues was required. The failure to object to instructions after they have been submitted to counsel for review or to offer more specific instructions if counsel feels the court-tendered instructions are not sufficiently specific will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice. *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

[11] We conclude that the court did not commit plain error when it instructed the jury using the language of the first degree sexual assault statute, § 28-319. We have said that in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute. *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999). Although the language of *Rossbach* might be an appropriate instruction elaborating on the considerations under § 28-319(1)(b) if requested by the defendant, there is nothing in *Rossbach* that requires that its language be used in a jury instruction or which indicates that use of the statutory language would result in a miscarriage of justice. In the present case, in the absence of a request by Sanders, it was not plain error for the court to give an instruction based on the statutory language. We reject this assignment of error.

Sufficiency of Evidence.

Sanders asserts that the court erred in failing to "direct a verdict" on the charge of first degree sexual assault because there was insufficient evidence to support a conviction on that charge. We conclude that there was sufficient evidence to support the conviction.

[12] We note that Sanders' assignment of error relates solely to the failure to direct a verdict in his favor on the first degree sexual assault charge "at the end of the State's case." Sanders waived his appellate right to challenge the overruling of his motion for "directed verdict" made at the close of the State's case when he presented evidence in his defense. A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction. *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002). Despite the wording of his assignment of error, we read Sanders' argument as briefed as a challenge to the sufficiency of evidence for his conviction, and we consider the assignment of error as such.

At the close of the State's case, Sanders moved to dismiss the charge of first degree sexual assault. He argued there was insufficient evidence to support the charge because J.F. claimed to have no memory of the incident and therefore could not deny that she had consented. He also argued that there was insufficient evidence that she was "incapable of resisting" because she had testified that she had become intoxicated on previous occasions and had not experienced memory loss and because there was no evidence that she had been drugged. J.F. testified that on the night in question, she had only one drink, and Sanders argued that one drink would not have been enough to sufficiently impair her ability to resist or to appraise the situation. The court overruled the motion to dismiss, and Sanders presented evidence in his defense. At the end of all the evidence, Sanders moved for "directed verdict," and the court overruled the motion.

Sanders argues on appeal that the evidence was insufficient to support a finding that penetration occurred "without consent." However, as discussed above in connection with the jury instruction regarding "without consent," we conclude that there was sufficient evidence from which the jury could have found that J.F. did not consent and that the issue was submissible.

Sanders further argues that there was insufficient evidence to establish that J.F. was incapable of resisting or of appraising the situation and to establish that Sanders knew this to be the case. Sanders argues that evidence that J.F. had been drinking was not enough to establish that she was intoxicated. Although there was evidence that her blood alcohol level was .10 grams per hundred milliliters the afternoon following the alleged assault, Sanders argues that witnesses who interacted with her at that time did not think she appeared intoxicated. Sanders further notes that there was no evidence that J.F. had been drugged.

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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004). Reviewing the evidence in this manner, we determine that there is sufficient evidence from which the jury could have found either that J.F. did not consent or that she was incapable of resisting Sanders or appraising the circumstances. Viewing J.F.'s testimony most favorably to the State, the jury could have determined that J.F. was not sexually interested in Sanders and the jury could have found that she did not consent. The jury could otherwise have found that J.F. was incapable of resisting or of appraising the situation. In this regard, the jury could have found from J.F.'s testimony regarding her memory loss, and from the evidence regarding her blood alcohol level, that at the time of penetration, she was so incapacitated that she was incapable of resisting Sanders or appraising the circumstances. The jury could also have found that Sanders was aware of, and took advantage of, J.F.'s incapacity. Viewing and construing the evidence in this case

most favorably to the State, we conclude that there was sufficient evidence to support Sanders' conviction for first degree sexual assault.

Excessive Sentence in Procuring Alcohol Conviction.

Finally, Sanders asserts that his sentence for procuring alcohol for a minor is excessive. We conclude that the district court did not abuse its discretion in sentencing Sanders on this count.

Sanders was sentenced to 5 years' probation on the first degree sexual assault conviction and to 90 days in jail and a $500 fine on the conviction for procuring alcohol for a minor. Sanders argues that the sentence in the alcohol conviction was excessive because he should not have been given imprisonment on that conviction when he was given probation on the sexual assault conviction. He argues that if grounds existed to make probation appropriate for the sexual assault conviction, the same grounds should have required probation rather than imprisonment on the alcohol conviction.

Procuring alcohol for a minor in violation of § 53-180 is a Class I misdemeanor. Neb. Rev. Stat. § 53-180.05(1) (Reissue 2004). The maximum penalty for a Class I misdemeanor is "not more than one year imprisonment, or one thousand dollars fine, or both." Neb. Rev. Stat. § 28-106(1) (Cum. Supp. 2000). Therefore, Sanders' sentence of 90 days in jail and a $500 fine is within statutory limits, and his sentence will not be disturbed on appeal absent an abuse of discretion by the district court. See *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004).

As the State notes and the record supports, this was Sanders' second conviction for procuring alcohol for a minor. Sanders was also previously convicted of selling alcohol without a license and of violating a permit for a public dance. Whereas Sanders had a prior history of alcohol offenses, he lacked a prior history of violent crimes. Considering that Sanders had previous convictions related to alcohol offenses, we do not find the sentence on this count excessive. Contrary to Sanders' argument, it was not an abuse of discretion to sentence Sanders to imprisonment on the alcohol conviction while sentencing him to probation on the assault conviction because different factors came to bear in the sentencing considerations for each offense. We find no abuse of

discretion in Sanders' sentence on the procuring alcohol for a minor offense.

CONCLUSION

We conclude that the district court did not err in rejecting Sanders' various challenges to the jury selection process and in overruling his request for discovery of information regarding jurors. We also conclude that the court did not err in permitting the testimony of Ross, in instructing the jury on "without consent," and in failing to instruct regarding "significant abnormality." We further conclude that there was sufficient evidence to support Sanders' conviction for first degree sexual assault. Finally, we conclude that Sanders' sentence for procuring alcohol for a minor was not an abuse of discretion. We therefore affirm Sanders' convictions and sentences.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DECABOOTER WILLIAMS, APPELLANT.

697 N.W.2d 273

Filed May 27, 2005. No. S-04-747.

1. **Confessions: Appeal and Error.** A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless this determination is clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. Concerning questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
3. **Constitutional Law: Miranda Rights: Self-Incrimination.** To safeguard an uncounseled individual's Fifth Amendment privilege against self-incrimination, suspects interrogated while in police custody must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation.
4. **Miranda Rights.** There is nothing magic about the particular words used to ensure that a suspect knows his or her *Miranda* rights.
5. **Miranda Rights: Waiver.** Neither exhaustion nor intoxication will necessarily invalidate a *Miranda* waiver.

6. **Confessions.** Intoxication is not conclusive on the issue of the voluntariness of a statement.
7. **Confessions: Appeal and Error.** In determining whether a statement is voluntary, an appellate court applies a totality of the circumstances test. The determination reached by the trial court will not be disturbed on appeal unless clearly wrong.
8. **Confessions: Miranda Rights: Waiver.** When considering whether intoxication rendered a waiver of *Miranda* rights involuntary, the defendant must be so intoxicated that he or she is unable to understand the meaning of his or her statements. If the trial judge is satisfied that under the totality of the circumstances, the defendant was able to reason, comprehend, or resist, the statements are to be admitted.
9. **Trial: Rules of Evidence: Testimony: Proof: Appeal and Error.** Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
10. **Jury Instructions: Appeal and Error.** Failure to timely object to jury instructions prohibits a party from contending on appeal that the instructions were erroneous.
11. **Trial: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, 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.
12. **Jury Instructions.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.

Appeal from the District Court for Douglas County: J. RUSSELL DERR, Judge. Affirmed.

A. Michael Bianchi for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

CONNOLLY, J.

Decabooter Williams appeals his convictions and sentences for two counts of felony murder. He contends that (1) he did not voluntarily waive his *Miranda* rights because he was sleep deprived and intoxicated, and therefore his confession should be suppressed; (2) he should have been allowed to use a transcript of a taped statement to refresh a witness' recollection; and (3) the court improperly instructed the jury. We affirm.

BACKGROUND

Summary

This appeal arises from a house fire that killed Victoria Burgess and her daughter LaTisha Tolbert. According to testimony at trial, before the fire, Burgess had accused Williams of stealing money from her purse. Another man later confronted Williams and took money from Williams and gave it to Burgess, which resulted in an argument between Williams and Burgess. Angry, Williams left and went to a neighbor of Burgess and asked the neighbor to loan him a gun. The neighbor refused, and Williams then went to a convenience store where he filled a wine bottle with gasoline and obtained matches.

Williams returned to the neighbor's home and stated that he was going to burn Burgess' house down; he then went to Burgess' house. Diane Williams (Diane), a former girl friend of Williams, lived with Burgess, and stated that Williams woke her and warned her to leave because he was going to burn the house down. Williams then poured gasoline around the interior of the house and lit it. Diane escaped through a window, but Burgess and Tolbert perished in the fire.

Interrogation at Police Station

Investigators learned that Williams was at the scene when the fire occurred and found him and Diane at Williams' home the morning after the fire. Williams consented to accompany the investigators to the station for questioning; he was left in an interview room for about 30 minutes before the interview started. During this time, he dozed off periodically. When the interview began, a police detective, Daniel R. Hayes, asked preliminary questions to determine whether Williams could understand questions and engage in conversation and whether he was under the influence of drugs or alcohol. In response to a question about drug and alcohol use, Williams responded that he had been drinking "[a] little earlier, yeah[, a] lot earlier" and that he had drunk "a buncha beer and gin." Hayes concluded that Williams was not under the influence and that he understood the questions and could engage in conversation.

Hayes read a *Miranda* rights advisory form to Williams and noted his responses on the form. A videotape in the record shows

that Williams stated "yes" to the following questions: Do you understand (1) that you have the right to remain silent, (2) that your statement could be used against you, (3) that you have the right to a lawyer and that the lawyer could be present during the questioning, and (4) that if you cannot afford a lawyer, the court will appoint one to represent you. Hayes did not read the final question on the form, "Knowing your rights in this matter, are you willing to talk to me now?" Instead, he asked Williams if he was going to talk about the fire, and Williams stated he did not know what happened. Hayes then asked whether Williams was going to answer questions, and Williams stated, "Yeah." Hayes wrote on the advisory form that Williams' answer to the last question was, "Go ahead, yes." This statement does not appear in the videotape of the interview.

Williams initially denied any involvement with the fire and stated that as he was coming down the alley near the house, he saw Diane run out of the house. Williams was periodically left alone in the interview room. During that time, police interviewed Diane. She initially denied involvement, but later changed her story. According to Diane, a disagreement arose between Williams and Burgess about some missing money and property, and Williams poured gasoline around the interior of the house and lit it. Hayes went back into the interview room and informed Williams that Diane told him what had happened; Williams then confessed to starting the fire. Williams moved to suppress the statements because he stated he was not properly advised of his *Miranda* rights and because the statements were involuntary. After a hearing, the motion was overruled.

Attempt to Refresh Diane's Memory

At trial, Diane testified about Williams' actions in setting the fire. She stated that she was sleeping when Williams came over to the house and knocked on the door to her room. She then opened the door, came out, and saw Williams start the fire. During cross-examination, Diane was asked if she recalled telling the police that when she opened the door, the fire was "already there." She answered, "No, I don't remember that." She was then asked whether it would refresh her recollection about what she told the police if she was shown a portion of the transcript from a taped

statement that she gave to the police. The State objected before Diane answered the question, and a side-bar conference was held. The State argued that Diane's recollection could not be refreshed or her statements impeached with unsworn statements in a document made by police. The court sustained the objection. Williams did not make an offer of proof. Neither the taped interview nor a transcript of the interview is in the record.

Jury Instructions

The court instructed the jury on the elements of felony murder. In instruction No. 10, the jury was instructed that Williams was guilty of felony murder if he intended to commit arson and the victim died during the course of arson or attempted arson. In instruction No. 20, the court instructed the jury in part that "[i]ntent is a material element of the crime of arson charged against the defendant." Williams did not object to instruction No. 10, defining arson as an intentional crime, but did suggest alternate language. He, however, did not object to instruction No. 20. The jury found him guilty on both counts, and he was sentenced to two consecutive terms of life imprisonment without parole. Williams appeals.

ASSIGNMENTS OF ERROR

Williams assigns, rephrased, that the court erred by (1) denying his motion to suppress because he did not waive his *Miranda* rights, (2) denying his motion to suppress involuntary statements, (3) precluding him from using a transcript to refresh a witness' recollection, and (4) instructing the jury that he had been charged with arson.

STANDARD OF REVIEW

[1] A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless this determination is clearly erroneous. *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004).

[2] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. Concerning questions of counsel's performance or prejudice to

the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Gales, ante* p. 443, 694 N.W.2d 124 (2005).

ANALYSIS

Miranda Form Not Read Exactly

Williams argues that he was not properly advised of his *Miranda* rights because the last line of the *Miranda* form was not read exactly and that his answer was not correctly recorded. Therefore, he contends that the warning was inadequate.

[3,4] To safeguard an uncounseled individual's Fifth Amendment privilege against self-incrimination, suspects interrogated while in police custody must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation. *State v. Thomas, supra*. We have stated that there is nothing magic about the particular words used to ensure that a suspect knows his or her rights. *State v. Jordan*, 229 Neb. 563, 427 N.W.2d 796 (1988).

Here, Hayes did not read the final question on the form—"Knowing your rights in this matter, are you willing to talk to me now?" Instead, he asked Williams if he was going to talk about the fire and answer questions. Williams answered, "Yeah." Although the last line of the advisory form was not read, Hayes' last question fulfilled the *Miranda* requirements. Therefore, we determine that the warnings read to Williams were adequate, even though they were not read exactly as written on the *Miranda* advisory form.

Motion to Suppress Because *Miranda* Waiver Was Involuntary

Williams argues that the court erred in not suppressing his statements because he did not knowingly and voluntarily waive his *Miranda* rights. He argues that because he was tired, sleep deprived, and intoxicated, his statements were not voluntary.

[5,6] But neither exhaustion nor intoxication will necessarily invalidate a *Miranda* waiver. *U.S. v. Korn*, 138 F.3d 1239 (8th

Cir. 1998). Thus, we have held that intoxication is not conclusive on the issue of the voluntariness of a statement. *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983).

[7,8] In determining whether a statement is voluntary, we apply a totality of the circumstances test. The determination reached by the trial court will not be disturbed on appeal unless clearly wrong. See, *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004); *State v. Lamb, supra*. Concerning intoxication, we have recognized that " '[t]he defendant must be so intoxicated that he is unable to understand the meaning of his statements. . . . If the trial judge is satisfied that under the totality of the circumstances the defendant was able to reason, comprehend, or resist, the statements are to be admitted.' " *State v. Lamb*, 213 Neb. at 504, 330 N.W.2d at 467, quoting *State v. Laffoon*, 125 Ariz. 484, 610 P.2d 1045 (1980).

Here, the trial court correctly admitted Williams' confession into evidence. Although the evidence showed that Williams was tired and had consumed alcohol, the record reflects that he was no longer intoxicated by the time of the interview and that he demonstrated his ability to understand and answer questions. In the videotaped interview, Williams appeared able to reason and comprehend the questions and he answered them coherently. Consequently, the trial court was not clearly wrong in determining that Williams knowingly and voluntarily waived his *Miranda* rights and voluntarily confessed.

Denial of Use of Police Transcript on Cross-Examination

Williams next contends that the trial court erred when it denied the use of a police transcript of Diane's statements for the purpose of impeachment or to refresh her recollection. Williams, however, did not make an offer of proof, and the transcript is not in the record.

[9] Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked. *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991).

Here, there was no showing of the evidence sought to be introduced through Diane's statement other than the comment she may have made to police stating that the fire was already started when she responded to Williams' knock on her door. Diane never answered the foundational question whether the transcript sought to be used would refresh her recollection. Nor did she answer foundational questions necessary to determine whether the transcript could be properly used for impeachment. We are unable to determine from the record any information about the transcript of the statement sought to be used, because no offer of proof was made and the transcript sought to be used was not included in the record. Without more, we cannot perform a meaningful review of this assignment of error. Accordingly, we determine that the issue was waived.

Jury Instructions

[10] Williams contends that the court improperly instructed the jury because the instructions stated that he was "charged" with arson. Failure to timely object to jury instructions prohibits a party from contending on appeal that the instructions were erroneous. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003). Because Williams did not object, he has waived the issue.

Ineffective Assistance of Counsel

[11,12] Williams next argues, however, that his counsel was ineffective for failing to object to the instruction. To establish a right to relief because of a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004). Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Anderson, ante* p. 365, 693 N.W.2d 267 (2005).

Here, Williams was not directly charged with arson. Instead, arson was the underlying felony for the charge of felony murder. The instruction at issue, however, was included to explain the

effect of intent on the underlying felony. When the instructions are read together, we find no prejudice. Williams was not denied effective assistance of counsel.

CONCLUSION

We determine that the trial court did not err in allowing Williams' confession into evidence. He waived any argument about the use of a police transcript to refresh Diane's recollection or to impeach her testimony, and he was not denied effective assistance of counsel. Accordingly, we affirm.

AFFIRMED.

IN RE INTEREST OF COREY P. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JENNIFER P., APPELLANT.

IN RE INTEREST OF MEISHA L. AND REMINGTON L., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. BRETT L., APPELLANT.

697 N.W.2d 647

Filed May 27, 2005. Nos. S-04-1079, S-04-1100.

1. **Juvenile Courts: Judgments: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Constitutional Law: Search and Seizure.** In Nebraska, freedom from unreasonable searches and seizures is guaranteed by U.S. Const. amend. IV and Neb. Const. art. I, § 7.
3. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by the exigencies which justify their initiation.
4. **Constitutional Law: Search and Seizure.** The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect.
5. **Constitutional Law: Search and Seizure: Evidence.** Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure.

6. **Juvenile Courts.** Juvenile proceedings are civil rather than criminal in nature.
7. **Constitutional Law: Search and Seizure.** Application of the exclusionary rule in civil cases is not automatic.
8. **Constitutional Law: Search and Seizure: Motions to Suppress.** In deciding whether the exclusionary rule should apply in a particular type of proceeding, the court must weigh the deterrent effect of suppression against its societal costs to determine if evidence should be suppressed. Where little or no deterrence will result, suppression is inappropriate.
9. ____: ____: ____. When balancing the deterrent effect of suppression against its societal costs to determine if evidence should be suppressed, the court must consider the State's interest in the matter and the right sought to be protected, the purpose of the proceeding and the potential sanctions that could result from the proceeding, and the purpose of the search and its relationship to the proceeding in which the rule is sought to be invoked.
10. **Juvenile Courts: Parental Rights.** The foremost purpose and objective of the juvenile code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law. The goal of juvenile proceedings is not to punish parents, but to protect children and promote their best interests.
11. **Juvenile Courts: Constitutional Law.** The Fourth Amendment exclusionary rule is inapplicable in child protection proceedings.
12. **Parental Rights.** The purpose of the adjudication phase is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase.
13. **Juvenile Courts: Jurisdiction: Proof.** In order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004), the State must prove the allegations of the petition by a preponderance of the evidence. The court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247.
14. **Juvenile Courts: Evidence: Appeal and Error.** When the evidence is in conflict in a juvenile case, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.

Appeals from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Timothy F. Shanahan for appellant Jennifer P.

Douglas R. Switzer, of Hathaway & Switzer, L.L.C., and Krisanne C. Weimer for appellant Brett L.

Stuart J. Dornan, Douglas County Attorney, Nicole Brundo Goaley, Karen Kassebaum Nelson, and Anne Armitage, Senior Certified Law Student, for appellee.

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

GERRARD, J.

NATURE OF CASE

Jennifer P. and Brett L. appeal from the order of the juvenile court adjudicating their respective children to be juveniles lacking proper parental care within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004). The evidence that provided the basis for those adjudications was obtained from a warrantless search of Jennifer and Brett's residence.

The primary issue presented on appeal is whether the exclusionary rule, designed to enforce the protections of the Fourth Amendment, applies to evidence obtained in a warrantless search and submitted in a child protection proceeding.

FACTUAL AND PROCEDURAL BACKGROUND

On March 17, 2004, at approximately 2 p.m., Deputy Alice Meyer responded to a report of a small child wandering outside in a trailer park in Omaha, Nebraska. Meyer arrived at the trailer park and spoke with the neighbor who had reported the wandering child. The neighbor had taken the child into her trailer because the child had blue lips and was very cold. Meyer testified that the child, who was 3 years old, was wearing only a pair of pink, knit pants that were wet and smelled of urine and that she appeared to have dried food around her mouth. Meyer stated that the child also smelled of "dirty and rotting food." Meyer testified that the neighbor indicated that she had seen the child wandering outside before and pointed to a trailer where she believed the child and her siblings lived.

Meyer testified that upon visiting the trailer identified by the neighbor, Jennifer answered the door and, at Meyer's request, allowed Meyer into the residence. Meyer learned that Jennifer lived at the residence with her four biological children: Corey P., Dylan P., Jasmine P., and Bryanna L. In addition, Jennifer indicated that her fiance, Brett, and his two children, Meisha L. and Remington L., also lived at the residence.

According to Meyer, Jennifer told Meyer that Brett was out with some of the other children looking for the missing 3-year-old, Jasmine, and that Jennifer had a baby, Bryanna, in the back

room of the residence. Jennifer objected when Meyer told her that to ensure Bryanna's welfare, Meyer needed to check on her without Jennifer's being present. Meyer testified that she suspected that Jasmine had been neglected and, thus, thought other children in the residence might also be at risk.

In contrast, Jennifer testified that when Meyer asked to enter the residence, Jennifer said that she was not feeling well and was not comfortable with Meyer's entering her home. Further, Jennifer indicated that Meyer and the male officer accompanying her again told Jennifer that they needed to come into the residence and that when Jennifer again denied entry, Meyer told her that she would not be permitted to see Jasmine until she allowed the officers into her home. Jennifer testified that fearing she would not get Jasmine back, she allowed Meyer to enter the home.

Meyer testified that inside Jennifer and Brett's residence, she observed an offensive odor, similar to the smell that had been coming from Jasmine. Meyer also noticed that the house was very dirty, the kitchen sink was full of dirty dishes, and there appeared to be food items "spread out." Pictures of the residence were received into evidence, which pictures Meyer testified were accurate depictions of her observations on March 17, 2004.

Meyer described the children as dirty and testified that after finding Bryanna in a crib with a urine-soaked blanket over her and observing the conditions in the bedroom, Meyer decided to take the six children, all of whom were under the age of 10, into protective custody.

On March 18, 2004, a petition (which was later amended) was filed in the separate juvenile court, alleging that Corey, Dylan, Jasmine, and Bryanna came within the meaning of § 43-247(3)(a). On the same day, a similar petition was filed, alleging that Meisha and Remington came within the meaning of § 43-247(3)(a). Motions for temporary custody were filed, requesting the court to place the six children in the custody of the Nebraska Department of Health and Human Services (DHHS). In support of the motions, the State attached affidavits completed by Meyer. Orders for immediate custody were entered by the court on March 18, ordering that the children be placed in temporary foster care.

On April 12, 2004, the court ordered the children to remain in the temporary custody of DHHS but directed that they be allowed to return to the parental home under certain conditions. Specifically, Jennifer and Brett were instructed to, among other things, cooperate with family support services and not do anything that would delay, or lead to the unsuccessful termination of, those services; enroll their school-aged children in school; maintain a sanitary and safe home; keep the children clean; participate in a pretreatment assessment; obtain and maintain a stable source of income; and submit the children for immediate physical and dental examinations.

On August 12, 2004, the State filed a motion in each case, citing the "need for PLACEMENT OF THE CHILDREN IN THE TEMPORARY CUSTODY OF NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FOR PLACEMENT TO EXCLUDE THE HOME OF" the parent, Jennifer or Brett. Attached to the motions, the State provided affidavits completed by a case manager from DHHS and a family support worker assigned to work with the family. In her affidavit, the DHHS case manager described in detail her observations upon visiting the home on August 12, indicating that the home was dirty, cluttered, and malodorous and recommending that the children be removed from the residence immediately. In a separate affidavit, the family support worker described her weekly visits to the home and the goals she had instructed the family to work toward. The family support worker explained that Jennifer and Brett had failed to make any progress toward the goals, that the home continued to be dirty, and that the children were sleeping on soiled mattresses with no bedding. The juvenile court ultimately entered orders for placement of the children in foster care, excluding the home of Jennifer and Brett.

Prior to the adjudication hearing, Jennifer and Brett filed motions to suppress or, alternatively, motions in limine, asking that any evidence obtained as a result of Meyer's warrantless entry into their home on March 17, 2004, be excluded as having been gathered in violation of their rights under the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution. The court overruled the motions, finding that exigent circumstances justified the search.

After the adjudication hearing, the court found Corey, Dylan, Jasmine, Bryanna, Meisha, and Remington to be within the meaning of § 43-247(3)(a). Further, the court ordered the children to remain in the temporary custody of DHHS for placement, excluding the home of Jennifer and Brett, until further order of the court.

Jennifer and Brett filed separate appeals from the order of the juvenile court. The appeals were docketed and argued separately in this court, but the underlying facts are the same. Therefore, we have consolidated the cases for purposes of disposition of these appeals.

ASSIGNMENTS OF ERROR

Both Jennifer and Brett assign that the juvenile court erred in allowing evidence obtained during Meyer's visit to their home on March 17, 2004, to be used in the proceedings.

In addition, Jennifer assigns that the court erred in finding sufficient evidence to order the continued detention of her children and in finding sufficient evidence to support the finding that the children came within the meaning of § 43-247(3)(a). Brett does not make any sufficiency of evidence arguments.

STANDARD OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling. *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002).

ANALYSIS

Fourth Amendment Exclusionary Rule Does Not Apply in Child Protection Proceedings.

Jennifer and Brett argue that the court erred in failing to exclude evidence obtained during Meyer's search of their home. Specifically, they argue that Meyer's entry into their home was a violation of their Fourth Amendment rights and that, thus, any evidence or information gathered during Meyer's visit should have been excluded from the proceedings. In response, the State argues that the Fourth Amendment does not apply to juvenile

proceedings and that, alternatively, even if it does apply, the remedy of exclusion should not apply to juvenile proceedings. The State also argues that exigent circumstances were present during Meyer's visit to Jennifer and Brett's home and that, thus, under that exception to the warrant requirement, the entry was reasonable.

[2,3] In Nebraska, freedom from unreasonable searches and seizures is guaranteed by U.S. Const. amend. IV and Neb. Const. art. I, § 7. *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003). Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by the exigencies which justify their initiation. *State v. Allen, ante* p. 69, 690 N.W.2d 582 (2005).

The State initially argues that the Fourth Amendment should not apply in juvenile proceedings and cites cases in which this court has concluded that certain constitutional rights do not apply in juvenile cases. See, *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004) (heightened standards of Sixth Amendment Confrontation Clause are not applicable in juvenile proceedings); *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990) (Sixth Amendment right to speedy trial applies only in criminal trials and thus does not apply in parental termination proceedings). However, the rights found to be inapplicable in juvenile proceedings in those cases are rights directly implicated during other court proceedings. In other words, they are procedural rights intended to govern the conduct of criminal trials. In contrast, the Fourth Amendment protections against unreasonable search and seizure are implicated whenever state action intrudes on a citizen's legitimate expectation of privacy. "The right of the people to be secure in their persons, houses, papers, and effects" applies to their persons, houses, papers, and effects, regardless of the venue of any subsequent litigation. U.S. Const. amend. IV. Instead, the question is whether, in a juvenile proceeding, those Fourth Amendment protections demand the use of the exclusionary rule as a remedy for their violation.

[4-7] The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect.

Allen, supra. Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. *Id*. However, juvenile proceedings are civil rather than criminal in nature. *In re Interest of Joshua R.*, 265 Neb. 374, 657 N.W.2d 209 (2003). Application of the exclusionary rule in civil cases is not automatic. See *City of Omaha v. Savard-Henson*, 9 Neb. App. 561, 615 N.W.2d 497 (2000).

In *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974), the U.S. Supreme Court addressed whether to extend the exclusionary rule to grand jury proceedings. The Court stated, "[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . . Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." 414 U.S. at 347. Further, the Court said the rule's application has been restricted to areas where its remedial objectives are most effectively served. *Id*. The Court concluded that application of the rule would greatly interfere with the "effective and expeditious discharge of the grand jury's duties" and would not significantly further the goal of deterrence. 414 U.S. at 350. Therefore, the Court held that the Fourth Amendment exclusionary rule should not be extended to grand jury proceedings. *Id*.

Similarly, in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984), the U.S. Supreme Court addressed whether to extend the exclusionary rule to civil deportation hearings and discussed the "framework for deciding in what types of proceeding application of the exclusionary rule is appropriate." The Court stated:

> Imprecise as the exercise may be . . . there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs. On the benefit side of the balance "the 'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct.' " . . . On the cost side there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.

Id., citing *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976). In *Lopez-Mendoza*, the Court weighed the costs and benefits of applying the exclusionary rule in civil deportation hearings and, finding the costs to outweigh the benefits, concluded that the rule should not apply in such proceedings.

[8] We acknowledged the limited application of the exclusionary rule in *State v. Tyrrell*, 234 Neb. 901, 453 N.W.2d 104 (1990), and, citing the balancing test announced in *Janis, supra*, also stated that a court must weigh the deterrent effect of suppression against its societal costs to determine if evidence should be suppressed. Where little or no deterrence will result, suppression is inappropriate. *Tyrrell, supra*. Accord *State v. Allen, ante* p. 69, 690 N.W.2d 582 (2005) (where exclusionary rule does not result in significant deterrence, its use is not warranted). Most recently, we held that the Due Process Clause does not require that the Fourth Amendment exclusionary rule be applied to administrative license revocation proceedings. *Chase v. Neth, ante* p. 882, 697 N.W.2d 675 (2005). We noted the civil, nonpunitive nature of administrative license revocation proceedings and determined that application of the rule in such proceedings would accomplish little in terms of deterring improper police conduct, given the applicability of the rule in criminal proceedings. *Id.* In addition, we concluded that any deterrent value would be outweighed by the public health and safety interests which the administrative license revocation statutes are intended to protect. *Id.* See, also, *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

[9] Although we have yet to address the application of the Fourth Amendment exclusionary rule in the context of juvenile proceedings, we now utilize the balancing test set forth by the Court to determine if such application is warranted. Only if the rule does apply in the context of child protection proceedings is it necessary for us to determine whether the search involved in this case was conducted in violation of the Fourth Amendment. See *State ex rel. A.R. v. C.R.*, 982 P.2d 73 (Utah 1999). In the course of our analysis, we must consider the State's interest in the matter and the right sought to be protected, the purpose of the proceeding and the potential sanctions that could result from the proceeding, and the purpose of the search and its relationship to

the proceeding in which the rule is sought to be invoked. See *Matter of Diane P.*, 110 A.D.2d 354, 494 N.Y.S.2d 881 (1985).

[10] We have observed that the foremost purpose and objective of the juvenile code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). Thus, the goal of juvenile proceedings is not to punish parents, but to protect children and promote their best interests. Application of the exclusionary rule in criminal proceedings may result in a crime's going unpunished, a price that society is willing to pay in order to protect the right to be free from unreasonable intrusions. In contrast, application of the rule in juvenile proceedings may lead to an erroneous conclusion that there has been no abuse or neglect, leaving innocent children to remain in unhealthy or compromising circumstances. See *Matter of Diane P., supra*. Any possible benefits of the exclusionary rule do not justify such a costly result in child protection proceedings.

Moreover, the potential impact on parents in such proceedings does not justify application of the exclusionary rule. The potential consequences of child protection proceedings range from an order requiring supervision of the child by a child protection agency, to leaving the child in the custody of the parents, to an order for the temporary or permanent removal of the child. These consequences are designed to protect innocent children, not to punish parents; their effect on the parents is merely collateral to their main purpose. Although parents may ultimately be prosecuted on the basis of the underlying acts of a child protective proceeding, in a criminal prosecution, any evidence obtained in an unlawful search would be inadmissible at trial. Thus, the deterrent effect of the exclusionary rule would be adequately served by the exclusion of illegally seized evidence in that context. See *id*. See, also, *Matter of Anne BB*, 202 A.D.2d 806, 609 N.Y.S.2d 111 (1994); *Care & Protection of Frank*, 409 Mass. 492, 567 N.E.2d 214 (1991); *In re Mary S.*, 186 Cal. App. 3d 414, 230 Cal. Rptr. 726 (1986); *In re Robert P.*, 61 Cal. App. 3d 310, 132 Cal. Rptr. 5 (1976).

[11] Considering the purpose of the rule, and the State's overwhelming interest in protecting innocent children, it would be improper to exclude evidence obtained during a warrantless search in subsequent child protection proceedings. On balance, the State's interest in protecting abused or neglected children and the undesirable consequences to the children if they are left in compromising circumstances far outweigh any deterrent effect that may result from applying the exclusionary rule. We, therefore, hold that the Fourth Amendment exclusionary rule is inapplicable in child protection proceedings. Thus, it is unnecessary to consider in this case whether the search by Meyer was unreasonable under the Fourth Amendment. We conclude that the juvenile court did not err in overruling Jennifer and Brett's motions to exclude evidence obtained during Meyer's search of their home.

Detention Hearing Issue Is Moot.

Jennifer argues that the juvenile court erred in ordering the continued detention of her children. Jennifer asserts that the testimony offered at the detention hearing on August 18 and 25, 2004, was general and insufficient to support the order of continued detention. However, since we cannot undo the temporary detention order keeping the children in the custody of DHHS pending adjudication, the issue is moot and we need not consider this assignment of error. See *In re Interest of Phoebe S. & Rebekah S.*, 11 Neb. App. 919, 664 N.W.2d 470 (2003). If Jennifer wished to challenge the temporary detention, she should have appealed from the order of continued detention prior to adjudication.

Order of Adjudication Was Supported by Sufficient Evidence.

[12,13] Finally, Jennifer argues that the court erred in finding her children to be within the meaning of § 43-247(3)(a). The purpose of the adjudication phase is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase. *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001). In order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance

of the evidence. *In re Interest of Heather R. et al., ante* p. 653, 694 N.W.2d 659 (2005). The court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. See *In re Interest of Sabrina K., supra*.

In this case, the amended petitions alleged that the six children at issue come within the meaning of § 43-247(3)(a), lacking proper parental care by reason of the faults or habits of their parents in that Jasmine was found wandering alone outside without proper clothing; the home of the children was found to be in a filthy, unwholesome condition; and the children were found to be in a filthy, unwholesome condition, placing the children at risk of harm.

In support of these allegations, Meyer testified extensively about her observations when she arrived at the home of Jennifer and Brett on March 17, 2004, as previously detailed. Several photographs, which Meyer testified were accurate depictions of the residence, were offered and received into evidence. Meyer's testimony and the photographs of the residence offered at the adjudication hearing provide sufficient evidence to support the allegations in the amended petition.

[14] Although Jennifer testified that the photographs were not accurate depictions of the residence and implied that law enforcement had created some of the mess illustrated in the photographs, we give deference to the juvenile court's explicit decision to accept Meyer's testimony in this matter. When the evidence is in conflict in a juvenile case, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Heather R. et al., supra*. Having reviewed the photographs and other evidence in the record, we find sufficient evidence to conclude, as did the juvenile court, that the children come within the meaning of § 43-247(3)(a).

CONCLUSION

We find on our de novo review that the evidence supports the juvenile court's finding that the children at issue come within the meaning of § 43-247(3)(a). Because the exclusionary rule does not apply in child protection proceedings, the juvenile

court did not err in overruling the Fourth Amendment objections to that evidence. Thus, we affirm the adjudication orders of the juvenile court.

AFFIRMED.

SHANNON M. WILKINS, APPELLANT AND CROSS-APPELLEE, V. JOSEPH A. WILKINS, APPELLEE AND CROSS-APPELLANT.

697 N.W.2d 280

Filed June 3, 2005. No. S-04-252.

1. **Modification of Decree: Child Support.** Modification of child support is entrusted to the discretion of the trial court.
2. **Modification of Decree: Child Support: Appeal and Error.** An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.
3. **Child Support: Rules of the Supreme Court: Presumptions.** The Nebraska Child Support Guidelines are to be applied as a rebuttable presumption to both temporary and permanent support, and any deviation from the guidelines must take into consideration the best interests of the children.
4. ____: ____: ____. A court may deviate from the Nebraska Child Support Guidelines when one or both of the parties have provided sufficient evidence to rebut the presumption.
5. **Child Support: Rules of the Supreme Court: Proof.** The party requesting a deviation from the Nebraska Child Support Guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing evidence regarding the obligation, including the income of the other parent of the child or children of the subsequent relationship.
6. **Child Support: Appeal and Error.** Whether a child support order should be retroactive is entrusted to the discretion of the trial court and will be affirmed absent an abuse of discretion.
7. **Modification of Decree: Child Support: Time.** Absent equities to the contrary, the modification of child support orders should be applied retroactively to the first day of the month following the filing date of the application for modification.
8. **Modification of Decree: Child Support.** In a modification of child support proceeding, the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system.

Appeal from the District Court for Fillmore County: PAUL W. KORSLUND, Judge. Affirmed as modified.

Joseph H. Murray, P.C., L.L.O., of Germer, Murray & Johnson, for appellant.

Sally A. Rasmussen, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Shannon M. Wilkins appeals from the trial court's order modifying the decree that dissolved her marriage to Joseph A. Wilkins. The court increased Joseph's child support obligation, denied retroactive application of the child support increase, and recalculated the responsibility for health care and childcare expenses. It declined to change the allocation of tax exemptions for the parties' minor children and denied Joseph's request that he be allowed a deduction for the entire amount of his monthly student loan payment in calculating his child support obligation. Joseph cross-appeals.

SCOPE OF REVIEW

[1,2] Modification of child support is entrusted to the discretion of the trial court. See *Emery v. Moffett, ante* p. 867, 697 N.W.2d 249 (2005). An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Id.*

FACTS

Shannon and Joseph were married in August 1993. A dissolution decree entered on January 11, 2001, granted custody of the parties' two minor children to Shannon, with reasonable visitation for Joseph, including 6 weeks in the summer. Joseph was ordered to pay child support of $600 per month for two children and $400 per month for one child, commencing January 1, 2001. The decree provided that child support would abate by one-half for 1 month during summer visitation. Joseph was directed to pay his student loans of approximately $80,000, and he was granted a deviation in child support based upon the student loan payments. The deviation reduced his child support obligation by $137 per month for two children and $114 per month for one child.

Shannon was directed to provide health insurance for the children when it is available through her employment, and Joseph was made responsible for one-half of any medical and health care expenses not covered by insurance. Each parent was directed to pay the daycare expenses incurred when the children were in that parent's physical custody. The decree provided that Shannon could claim one of the children as a dependent for income tax purposes and that Joseph could claim the other, as long as he was current in his child support obligation.

On November 29, 2001, Shannon filed an application for modification of the dissolution decree, asserting that there had been material changes of circumstances. She alleged that the cost of daycare had increased and requested a modification to require Joseph to pay a proportionate share of this expense. She claimed that Joseph's income had increased since the decree and that application of the Nebraska Child Support Guidelines to his current income would result in an increase in child support in excess of 10 percent of his current obligation. Shannon also asked for a court order requiring the parties to file separate applications for credit in order to separate their loan obligations.

The issues raised in the modification request were not ultimately determined until February 2004, over 2 years after it was filed. The delays were the result of a number of events.

When Shannon filed the application for modification in November 2001, she did not have Joseph served with a summons. He entered a voluntary appearance on February 7, 2002. In an amended answer, Joseph asserted that the trial court should take into consideration his obligation to make monthly student loan payments when determining child support. Joseph also filed a counterclaim, alleging that he should be entitled to claim both children as dependents for income tax purposes.

On December 16, 2002, the trial court ordered that Joseph's child support obligation for two minor children be increased temporarily to $900 per month, effective November 1, 2002. A final decree was subsequently entered, and Joseph filed a motion for new trial or to alter or amend the judgment. He also filed a motion to recuse the trial judge because of ex parte communications between the judge and Shannon's counsel. The judge subsequently recused himself.

On May 2, 2003, a different judge sustained Joseph's motion for new trial and vacated and set aside the orders of the first trial judge. The second judge ordered continuation of the temporary child support during the pendency of the action and scheduled a new trial for July 1. Shannon's counsel filed a motion for continuance on June 30 because his residence had sustained severe tornado damage and he did not have adequate time to prepare for trial.

Following the new trial, the trial court entered an order on September 30, 2003, modifying the original decree. The court found a material change in circumstances in that Joseph's annual income had increased while Shannon's income had remained the same. As to Joseph's request for a deduction of his $1,029 per month student loan payments in calculating child support, the court found some evidence that the student loans might have been taken into consideration at the time of the decree. The court granted a deduction of 25 percent of the monthly loan payment, or $257.25, from Joseph's monthly income in calculating child support. It ordered monthly child support of $907 for two children and $627 for one child.

Shannon had requested that the modification of child support be made retroactive to the month following the filing of her application. The trial court noted that Joseph had paid $900 per month for approximately 10 months under the temporary child support order. It concluded that the delays in the case could not be specifically attributed to either party and that it would create a hardship on Joseph to make his child support obligation retroactive to December 1, 2001. The court found that the temporary child support had given Shannon adequate relief, and the modified child support obligation was made effective October 1, 2003.

The trial court ordered that each party would be responsible for one-half of the children's medical expenses not covered by insurance, in accordance with the child support guidelines. The court made no change in the allocation of tax exemptions. It ordered Joseph to reimburse Shannon for 50 percent of work-related childcare and ordered Shannon to reimburse Joseph for 50 percent of work-related childcare during summer visitation.

At the new trial, Joseph presented evidence that he had remarried and that his wife was expecting a child relatively soon. He requested credit for the support of this child in the calculation of his child support obligation. The trial court found it not appropriate to do so prior to the birth of the child. It stated, "However, it appears that [Joseph] would certainly be entitled to such a credit upon the birth of the child, and it is hoped that the parties can reach a stipulation in that regard." The court indicated a willingness to enter a further order of modification if an application was filed and the parties stipulated to the modification. The court stated that if no agreement could be reached concerning a further application to modify, it would consider entering a temporary order after notice and hearing, with all evidence to be presented by affidavit.

On October 2, 2003, Joseph filed a motion to reopen his rest or for new trial in order to present evidence of the birth of his daughter on September 27. Shannon filed a motion for new trial on October 6.

The trial court overruled the motions for new trial but granted Joseph's motion to reopen his rest for the limited purpose of providing evidence of the birth of the child. After evidence was offered, the court took the matter under advisement.

The final order modifying the dissolution decree was entered on February 23, 2004. The trial court found a material change in circumstances based on the 47-percent increase in Joseph's income while Shannon's income remained the same. The court again granted Joseph the student loan deduction of 25 percent. It made the child support modification effective March 1, 2004, finding that the temporary child support had given Shannon adequate relief and that the delays could not be specifically attributed to either party. Each party was directed to be responsible for one-half of any medical expenses in excess of $480 per calendar year per child up to a maximum of Joseph's monthly child support obligation. The court granted no change in the tax exemptions.

As a deviation from the child support guidelines, the trial court allowed Joseph a deduction of $411 from his income as the amount of his child support obligation for the child born

September 27, 2003. The court based this deduction on a worksheet provided by Joseph. Joseph was ordered to pay child support of $792.35 per month for two children and $548.94 for one child. Shannon appealed, and Joseph has filed a cross-appeal.

ASSIGNMENTS OF ERROR

Shannon assigns as error the trial court's abuse of discretion in (1) calculating child support on the basis of Joseph's total monthly income less $411 attributable to his obligation to support a child born September 27, 2003; (2) failing to make the child support order effective as of December 1, 2001, the first day of the month after Shannon filed her application for modification of the decree; and (3) failing to make Joseph's requirement to contribute to childcare expenses retroactive to December 1, 2001.

On cross-appeal, Joseph asserts that the trial court erred in (1) failing to grant him a credit in the amount of his entire student loan payment, which resulted in an increase in his child support payments, and (2) failing to award Joseph the tax exemptions for both minor children.

ANALYSIS

Child Support for Subsequently Born Child

Shannon's first assignment of error asserts that the trial court abused its discretion in granting Joseph a deviation from the child support guidelines based upon his obligation to support a subsequently born child.

The Nebraska Child Support Guidelines contain two provisions related to credit that may be given for other children. In paragraph E(6), the guidelines state: "Other Children. Subject to Paragraph T, credit may be given for biological or adopted children for whom the obligor provides regular support." Paragraph T, which went into effect on September 1, 2002, provides:

> Limitation on Decrease. An obligor shall not be allowed a reduction in an existing support order solely because of the birth, adoption, or acknowledgement of subsequent children of the obligor; however, a duty to provide regular support for subsequent children may be raised as a defense to an action for an upward modification of such existing support order.

Joseph raised the defense of subsequent children at the trial held on August 19, 2003. When Joseph was asked if he and his current wife had any children, he responded that they were expecting a child in about a month. Shannon objected when Joseph was asked when the child was due. The trial court reserved ruling on the relevancy objection and allowed Joseph to make a record. Joseph testified that the child was due September 22. At the hearing on the motions for new trial, the court received into evidence the birth certificate of the child, showing that she was born on September 27. In its order of February 23, 2004, the court allowed Joseph a deduction of $411 from his income for the support of the third child.

[3-5] The child support guidelines are to be applied as a rebuttable presumption to both temporary and permanent support, and any deviation from the guidelines must take into consideration the best interests of the children. See *Dueling v. Dueling*, 257 Neb. 862, 601 N.W.2d 516 (1999). A court may deviate from the guidelines when one or both of the parties have provided sufficient evidence to rebut the presumption. *Czaplewski v. Czaplewski*, 240 Neb. 629, 483 N.W.2d 751 (1992). In *Brooks v. Brooks*, 261 Neb. 289, 292-93, 622 N.W.2d 670, 673 (2001), this court stated, "The party requesting a deviation from the guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing evidence regarding the obligation, including the income of the other parent of the child or children of the subsequent relationship."

In *Emery v. Moffett, ante* p. 867, 697 N.W.2d 249 (2005), we cited *Brooks* and noted that there is no precise mathematical formula for calculating child support when subsequent children are involved. "[T]he calculation is left to the discretion of the court as long as the court considered the obligations to both families and the income of the other parent of the subsequent children." *Emery v. Moffett, ante* at 871, 697 N.W.2d at 254. The trial court "has discretion to choose if and how to calculate the deviation, but must do so in a manner that does not benefit one family at the expense of the other." *Id.*

Joseph presented evidence concerning his income and that of his current wife, including their joint income tax return for 2002 and their pay stubs. The trial court used this information in

calculating Joseph's child support obligation for the two children born of his marriage to Shannon. The court found that it was equitable to grant a deduction of $411 for the child born subsequent to the dissolution decree in calculating the modification of child support for the prior children.

Shannon concedes that it is "certainly fair, at some point, to give [Joseph] a reduction for the support of subsequently born children." Brief for appellant at 22. However, she argues that the circumstances of the case had not yet reached that point and that the trial court abused its discretion in allowing a deviation from the guidelines.

Two questions are presented: (1) whether the trial court abused its discretion in allowing a deduction for the support of the child born to Joseph and his current wife and (2) whether the amount of the deduction was an abuse of discretion.

Modification of child support is entrusted to the discretion of the trial court. See *Emery v. Moffett, supra*. An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Id*. It is true that if the case had been decided earlier, the child of Joseph and his current wife would not have been a consideration that affected the child support calculation. However, under the circumstances of this case, it was not an abuse of discretion to allow a deviation from the child support guidelines pursuant to paragraph T. This case was plagued by delays, none of which were necessarily attributable to either party.

The district court calculated child support for the children of Joseph's first marriage while taking into consideration his obligation to the child of his second marriage. The court therefore determined child support in an interdependent manner that considered the obligation to each family, and we find no abuse of discretion in that determination. See *Emery v. Moffett, supra*.

Retroactive Application of Modification

Shannon argues that the trial court abused its discretion in failing to make the modified child support order effective December 1, 2001, which was the first day of the month after she filed her application for modification of the dissolution decree. Shannon argues that although Joseph paid $900 in temporary support for

14 months during the proceedings, he paid only $600 per month during the first 11 months the case was pending. She also argues that the court abused its discretion in failing to make Joseph's requirement to contribute to childcare expenses retroactive to December 1, 2001.

[6-8] Whether a child support order should be retroactive is entrusted to the discretion of the trial court and will be affirmed absent an abuse of discretion. *Emery v. Moffett, ante* p. 867, 697 N.W.2d 249 (2005). Absent equities to the contrary, the modification of child support orders should be applied retroactively to the first day of the month following the filing date of the application for modification. *Erica J. v. Dewitt*, 265 Neb. 728, 659 N.W.2d 315 (2003). In a modification of child support proceeding, the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system. *Id.*

The trial court found that the delays in this case were not attributable to either party. The delays resulted from, inter alia, a motion to recuse the judge who initially handled the case, the failure of the court clerk to notify Joseph of the entry of an order, and tornado damage to the home of Shannon's attorney.

The Nebraska Court of Appeals has addressed the retroactivity of a modification of child support by stating:

> The rule providing that the status, character, and situation of the parties and attendant circumstances should be considered in determining whether to make child support modifications retroactive naturally requires consideration of the obligated party's ability to pay the lump sum that will necessarily result in such a retroactive order. We find no cases in which the ability of the obligated party to pay the retroactively ordered support is discussed, but we think the ability to pay is a paramount factor. We think that in the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent does not have the ability to pay the retroactive support and still meet current obligations.

Cooper v. Cooper, 8 Neb. App. 532, 538, 598 N.W.2d 474, 478 (1999).

It appears that Shannon is seeking an additional $300 per month for 11 months, or $3,300. The trial court found that it

would create a hardship on Joseph to make the child support modification retroactive to the month following the filing of the application for modification and that the temporary child support had given Shannon adequate relief.

Joseph testified that he did not have the means to pay a retroactive award. He offered into evidence an account summary from Wells Fargo Bank which showed that as of August 15, 2003, he had $1,945.86 in his checking account and $339.32 in his savings account. Joseph stated that the checking account was a bill-paying account and that there were outstanding checks. The savings account was Joseph's only source of savings.

There was no showing of bad faith on the part of Joseph to suggest that he had other funds available to pay a retroactive award of child support, and he offered evidence that his average living expenses exceeded his monthly net income. The trial court's finding that a retroactive order would create a hardship on Joseph is supported by the record. The court did not abuse its discretion in failing to order retroactive payment of child support or childcare expenses.

Cross-Appeal

On cross-appeal, Joseph asserts that the trial court erred in failing to deduct the entire amount of his monthly student loan payment from his monthly income when the court calculated his child support obligation. This assignment of error is without merit.

The trial court granted a deduction from monthly income equal to 25 percent of Joseph's monthly student loan payment. Joseph argues that the court's failure to deduct 100 percent of the student loan payment ignored the fact that it is a fixed, legally unavoidable expense, and he complains that the court did not explain its reasoning for a deduction of only 25 percent.

In the dissolution decree, Joseph was directed to pay his student loans of approximately $80,000, and as a result, he was granted a deviation in child support. His child support was decreased by $137 per month for two children and $114 per month for one child. Neither party filed an appeal following the entry of the dissolution decree.

When the second trial judge assumed this case, he noted that Joseph was requesting a deduction of $1,029 (the amount of his

monthly student loan payment) from his monthly income in the calculation of child support. The court found that the student loans contributed to Joseph's ability to earn his present income and that the loans may have been taken into consideration at the time of the dissolution decree. The court concluded that it was equitable to grant Joseph some deviation from the child support guidelines, and it ordered a deduction of 25 percent of Joseph's monthly student loan payment, or $257.25, from his monthly income.

A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree and (2) was not contemplated when the decree was entered. See *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003). In this case, the amount of Joseph's student loan payments was known to the parties when the dissolution decree was entered, and it was considered in determining child support at that time. Joseph did not appeal from the dissolution decree. Therefore, he has no basis for arguing that the total amount of his monthly student loan payment should be deducted from his monthly income in calculating child support upon Shannon's application for modification. He was not allowed to deduct the entire amount in the dissolution decree, and he cannot relitigate that issue upon an application for modification.

Joseph also argues that the trial court should have carried over the $137 and $114 reductions for two children and one child respectively from the monthly child support. We conclude that the reduction in support for the student loan payments was determined in the original decree and should not have been changed by the court upon the application to modify.

Joseph also asserts that the trial court erred when it denied his request that he be allowed to claim both of the minor children as dependents for income tax purposes. We find no abuse of discretion in the court's denial of this request.

CONCLUSION

For the reasons stated above, the judgment of the trial court is modified as follows: Joseph is ordered to pay $737 per month as child support for two children and $479 per month as child support for one child, effective February 23, 2004, the date of the

final order of modification entered by the trial court. Each party shall pay his or her own costs and attorney fees.

AFFIRMED AS MODIFIED.

STEPHAN, J., not participating.

ROBERT SALTS, APPELLANT, V. LANCASTER COUNTY, NEBRASKA, AND BERNIE HEIER ET AL., AS THE LANCASTER COUNTY BOARD OF COMMISSIONERS FOR LANCASTER COUNTY, NEBRASKA, APPELLEES.

697 N.W.2d 289

Filed June 3, 2005. No. S-04-642.

1. **Judgments: Final Orders: Appeal and Error.** A judgment rendered or final order made by a district court may be reversed, vacated, or modified for errors appearing on the record.
2. **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.
3. **Counties: Public Assistance.** The extent of a county's duty to provide assistance to indigent persons must be determined by reference to the applicable statutes which create the duty.
4. **Political Subdivisions: Counties: Legislature: Statutes.** A county is a political subdivision of the state and has only that power delegated to it by the Legislature. It follows that a county may not employ its rulemaking power to modify, alter, or enlarge portions of a statute pursuant to which it acts.
5. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.
6. ____. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
7. ____. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded for further proceedings.

Rebecca L. Gould, of Nebraska Appleseed Center for Law in the Public Interest, Welfare Due Process Project, for appellant.

Kristy Mundt, Deputy Lancaster County Attorney, and Julie Agena, Senior Certified Law Student, for appellee.

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

STEPHAN, J.

In this appeal, Robert Salts contends that Lancaster County exceeded its statutory authority in establishing certain durational residency requirements for primary health care benefits through its general assistance program. We agree and reverse the decision of the district court, and remand the cause for further proceedings.

FACTS

On March 17, 2003, Salts moved to Lancaster County in order to receive substance abuse treatment at Cornhusker Place of Lincoln-Lancaster County, Inc. (Cornhusker Place). Immediately prior to this move, Salts lived in Beatrice for 1 month, Kearney for 3 months, and Lexington for 1½ years. On May 29, Salts applied for medical and dental benefits under Lancaster County's general assistance program to enable him to obtain primary health care for large tumors on his arm and rib cage, an ear infection, an ingrown toenail, and dental problems. General assistance programs are made available by each Nebraska county to provide benefits to indigent persons who are not eligible for other state and federal assistance programs. See Neb. Rev. Stat. §§ 68-104 to 68-156 (Reissue 2003).

Although Salts qualified as an indigent person under the general assistance guidelines promulgated by Lancaster County, his application was denied on the basis that he did not meet eligibility requirements with respect to residence as set forth in the Lancaster County General Assistance Guidelines (rev. 2003). Guideline 2:101 provides:

> **Residency**: An applicant must reside within the geographic boundaries of Lancaster County in order to make application through the Lincoln Office. Individuals residing outside Lancaster County should be referred to the appropriate county office for assistance. If an individual is not permanently residing in Nebraska and/or Lancaster County, temporary assistance may be granted provided all other eligibility criteria are met.

Guideline 3:101 provides:

> **Residency**: An applicant must meet the requirements of 2:101. Applicants not residing in Lancaster County must also meet the following criteria:
>
> 1. The applicant did not enter Lancaster County for the sole purpose of obtaining medical care; and
>
> 2. The illness or injury for which medical assistance is requested arose in Lancaster County, Nebraska; and
>
> 3. The medical care is provided for a life threatening or life trauma condition.

Salts filed a timely appeal in which he alleged that the Lancaster County residency requirements were contrary to law. A hearing officer for the Lancaster County Board of Commissioners upheld the denial of Salts' application, and Salts then filed a timely appeal to the district court for Lancaster County. The district court affirmed the denial, reasoning that the applicable Nebraska statutes grant counties discretion in providing general assistance to nonresidents and that the eligibility requirements adopted by Lancaster County were within this statutory discretion. Salts filed this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

In his sole assignment of error, Salts assigns, restated, that the district court erred in holding that Lancaster County did not exceed its statutory authority in establishing the residency requirements for its general assistance program found in general assistance guidelines 2:101 and 3:101.

STANDARD OF REVIEW

[1] A judgment rendered or final order made by a district court may be reversed, vacated, or modified for errors appearing on the record. Neb. Rev. Stat. § 25-1911 (Reissue 1995).

[2] 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. See *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004).

ANALYSIS

[3,4] Counties had no common-law duty to provide assistance to indigent persons. *Mary Lanning Memorial Hospital v. Clay County*, 170 Neb. 61, 101 N.W.2d 510 (1960). However, since the inception of our state, the county board by statute has been "made the overseer of the poor and the county has a mandatory duty to provide for poor persons whether they are residents or nonresidents of the county." *Creighton-Omaha Regional Health Care Corp. v. Douglas County*, 202 Neb. 686, 690, 277 N.W.2d 64, 67 (1979). See, *Mary Lanning Memorial Hospital v. Clay County, supra*; Rev. Stat. ch. 40, §§ 1-23 (1866). The current statutes governing county general assistance programs for the poor are codified at §§ 68-104 et seq. The extent of a county's duty to provide assistance to indigent persons must be determined by reference to the applicable statutes which create the duty. *Mary Lanning Memorial Hospital v. Clay County, supra*. A county is a political subdivision of the state and has only that power delegated to it by the Legislature. *Guenzel-Handlos v. County of Lancaster*, 265 Neb. 125, 655 N.W.2d 384 (2003). It follows that a county may not employ its rulemaking power to modify, alter, or enlarge portions of a statute pursuant to which it acts.

The issue in this case is whether Lancaster County exceeded its statutory authority by imposing certain durational residency requirements for primary health care benefits under its general assistance program. In upholding the validity of Lancaster County's residency requirements, the district court focused on a portion of § 68-114 which provides in part:

> Whenever any nonresident shall fall sick in any county in this state, not having money or property to pay his or her board, or whenever any poor person not having a legal settlement in the county is found in distress, without friends or money, so that he or she is likely to suffer, it shall be the duty of the county board to furnish such temporary assistance to such person as it shall deem necessary; and if any such person shall die, the county board shall provide all necessary means for a decent burial of such person.

In *Mary Lanning Memorial Hospital v. Clay County, supra*, this court held that § 68-114 applied to an indigent nonresident of the state who was injured while walking along a Nebraska highway.

In the instant case, the district court held that the statute also applied to a Nebraska resident who did not reside in the county in which he sought medical care under a general assistance program. The district court reasoned that § 68-114 gave Lancaster County "broad discretion on how it chooses to address the medical needs of nonresidents" and therefore upheld the county's denial of medical benefits to Salts because he was a nonresident of the county and his medical needs were not life-threatening. The district court agreed with the determination of the hearing examiner that Salts should apply for general assistance in Dawson County, where he had established legal settlement for purposes of general assistance, and request that he be permitted to remain in Lancaster County for treatment.

[5] We agree with Salts' contention that § 68-114 should not be considered in isolation, but, rather, in conjunction with other statutory provisions which govern the provision of county general assistance benefits to indigent persons. A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004). The starting point in our analysis is § 68-104, which obligates the county board of each county to "furnish such medical service as may be required for the poor of the county who are not eligible for other medical assistance programs and general assistance for the poor of the county." This statute further states that in providing such medical assistance, "the county board shall make use of any existing facilities, including tax-supported hospitals and charitable clinics so far as the same may be available."

Each Nebraska county is required by § 68-133(1) to "[p]rovide that all individuals desiring to make application for general assistance shall have opportunity to do so . . . ." Each county is further required by § 68-133(2) to provide a schedule of goods and services, including medical expenses, which are "necessary for the maintenance of minimum decency and health for families of various sizes, including single persons." Lancaster County provides certain primary health care benefits for persons participating in its general assistance program, as well as specialty physician services and hospital care when certified as "medically necessary" by the primary physician. Treatment for

a condition is considered medically necessary "if the condition will worsen without medical intervention and interfere with the client's self-sufficiency or ability to work." See Lancaster County General Assistance Guidelines 1:116. The record includes a letter from the medical director of Cornhusker Place dated July 24, 2003, verifying Salts' medical condition and stating that the nursing staff at Cornhusker Place has "made many, many attempts to get . . . Salts approved for General Assistance to help with all of his current medical needs without any success." The letter further indicated that Salts' tentative discharge from his long-term substance abuse treatment program was not scheduled until August or September 2004 and that the staff of Cornhusker Place was "at a loss in attempting to help this individual with his medical needs."

With respect to Nebraska residents, the place of "legal settlement" is an essential factor in determining responsibility for general assistance benefits. Section 68-131 states in part:

> When any poor person does not have a spouse, parent, or stepparent supporting him or her or is not eligible for other general assistance programs, the poor person shall receive such relief, referred to as general assistance for purposes of sections 68-131 to 68-148, out of the treasury of the county in which he or she has legal settlement at the time of applying for assistance, in the manner provided in sections 68-131 to 68-148.

The term "legal settlement" for purposes of all public assistance programs is defined by § 68-115 in part as follows:

> Every person, except those hereinafter mentioned, who has resided one year continuously in any county, shall be deemed to have a legal settlement in such county.
>
> Every person who has resided one year continuously within the state, but not in any one county shall have a legal settlement in the county in which he or she has resided six months continuously.
>
> (2) The time during which a person has been an inmate of any public or private charitable or penal institution, or has received care at public expense in any type of care home, nursing home, or board and room facility licensed as such and caring for more than one patient or guest, and each

> month during which he or she has received relief from private charity or the poor fund of any county shall be excluded in determining the time of residence hereunder, as referred to in subsection (1) of this section.

The significance of an indigent person's county of "legal settlement" is apparent from §§ 68-143 through 68-145. Section 68-143 provides that "[a]ny person becoming chargeable as a poor person in this state shall be chargeable as such in the county in which he or she has established a legal settlement as defined in section 68-115." Section 68-144 then provides:

> If any person shall become chargeable in any county in which he or she has not established a legal settlement at the time of applying for aid, he or she shall be duly taken care of by the proper authority of the county where he or she may be found. It shall be the duty of the clerk of the county board to send a notice by mail to the clerk of the county board of the county in which such poor person has a legal settlement that such person has become chargeable as a poor person, and requesting the authorities of such county to promptly remove such poor person and to pay the expense accrued in taking care of him or her.

Section 68-145 provides:

> If a poor person, by reason of sickness or disease, or by neglect of the authorities of the county in which he or she has a legal settlement, or for any other sufficient cause, cannot be removed, then the county taking charge of such individual may sue for, and recover from the county to which such individual belongs, the amount expended for and in behalf of such poor person and in taking care of such person.

In this case, it is undisputed that Salts met the financial prerequisites for entitlement to general assistance. The dispute arises from the fact that Salts' need for medical care arose while he was physically present in Lancaster County at a time when his place of "legal settlement" was Dawson County. Lancaster County argues that its duty under § 68-114 was to provide only that medical care which it deemed "necessary," which did not include treatment for medical conditions which were not life-threatening, and that therefore, it had no obligation to provide the medical care

needed by Salts. Thus, the issue presented is one of statutory interpretation, requiring our independent review.

[6,7] 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. *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004); *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003). Moreover, a court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose. *City of Gordon v. Ruse*, 268 Neb. 686, 687 N.W.2d 182 (2004); *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004). The statutory scheme summarized above clearly contemplates that a person eligible for general assistance benefits may apply for such benefits in a county other than his or her county of "legal settlement." Likewise, a county in which the eligible applicant has not established "legal settlement" may be responsible for providing necessary services, although it would then have a right to seek reimbursement from the county in which the recipient had legal settlement and which, under § 68-131, bears ultimate financial responsibility for such general assistance benefits. Construed as a whole, the only reasonable interpretation of the general assistance statutes is that a county must provide to all eligible persons located in the county that assistance which is necessary to maintain minimum health and decency, subject to its right to seek financial reimbursement from another county in which a recipient has "legal settlement." The phrase "shall deem necessary" in § 68-114 does not authorize a county to provide a level of medical assistance to nonresidents of the county which is different from that which it provides to its own eligible residents. Rather, we conclude that the general assistance statutes obligate each county to provide to all eligible persons, whether or not they are residents of that county, the minimum level of care which it has undertaken pursuant to § 68-133(2). This statutory interpretation should not impose an undue financial burden on those counties having a concentration of medical facilities because of the requirement that general assistance benefits are to be paid "out of the treasury of the county in which [the recipient] has legal settlement at the time of applying for assistance," and because a

county providing necessary medical care through its general assistance program has a right of reimbursement from the recipient's county of legal settlement. See §§ 68-131, 68-144, and 68-145. Based upon our independent review, we conclude that the district court erred in determining that § 68-114 granted the county discretion to adopt the Lancaster County General Assistance Guidelines 2:101 and 3:101.

CONCLUSION

For the reasons set forth, we reverse the judgment of the district court and remand the cause to the district court with directions to reverse the determination of the Lancaster County Board of Commissioners and remand the matter to that body for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HYANNIS EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE AND CROSS-APPELLANT, V. GRANT COUNTY SCHOOL DISTRICT NO. 38-0011, ALSO KNOWN AS HYANNIS HIGH SCHOOL, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

698 N.W.2d 45

Filed June 10, 2005. No. S-04-133.

1. **Commission of Industrial Relations: Appeal and Error.** The applicable standard of review in an appeal from the Commission of Industrial Relations in a case involving wages and conditions of employment is as follows: Any order or decision of the commission may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Commission of Industrial Relations: Jurisdiction.** The statutory jurisdiction of the Commission of Industrial Relations is to settle pending controversies.
3. **Labor and Labor Relations: Teacher Contracts.** A dispute over the presence of a deviation clause in a teacher contract is the subject of mandatory bargaining.
4. **Commission of Industrial Relations: Teacher Contracts.** A deviation clause in a teacher contract falls under the category of "wages, hours, and other terms of

employment, or any question arising thereunder," as stated in Neb. Rev. Stat. § 48-816(1) (Reissue 1998), and is a subject of mandatory bargaining.

5. **Commission of Industrial Relations: Contracts.** The Commission of Industrial Relations' orders are not designed to force a party into a contract, but, rather, are to exercise the commission's authority to settle disputes.
6. **Commission of Industrial Relations: Evidence: Words and Phrases.** A prevalence determination by the Commission of Industrial Relations is a subjective determination. The standard inherent in the word "prevalent" will be one of general practice, occurrence, or acceptance.
7. **Commission of Industrial Relations: Evidence.** A valid prevalence analysis by the Commission of Industrial Relations does not require as a prerequisite a complete identity of provisions in the array.
8. ____: ____. As a general rule, it may be said that the factors most often used by the Commission of Industrial Relations to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions.
9. **Commission of Industrial Relations: Evidence: Appeal and Error.** Absent a showing that the entities considered by the Commission of Industrial Relations did not present a suitable array, an appellate court cannot say that the commission erred in refusing to consider every other or additional entity, wherever located, which might also be comparable.
10. **Commission of Industrial Relations: Wages: Evidence.** The requirement that the Commission of Industrial Relations select a suitable array does not obligate the commission to consider every conceivable comparable array, but only to consider a sufficient representative array so that the commission can determine whether the wages paid or the benefits conferred are comparable.
11. **Commission of Industrial Relations: Evidence.** Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables for purposes of establishing an array are within the field of its expertise and should be given due deference.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed in part, and in part reversed and remanded for further proceedings.

Rex R. Schultze, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Mark D. McGuire, of McGuire & Norby, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

This industrial dispute over wages and conditions of employment for the 2002-03 contract year is between the appellant and

cross-appellee, Grant County School District No. 38-0011 (the District), and the appellee and cross-appellant, Hyannis Education Association (the Association), the collective bargaining unit for teachers employed by the District. The District and the Association were unable to reach a negotiated agreement for the 2002-03 contract year, and the Association filed a petition with the Nebraska Commission of Industrial Relations (the CIR) seeking to invoke the CIR's authority to resolve the parties' industrial dispute over wages, fringe benefits, and other contract terms.

Following a hearing, the CIR determined that the fringe benefit issues raised by the parties were moot, but that it nonetheless could and did decide the issue regarding the appropriate salary schedule. The CIR also determined that it was without authority to resolve an issue raised by the parties concerning the inclusion of a deviation clause in the parties' agreement, which clause permitted the District to deviate upward from the agreement's base salary schedule in the course of hiring teachers. In order to resolve the parties' wage dispute, the CIR determined the array of comparable school districts against which contract terms were compared and, based upon this array, established the base salary.

On appeal, the District challenges, in summary, the CIR's determinations concerning the mootness of the fringe benefit issues, the CIR's professed inability to resolve the parties' dispute concerning the deviation clause, and the CIR's selection of the array of comparable school districts. For its cross-appeal, the Association essentially challenges the CIR's refusal to consider the deviation clause.

As explained below, we conclude that the deviation clause is the subject of mandatory bargaining and that the CIR has the authority to consider the parties' dispute over the deviation clause. We therefore reverse the CIR's order to the extent it states that the CIR is without authority to consider the deviation issue in this case. The cause is remanded for such consideration, and our ruling resolves the cross-appeal. The parties' remaining assignments of error are without merit. Accordingly, we affirm in part, and in part reverse the order of the CIR and remand the cause for further proceedings.

STATEMENT OF FACTS

The relevant facts are essentially undisputed. The District is a Class VI school district, maintaining Hyannis High School, which is located in Hyannis, Grant County, Nebraska, and educating students in grades 7 through 12 under the direction of a single school board. See Neb. Rev. Stat. 79-102(6) (Reissue 2003). For the 2002-03 contract year, the school had 103 students, 21 in grades 7 and 8, and 82 in grades 9 through 12. The District employed 14 staff members.

The Association is a labor organization formed by teachers employed by the District for the purpose of representation in matters of employment relations. See Neb. Rev. Stat. § 48-801(6) (Reissue 2004). On March 5, 2003, the Association filed a petition with the CIR, seeking the resolution of an industrial dispute involving wages and conditions of employment pursuant to the Industrial Relations Act, Neb. Rev. Stat. §§ 48-801 to 48-838 (Reissue 1998 & Cum. Supp. 2002). Specifically, the petition alleged that an "industrial dispute" pursuant to § 48-801(7) existed between the District and the Association, because the parties had negotiated on items concerning wages and other conditions of employment for the 2002-03 contract year, and such negotiations had failed to result in an agreement between the parties. Pending the successful negotiation and execution of an agreement for the 2002-03 contract year, the District had continued to apply the provisions of the last negotiated agreement between the parties, which pertained to the 2001-02 contract year.

The Association's petition came on for hearing before the CIR on June 18, 2003. Prior to the hearing, the parties entered into a pretrial order in which they stipulated to certain facts and to the disputed issues to be presented to the CIR. The parties also stipulated that the last day of school for the 2002-03 contract year was May 23, 2003. The disputed issues identified by the parties included the salary schedule and certain fringe benefits. Another issue identified by the parties was the inclusion of a deviation clause in the agreement. The clause, which had been part of the 2001-02 agreement, provided as follows: "The Board reserves the right to deviate from the agreement if it becomes necessary to hire teachers for a particular position." Although the deviation clause had been a negotiated term in the 2001-02

agreement, the Association sought to have the clause deleted from the 2002-03 contract.

Regarding the array of comparable school districts to be used by the CIR in resolving the parties' industrial dispute, the parties agreed that Garden County, Rushville, Gordon, and Thedford, all of which were Class VI school districts, were comparable. The Association claimed additional comparables were Rock County, West Holt, and Burwell, all of which were Class VI school districts. The District claimed additional comparables were Hay Springs, Hemingford, Chappell, South Platte, Stapleton, Paxton, Mullen, Sandhills, and Cody-Kilgore, all of which were Class III districts, meaning the school district embraced a territory with a population of more than 1,000 and less than 150,000 inhabitants that maintained both elementary and high school grades under the direction of a single school board. § 79-102(3). The District claimed that unlike the Association's comparables, all of the school districts in its array were located within 72 air miles from Hyannis.

The parties stipulated that the "[w]ork, skills, and working conditions of the bargaining unit employees at Rock County, Garden County, Rushville, West Holt, Gordon, Burwell, and Thedford are sufficiently similar to [the Association's] bargaining unit to satisfy the standards set forth in NEB. REV. STAT. § 48-818," but that by so stipulating, the District did not agree that Burwell, Rock County, Thedford, and West Holt should be in the array adopted by the CIR. In its brief on appeal, the District expressed additional misgivings regarding including Gordon in the array.

As stated above, a hearing was held before the CIR on June 18, 2003. Four witnesses appeared and testified, and 39 exhibits were offered into evidence. On January 6, 2004, the CIR issued its findings and order. In summary, the CIR accepted the Association's array of comparable districts. Thus, the seven-district array as determined by the CIR included the four initially agreed-upon districts of Garden County, Rushville, Gordon, and Thedford, and the three contested array districts of Rock County, West Holt, and Burwell. Based upon the array, the CIR concluded there was no clear prevalence to permit the District to change its salary schedule, and utilizing the District's existing salary schedule, the CIR

established the District's base salary of $23,620 for the 2002-03 contract year. The CIR concluded that the fringe benefit issues raised by the parties were moot because the contract year was over, and it was impossible or impractical to retroactively change such benefits. Thus, the CIR did not specifically rule on the substance of the fringe benefit issues. Finally, the CIR determined that unless it was presented with a prevalent array of deviation clauses which happened to be identical in their terms, it was without authority to rule on the parties' dispute over the inclusion of the deviation clause in the contract. As a result, the CIR declined to rule on the appropriateness of the deviation clause.

The District appeals from the CIR's order. The Association has filed a cross-appeal from the CIR's order, essentially limited to the CIR's refusal to rule on the deviation clause.

Additional facts will be set forth below when pertinent to our analysis of the parties' arguments on appeal.

ASSIGNMENTS OF ERROR

In its appeal, the District assigns seven errors, which we restate as three. The District claims, restated, that the CIR erred (1) in determining that the fringe benefit issues were moot, while not determining the entire contract dispute was moot; (2) in determining that it was unable to resolve the parties' dispute concerning the deviation clause in the contract; and (3) in selecting the appropriate array.

In its cross-appeal, the Association assigns two errors, which we restate as one. The Association claims, restated, that the CIR erred in refusing to resolve the parties' dispute concerning the inclusion of the deviation clause in the contract and in failing to state that a deviation clause would render the parties' contract regarding salaries illusory and void.

STANDARD OF REVIEW

The parties disagree as to the proper standard of review on appeal in this case. We therefore take this opportunity to state the appropriate standard of review regarding the appeal of a case involving wages and conditions brought under § 48-818.

This case involves an industrial dispute and arises under § 48-818, which authorizes the CIR to enter orders concerning

wages and other conditions of employment. Previously, when considering appeals involving an industrial dispute over wages and conditions of employment, we derived our standard of review from case law and recited the standard as follows:

> In our review of orders and decisions of the [CIR], we are restricted to considering whether the order of that agency is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.

Lincoln Firefighters Assn. v. City of Lincoln, 253 Neb. 837, 839, 572 N.W.2d 369, 372 (1998). See, *Hall Cty. Pub. Defenders v. County of Hall*, 253 Neb. 763, 571 N.W.2d 789 (1998); *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988); *IBEW Local 1536 v. City of Fremont*, 216 Neb. 357, 345 N.W.2d 291 (1984); *IAFF Local 831 v. City of No. Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983); *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981), *modified* 209 Neb. 597, 309 N.W.2d 65; *American Assn. of University Professors v. Board of Regents*, 198 Neb. 243, 253 N.W.2d 1 (1977).

Contrary to the standard of review noted above, the parties refer us to § 48-825, in which a standard of review was added to the industrial relations statutes. In particular, § 48-825(4) provides as follows:

> Any order or decision of the [CIR] may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other:
>
> (a) If the [CIR] acts without or in excess of its powers;
>
> (b) If the order was procured by fraud or is contrary to law;
>
> (c) If the facts found by the [CIR] do not support the order; and
>
> (d) If the order is not supported by a preponderance of the competent evidence on the record considered as a whole.

The question raised in the current appeal is whether the appropriate standard of review in a case involving wages and conditions of employment is that previously set forth by *Lincoln Firefighters Assn., supra*, or whether the standard of review

is that set forth in § 48-825(4). We conclude that § 48-825(4) controls.

Section 48-825(4) was added to the Industrial Relations Act by 1995 Neb. Laws, L.B. 382. By its terms, the standard of review in § 48-825(4) applies to "[*a*]*ny order or decision of the* [*CIR*]." (Emphasis supplied.) We believe the use of the word "any" in § 48-825(4) signifies broad application of the standard of review enunciated therein. We, therefore, conclude that the standard of review in § 48-825(4) applies to this appeal involving wages and conditions of employment. With reference to § 48-825(4), we note that, subsequent to 1995, we have applied the standard of review set forth in § 48-825(4) to cases involving allegations of prohibited practices under § 48-824. See, *International Union of Operating Engrs. Local 571 v. City of Plattsmouth*, 265 Neb. 817, 660 N.W.2d 480 (2003) (union alleged city failed to bargain in good faith with respect to mandatory topic of negotiation in violation of § 48-824(1)); *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002) (teachers' association alleged school district's negotiator engaged in prohibited practices in violation of § 48-824(2)); *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999) (union alleged county's negotiator engaged in prohibited practices in violation of § 48-824(2)). However, to the extent cases pertaining to wages and conditions such as *Lincoln Firefighters Assn., supra*, and *Hall Cty. Pub. Defenders, supra*, diverge from the standard of review in § 48-825(4), they are disapproved.

[1] Accordingly, in our review of orders and decisions of the CIR involving an industrial dispute over wages and conditions of employment, our standard of review is as follows: Any order or decision of the commission may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. We apply this standard of review to the instant case.

ANALYSIS

CIR Did Not Err When It Determined That Fringe Benefit Issues Were Moot but That Parties' Salary Dispute Was Capable of Resolution.

The District challenges the CIR's determination that the fringe benefit issues presented to the CIR were moot, but that the salary dispute was nevertheless capable of being decided. As we read the District's assignment of error regarding salary and mootness, the claimed error is limited to the propriety of the CIR's undertaking to make a decision regarding the salary schedule rather than the particular amount of base salary that was determined. We conclude that there is no merit to this assignment of error.

As noted above, in its order, the CIR determined that all benefits issues in the case, "such as health insurance, sick leave, sick leave bank, maternity/paternity leave, academic study leave, and travel leave" were moot because the contract year had ended and that as a result, it would be impossible or impractical to retroactively change such a benefit. The CIR ruled that any determination with regard to these fringe benefits would be merely advisory and that it was not authorized to render advisory opinions. The CIR also concluded, however, that the salary structure question was not moot, because relief could be afforded retroactively if necessary.

[2] We have previously recognized "the impossibility or impracticality of retroactively changing fringe benefits for an expired contract year." *Lincoln Firefighters Assn. v. City of Lincoln*, 253 Neb. 837, 845, 572 N.W.2d 369, 375 (1998) (affirming CIR's determination that issues involving fringe benefits such as funeral leave were moot). Moreover, we have stated that "[t]he statutory jurisdiction of the CIR is to settle pending controversies." *NAPE v. Game & Parks Comm.*, 220 Neb. 883, 885, 374 N.W.2d 46, 48 (1985) (citing § 48-810).

When the CIR heard this case, the 2002-03 contract year was completed. The impracticality of changing fringe benefits already exercised for the expired year was evident. Therefore, we conclude that the CIR's decision that the fringe benefit issues were moot was within its powers, not contrary to law, and supported by a preponderance of competent evidence.

In this case, the CIR refused to allow the District to alter its existing salary schedule that was part of the 2001-02 contract. In this connection, we further conclude that there is no merit to the District's claim that if the fringe benefit issues are deemed moot, the salary issue must necessarily be deemed moot. Unlike fringe benefits, issues involving salaries are capable of being given retroactive effect by the CIR. See *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988) (stating that retroactive wage increase was within authority of CIR). We conclude that the CIR's decision that the salary schedule dispute could be resolved was within its powers, not contrary to law, and supported by a preponderance of competent evidence. We conclude this assignment of error is without merit.

CIR Erred When It Determined That It Was Without Authority to Rule on Inclusion of Deviation Clause in Parties' Contract.

On appeal, the District challenges the CIR's determination that it was without authority to resolve the parties' dispute concerning the deviation clause in the contract and its consequent refusal to do so. The deviation clause at issue provides as follows: "The Board reserves the right to deviate from the agreement if it becomes necessary to hire teachers for a particular position." Referring to the record and reading the 2001-02 contract as a whole, the deviation clause permits the District to pay a salary in excess of the base salary schedule. We agree with the District that the CIR's decision that it did not have authority to consider the parties' dispute over the deviation clause was contrary to law and that the CIR further erred when it failed to rule on the deviation issue. Accordingly, we reverse the portion of the CIR's order declining to consider the deviation issue and remand the cause with directions to the CIR to consider the deviation issue based on prevalence.

In its order refusing to decide the deviation issue, the CIR indicated that the District did not have a "right" to deviate from the salary schedule because deviation is a mandatory subject of bargaining. The CIR observed that the CIR's orders are not designed to force a party to enter into a contract, but, rather, are a way for the CIR to exercise its power to settle individual disputes. The

CIR also stated that it could not resolve the deviation issue because, for mathematical certainty, the only relevant comparisons "would need to be identical." In this regard, the CIR stated that "unless the [CIR] is presented with a prevalent array of identical contract provisions, the [CIR] will not determine the issue of deviation as one of prevalency."

[3,4] We agree with the CIR's observation that the parties' dispute over the presence of a deviation clause in the contract is the subject of mandatory bargaining. See *Coleridge Educ. Assoc. v. Coleridge Comm. Schools*, 13 C.I.R. 376 (2001). Pursuant to the Industrial Relations Act, mandatory collective bargaining subjects are those that relate to "wages, hours, and other terms and conditions of employment or any question arising thereunder." § 48-816(1). The Industrial Relations Act requires parties to bargain over mandatory bargaining subjects. *Id.* Teacher salary schedules have historically been the basic framework for teacher contracts and the method by which teacher wages are determined. *Coleridge Educ. Assoc., supra*. Deviation from the salary schedule pursuant to a deviation clause affects those wages. Accordingly, a deviation clause falls under the category of "wages, hours, and other terms of employment or any question arising thereunder," § 48-816(1), and, as the CIR correctly observed, is a subject of mandatory bargaining.

[5] We also agree with the CIR's general observation that its orders are not designed to force a party into a contract, but, rather, are to exercise the CIR's authority to settle disputes. However, because the parties had bargained for the deviation clause in the 2001-02 contract, we disagree with the CIR's implication that ruling on the deviation clause in this case would create a contract where none existed.

In its order, the CIR cited extensively from *Coleridge Educ. Assoc., supra*, in resolving the question of its authority to rule on the deviation issue in this case. After concluding that a deviation clause was a subject of mandatory bargaining, the CIR in *Coleridge Educ. Assoc.* examined the record therein and noted that despite the presence of a deviation provision in the agreement for at least 10 years, "there [was] no evidence" that the deviation provision was bargained for. *Id.* at 386. The CIR in *Coleridge Educ. Assoc.* therefore refused to approve application

of the deviation provision to the teachers' salaries at issue therein. In contrast to *Coleridge Educ. Assoc.*, in the instant case, the parties do not dispute that the deviation clause under consideration was bargained for in the 2001-02 contract year, and such fact is implicit in the CIR's statement that the deviation clause was "placed in the 2001-2002 contract." Unlike *Coleridge Educ. Assoc.*, approval of the deviation clause by the CIR would not force the parties into a contract term where none existed, because such term was previously agreed to. Approval of the deviation clause by the CIR would be in the nature of settling an industrial dispute, which is within the authority of the CIR. Thus, contrary to the CIR's rationale, the deviation clause at issue was bargained for as found by the CIR and capable of application if inclusion of its terms is justified based upon prevalence.

Despite acknowledging the subjective nature of a prevalence analysis, the CIR also stated in its order that "unless the [CIR] is presented with a prevalent array of identical contract provisions, the [CIR] will not determine the issue of deviation as one of prevalency." The CIR's conclusion that a prevalence standard can be used when considering deviation clauses only if the provisions in the array contain identical contract provisions is contrary to law. Accordingly, we reverse this portion of the CIR's order and remand the cause with directions to perform a prevalence analysis.

[6] It is clear that the CIR is authorized in industrial disputes involving wage issues to "establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions." § 48-818. See *Lincoln Firefighters Assn. v. City of Lincoln*, 253 Neb. 837, 572 N.W.2d 369 (1998). When discussing the CIR's authority under this provision, this court has acknowledged that "[a] prevalent wage rate to be determined by the [CIR] must almost invariably be determined after consideration of a combination of factors." *Omaha Assn. of Firefighters v. City of Omaha*, 194 Neb. 436, 440, 231 N.W.2d 710, 713 (1975). We have stated that when the members of the array to which the comparison is made "are sufficiently similar and have enough like characteristics or qualities[, then]

comparison [is] appropriate." *Id.* at 441, 231 N.W.2d at 713-14. We apply these principles stated in the context of wage rates to the instant case involving the deviation issue. We do not believe that the use of the word "prevalent" in the context under consideration requires that the employment terms elsewhere be completely identical to the provision at issue. As the CIR observed in its order, a prevalence determination is a subjective determination. The standard inherent in the word "prevalent" is one of general practice, occurrence, or acceptance, and determinations regarding "prevalent" practices are within the field of expertise of the CIR. See *Omaha Assn. of Firefighters, supra*.

Contrary to the reluctance exhibited by the CIR in the instant case, it has in the past considered a deviation clause composed of language similar to the clause at issue, utilizing a prevalence analysis in such consideration. In *Yutan Educ. Ass'n v. Saunders Co. School Dist.*, 12 C.I.R. 68 (1994), the CIR was asked to determine whether a deviation clause that permitted the school district to " 'deviate from the schedule as conditions warrant' " was prevalent. *Id.* at 71. Upon performing a prevalence analysis, the CIR determined that the contracts of 7 of the 11 array members did "not have specific contract language authorizing the school to deviate from the salary schedule, and thus, it is not prevalent to do so." *Id.* In reaching this conclusion, the CIR noted that it had "previously determined the prevalence of similar contract language in the case of *Wayne Education Association v. School District of Wayne*, 9 CIR 281 (1988) [(finding that deviation language was not prevalent and should be stricken)]." *Yutan Educ. Ass'n*, 12 C.I.R. at 71.

[7] In sum, the dispute concerning the inclusion of the deviation clause in the parties' contract for the 2002-03 contract year is a subject of mandatory bargaining. Pursuant to § 48-818, the CIR is authorized to make findings and orders which "establish rates of pay and conditions of employment," and when the CIR acts under its statutory authority pursuant to § 48-818, it ordinarily does so utilizing a prevalence standard. A valid prevalence analysis does not require as a prerequisite a complete identity of provisions in the array. Rather, prevalence involves a general practice, occurrence, or acceptance, as determined by the CIR. We conclude that the portion of the CIR's order stating that it

could not consider the parties' dispute over the inclusion of the deviation clause is contrary to law. Accordingly, given the facts, we reverse that portion of the CIR's order declining to consider the deviation issue and remand the cause to the CIR for consideration of the deviation issue under a prevalence analysis.

CIR's Selection of Array for Comparability Purposes Was Supported by Preponderance of Competent Evidence and Was Not in Excess of CIR's Powers or Contrary to Law.

The District maintains that the CIR erred in its selection of the array for comparability purposes. As noted above, the CIR selected seven school districts, of which four had been agreed to as comparable prior to the hearing. The District claims that the CIR failed to select an array that met various factors, including, inter alia, geographic proximity and population size, that could be considered when selecting an array of comparable employers. The District claims that the CIR should have utilized the school districts the District proposed when selecting an array, all of which were within 72 air miles of Hyannis, but not all of which were Class VI schools. The District claims the CIR's refusal to include nine of its proposed school districts resulted in an array which was not supported by a preponderance of the competent evidence. We do not agree.

[8-10] Under § 48-818, the CIR is empowered to establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work or workers exhibiting like or similar skills under the same or similar working conditions. Section 48-818 requires that the employers selected for a comparative array must be demonstrated to be similar, and we have stated that "[a]s a general rule, it may be said that the factors most often used to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions." *Lincoln Firefighter Assn. v. City of Lincoln*, 253 Neb. 837, 842, 572 N.W.2d 369, 373 (1998). We have also stated, however, that "[a]bsent a showing that the [entities] considered by the CIR did not present a suitable array, we cannot say that the CIR [erred] in refusing to consider every other or additional [entity], wherever located, which also might be comparable." *Lincoln Co. Sheriff's*

Emp. Assn. v. Co. of Lincoln, 216 Neb. 274, 278, 343 N.W.2d 735, 739 (1984). Moreover, the requirement that the CIR select a suitable array does not obligate the CIR "to consider every conceivable comparable [array] but only to consider a sufficient representative array so that the [CIR] can determine whether the wages paid or the benefits conferred are comparable." *Id.*

In the instant case, the CIR determined that when a considerable number of comparables existed in an array of school districts from the same class as the subject district, it did not need to consider other school districts outside of that class for comparison. The CIR then proceeded to review the parties' proposed arrays and found that prior to the hearing, the parties had four Class VI school districts in common. In addition, the CIR noted that prior to the hearing, the District and Association had stipulated, inter alia, that the "[w]ork, skills, and working conditions of the bargaining unit employees at Rock County, Garden County, Rushville, West Holt, Gordon, Burwell, and Thedford are sufficiently similar to [the Association's] bargaining unit to satisfy the standards set forth in NEB. REV. STAT. § 48-818."

The CIR reviewed the Association's proposed array members, all of which were Class VI schools. The CIR noted that the Association's proposed array members, together with the four Class VI common array members, met "the [CIR's] proximity and geographical guidelines." The CIR also reviewed the District's proposed additional array members, noting that none were Class VI schools. Following its review of the parties' proposed arrays, the CIR determined that the Association's proposed array constituted an appropriate array. The CIR therefore concluded that the array for purposes of this case consisted "of the four common array members of Garden County, Rushville, Gordon and Thedford and the contested array members of Rock County, West Holt, and Burwell."

[11] We have recognized that

> [o]f necessity, determining comparables requires the granting of some discretion to the [CIR], and unless there is no substantial evidence upon which the [CIR] could have concluded that the factors it used resulted in an appropriate array, we may not as a matter of law disallow the [CIR's] determination.

Lincoln Firefighters Assn., 253 Neb. at 843, 572 N.W.2d at 374. "Stated another way, determinations made by the [CIR] in accepting or rejecting claimed comparables [for purposes of establishing an array] are within the field of its expertise and should be given due deference." *Id.* The record contains considerable information regarding the parties' proposed arrays, not repeated here. The CIR's determination is supported by a preponderance of the competent evidence and is not in excess of its powers or contrary to law. There is no merit to this assignment of error.

District's Remaining Assignments of Error Are Without Merit.

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

Association's Cross-Appeal Is Resolved by Our Ruling on District's Appeal.

For its cross-appeal, the Association claims, inter alia, that the CIR erred in determining that it was unable to resolve the parties' dispute concerning the deviation clause in the contract, which clause permits the District to deviate upward from the base salary. We have addressed this argument above, and we agree with the Association that the CIR erred when it concluded it did not have authority to consider the deviation issue. To the extent the Association raises other issues in its cross-appeal, given the posture of this case and our decision to remand the cause to the CIR for further consideration of the parties' claims with regard to the deviation clause based on a prevalence analysis, we need not and do not further comment on the Association's remaining arguments.

CONCLUSION

We conclude that the CIR did not err in determining that the fringe benefit issues were moot but that the salary dispute was capable of being resolved. We also conclude that the CIR did not err in determining the comparable array for purposes of resolving the issues presented in this industrial dispute. We further conclude, however, that the deviation clause is the subject of mandatory bargaining and that the CIR has the authority to consider the parties' dispute over the deviation clause by performing

a prevalence analysis. Accordingly, we reverse that portion of the CIR's order in which the CIR declined to consider the deviation issue and remand the cause for further proceedings. In all other respects, the order of the CIR is affirmed.

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

CORNHUSKER PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE, V. CITY OF SCHUYLER, NEBRASKA, A MUNICIPAL CORPORATION AND CITY OF THE FIRST CLASS OF THE STATE OF NEBRASKA, APPELLANT.

699 N.W.2d 352

Filed June 17, 2005. No. S-04-367.

1. **Annexation: Ordinances: Equity.** An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
3. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy.
4. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
5. **Standing: Jurisdiction: 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.
6. **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.
7. **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.
8. ____: ____: ____. The litigant must have some legal or equitable right, title, or interest in the subject of the controversy.
9. **Municipal Corporations: Annexation.** The annexation of land to cities and towns is a legislative function, and it is for their governing bodies to determine the facts which authorize the exercise of the power granted.
10. **Municipal Corporations: Annexation: Boundaries.** A municipal corporation has no power to extend or change its boundaries otherwise than provided by constitutional enactment or as it is empowered by the Legislature by statute to do.

11. **Municipal Corporations: Annexation: Statutes.** The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring it.
12. **Municipal Corporations: Annexation.** The power of a municipality to annex territory is, under the specific provisions of Neb. Rev. Stat. § 16-117 (Reissue 1997), limited to annexing contiguous or adjacent land if it is urban or suburban in character, and not agricultural land that is rural in character.
13. **Ordinances: Proof.** The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.
14. **Municipal Corporations: Annexation: Words and Phrases.** The terms "contiguous" and "adjacent" are used synonymously and interchangeably. If the territory sought to be annexed is not contiguous to the municipality, the proceedings are without legal effect.
15. **Municipal Corporations: Annexation: Boundaries: Words and Phrases.** Contiguity means that the two connecting boundaries should be substantially adjacent.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Affirmed.

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellant.

Thomas M. Maul, of Law Office of Thomas M. Maul, for appellee.

Steven G. Seglin, of Crosby Guenzel, L.L.P., for amicus curiae Nebraska Rural Electric Association.

Gary G. Krumland and Mary E. Sommermeyer for amicus curiae League of Nebraska Municipalities.

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

MCCORMACK, J.

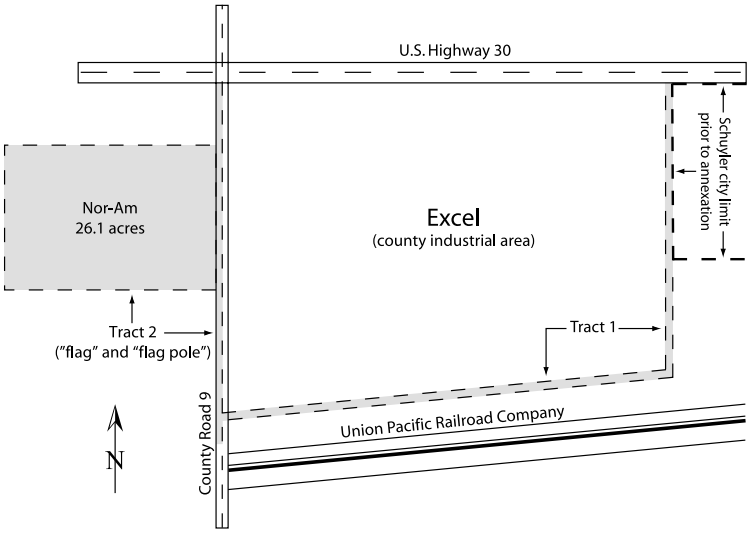
NATURE OF CASE

Nebraska law allows cities of the first class to annex "contiguous or adjacent lands, lots, tracts, streets, or highways." Neb. Rev. Stat. § 16-117(1) (Reissue 1997). Cornhusker Public Power District (Cornhusker) challenged in the district court for Colfax County the City of Schuyler's attempted annexation of certain tracts of land. The court ruled in favor of Cornhusker and enjoined Schuyler from enforcing its ordinance annexing such tracts of land. Schuyler appeals. The primary issue presented is whether

the tracts of land Schuyler attempted to annex are "contiguous or adjacent" to its existing corporate limits. We conclude that they are not and therefore affirm the judgment of the district court.

BACKGROUND

On September 2, 2003, Schuyler enacted ordinance No. 979. The ordinance defined two separate tracts of land to be annexed. For the reader's assistance, we include a sketch for illustrative purposes that is not drawn to scale in which the annexed tracts of land are shaded.



The first is a tract 30 feet wide and 4,379 feet long, consisting of approximately 3 acres. It begins on the south side of U.S. Highway 30, adjacent to the west edge of Schuyler's corporate limits, extends south to the railroad tracks, and then west to County Road 9. It lies along the eastern and southern edges of property owned by Excel Corporation (Excel).

Excel's property lies to the immediate west of Schuyler's corporate limits. Prior to August 28, 2003, all of Excel's property, including the first tract of annexed land, was designated as a

county industrial area. See Neb. Rev. Stat. §§ 13-1111 to 13-1121 (Reissue 1997). On that date, with Excel's consent, the Colfax County Board of Commissioners excluded the first tract of land (30 feet by 4,379 feet) from the county industrial area. See, generally, § 13-1119. The remainder of Excel's property is still designated as a county industrial area. Land designated as a county industrial area cannot be annexed by a city of the first class, with some exceptions. See § 13-1115.

The second tract of land takes the general shape of a flag and flagpole. It begins at the 30-foot-wide western edge of the first tract of land on County Road 9. The "flagpole" extends south 149 feet to the railroad tracks and north 1,939 feet to Highway 30 and, for much of the distance, is 37.5 feet wide. However, near Highway 30, the "flag" bulges westward to include approximately 26 acres of land, which is owned by Nor-Am Properties, L.L.C. (Nor-Am). Cornhusker and Schuyler stipulated that both tracts of annexed land are urban or suburban in character and are not part of a county industrial area. Nor-Am's property, Excel's property, and the property to the east of Excel's property are all zoned by Schuyler for industrial use.

Excel operates a meatpacking plant on its property. Nor-Am was expected to operate a refrigeration facility on its property, which was scheduled to open in December 2003. The two facilities are physically connected by a 10-foot-diameter tube that travels over County Road 9. The tube contains a conveyor belt and allows Excel to transport its products directly into the Nor-Am facility for refrigeration and storage.

Nor-Am and Excel consented to Schuyler's annexation of tracts 1 and 2. In fact, the annexation was initiated at the request of Nor-Am. Nor-Am's primary motive for requesting the annexation was to receive electrical power from Schuyler. The Excel property currently receives electrical power from Schuyler, while Nor-Am's facility lies within Cornhusker's service territory. Because the two facilities were linked by the conveyor belt, Nor-Am was concerned that if one facility, but not the other, were to lose power, it could result in considerable disruption to each business. If the annexation is valid, Schuyler could obtain the right to provide electrical power to the Nor-Am facility. See Neb. Rev. Stat. § 70-1008 (Reissue 2003).

Cornhusker filed a complaint in district court on September 16, 2003. It sought an order enjoining Schuyler from enforcing its annexation ordinance and declaring the ordinance null and void. After a trial, the district court concluded that the ordinance was invalid because:

> The annexation is not unified with, compact with, or contiguous to, the City of Schuyler. The boundary of the area sought to be annexed is not substantially adjacent to the City of Schuyler. The strip itself does not add to the development of the territory. Its only purpose is to reach out and grab the Nor-Am property. This is exactly the type of annexation which was disapproved in [*Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992)].

The district court enjoined Schuyler from enforcing the ordinance, prompting Schuyler's appeal. We moved the case to our docket on our own motion.

ASSIGNMENTS OF ERROR

Schuyler assigns, rephrased and consolidated, that the district court erred in (1) determining that Cornhusker had standing to challenge the enforcement of the ordinance and (2) finding that the ordinance was invalid because the lands annexed were not contiguous and adjacent and in enjoining Schuyler from enforcing it.

STANDARD OF REVIEW

[1,2] An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity. *Swedlund v. City of Hastings*, 243 Neb. 607, 501 N.W.2d 302 (1993). On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *Detter v. Miracle Hills Animal Hosp., ante* p. 164, 691 N.W.2d 107 (2005).

ANALYSIS

STANDING

[3-5] First, we address Schuyler's argument that Cornhusker does not have standing to challenge the ordinance. The applicable rules of law are well known. Standing is the legal or equitable

right, title, or interest in the subject matter of the controversy. *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004). 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. *Id.* Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Id.*

[6-8] 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. *Id.* 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. *Id.* The litigant must have some legal or equitable right, title, or interest in the subject of the controversy. *Id.*

We recently traced the development of the law with respect to a party's standing to challenge an annexation of territory in *County of Sarpy v. City of Gretna, supra*. Currently, to establish standing to challenge an annexation, a party must show (1) a personal, pecuniary, and legal interest that has been affected by the annexation and (2) the existence of an injury to that interest that is personal in nature. *Id.* As we mentioned in *County of Sarpy*, this list of enumerated parties is not exclusive. It is undisputed that Schuyler is attempting to annex property lying within Cornhusker's service territory. In addition, the general manager of Cornhusker testified that providing electrical power to the Nor-Am facility would produce approximately $300,000 in annual revenue for Cornhusker. However, if the annexation were valid, Schuyler could obtain the right to provide electrical power to the Nor-Am facility. See § 70-1008(2) ("municipally owned electric system, serving such municipality at retail, shall have the right, upon application to and approval by the [Nebraska Power Review Board], to serve newly annexed areas of such municipality"). In *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992), the annexation, and subsequent removal, of property within the service territory of a public power district was sufficient to convey standing on the power district to challenge the annexation. See *id.* at 301, 488 N.W.2d at 26 ("[t]his fact alone

indicates that [the rural public power district] has a personal, pecuniary, and legal interest which is adversely affected by the annexation"). Schuyler's annexation would remove property, and the revenue produced by it, from Cornhusker's service area. This assignment of error is without merit.

ANNEXATION

Schuyler is a city of the first class. See Neb. Rev. Stat. § 16-101 (Reissue 1997). A city of the first class "may by ordinance . . . include within the corporate limits of such city any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character and in such direction as may be deemed proper." § 16-117(1). The parties have stipulated that the tracts of land Schuyler purported to annex are urban or suburban in character.

[9-13] The annexation of land to cities and towns is a legislative function, and it is for their governing bodies to determine the facts which authorize the exercise of the power granted. *Johnson v. City of Hastings, supra*. However, a municipal corporation has no power to extend or change its boundaries otherwise than provided by constitutional enactment or as it is empowered by the Legislature by statute to do. *Id*. The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring it. *Id*. The power of a municipality to annex territory is, under the specific provisions of § 16-117, limited to annexing contiguous or adjacent land if it is urban or suburban in character, and not agricultural land that is rural in character. *Johnson v. City of Hastings, supra*. The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity. *Id*.

[14,15] The issue in this case is whether the tracts of land Schuyler seeks to annex are contiguous or adjacent to its existing corporate limits. The terms "contiguous" and "adjacent" are used synonymously and interchangeably, and if the territory sought to be annexed is not contiguous to the municipality, the proceedings are without legal effect. *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), *disapproved on other grounds, Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004).

See, also, *Swedlund v. City of Hastings*, 243 Neb. 607, 501 N.W.2d 302 (1993); *Johnson v. City of Hastings, supra*; *Village of Niobrara v. Tichy*, 158 Neb. 517, 63 N.W.2d 867 (1954). This court has held that " 'contiguity means that the two connecting boundaries should be *substantially* adjacent.' " *Swedlund v. City of Hastings*, 243 Neb. at 611, 501 N.W.2d at 305. " 'Substantial adjacency' exists when ' " '*a substantial part of the boundary thereof is adjacent to a segment of the boundary of the city or village*. Adjacent . . . means contiguous or coexistent with.' " ' " *Id.* at 611, 501 N.W.2d at 305.

An annexation of land joined to a city only by a narrow stem of land is sometimes referred to as a "strip" or "corridor" annexation. A strip or corridor annexation similar to what occurred in this case was at issue in *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992). The City of Hastings, a city of the first class, attempted to annex the Central Community College campus, which was located approximately three-quarters of a mile east of Hastings' corporate limits. To reach the campus, Hastings annexed a 120-foot-wide strip of U.S. Highway 6 and the highway's right-of-way. This court held that Hastings' attempted annexation was void because the annexed land was not contiguous or adjacent to Hastings' corporate limits:

> [I]n this case, the City of Hastings is reaching out like a finger, along Highway 6, a 120-foot-wide strip, to the college campus. . . .
>
> We hold that as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation. . . . The requirement of contiguity has not been achieved in this case, since the boundary of the area sought to be annexed is not substantially adjacent to the boundary of the city.

(Citations omitted.) *Johnson v. City of Hastings*, 241 Neb. at 297, 488 N.W.2d at 24. Cf. *Witham v. City of Lincoln*, 125 Neb. 366, 250 N.W. 247 (1933).

Schuyler's attempted annexation does not comply with § 16-117. The boundary of the land sought to be annexed is not "substantially adjacent" to Schuyler's existing corporate limits. See *Swedlund v. City of Hastings, supra*. Therefore, the territory sought to be annexed is not contiguous to the municipality within

the meaning of § 16-117. We conclude, therefore, that Schuyler's annexation ordinance is null and void.

In support of its contention that its annexation is valid, Schuyler attempts to distinguish *Johnson* because "in Johnson the 'strip' passed through an agricultural area which specifically by statute cannot be annexed." Brief for appellant at 14. In a related argument, Schuyler contends that because all the land from its western corporate limits to Nor-Am's property is zoned for industrial use, the homogeneity of the character of the land achieves the purpose of § 16-117. We reject those arguments. The *Johnson* court expressly declined to decide whether the strip passed through urban or rural land. *Johnson* was decided solely on the basis of the "contiguous or adjacent" requirement of § 16-117, which requires substantial adjacency between the boundary of the area sought to be annexed and the boundary of the city, without contemplation of the character or use of any intervening property.

To validate its annexation, Schuyler also relies on dicta in *Johnson*, where the court said: "[T]he record does not give us enough facts to decide whether § 13-1115 precluded the annexation of the area adjacent to Highway 6, which, if it did, could provide an excuse for the strip annexation in this case." *Johnson v. City of Hastings*, 241 Neb. at 299, 488 N.W.2d at 25. Citing that statement, Schuyler suggests that if the presence of a county industrial area prevented a city from annexing contiguous land, then a strip or corridor annexation could be permitted to reach around the county industrial area. County industrial areas are governed by §§ 13-1111 to 13-1121. Section 13-1115 generally prevents a city of the first class from annexing a county industrial area.

We decline to elevate the dicta in *Johnson* to the status of law. Section 16-117 requires that annexed land be contiguous or adjacent to a city's corporate limits; it does not provide an exception to that requirement if a city's growth is boxed in by a county industrial area, unless one of the conditions set forth in § 13-1115 is met. That is not the case here.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

DEBORA HARRIS, APPELLANT, V. OMAHA HOUSING AUTHORITY AND OMAHA TEMPORARY SERVICES, INC., APPELLEES.

698 N.W.2d 58

Filed June 17, 2005. No. S-04-555.

1. **Pleadings: Limitations of Actions.** A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient facts to constitute a cause of action.
2. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
3. **Limitations of Actions: Appeal and Error.** Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.
4. **Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made by the court below.
5. **Statutes: Time.** Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not.
6. **Limitations of Actions: Legislature.** Statutes of limitations are generally considered procedural, and legislative changes to limitation periods operate on all proceedings instituted after passage, whether the rights accrued before or after that date.
7. **Words and Phrases.** A substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. A procedural right, on the other hand, is simply the method by which an already existing right is exercised.
8. **Limitations of Actions: Statutes.** Laws prescribing the time within which particular rights may be enforced generally relate to remedies only and not substantive rights.
9. **Limitations of Actions: Legislature.** The Legislature's power to change limitation periods is subject to two restrictions. First, the Legislature may not deprive a defendant of a bar which has already become complete. Second, the Legislature may not deprive a plaintiff of an already accrued cause of action without providing the plaintiff a reasonable time in which to file the action.
10. **Limitations of Actions: Legislature: Intent: Due Process.** The restriction that the Legislature may not deprive a plaintiff of an already accrued cause of action without providing the plaintiff a reasonable time in which to file the action is intended to ensure that a plaintiff is not denied his or her constitutional right to due process of law; the question is whether the time afforded the plaintiff to file his or her claim was "reasonable" in that no such constitutional violation occurred.
11. **Limitations of Actions.** A reasonable time for prosecution of a claim must be of sufficient duration to afford full opportunity to resort to the courts for enforcement of the rights on which the statute of limitations operates.

12. **Political Subdivisions Tort Claims Act.** The exceptions set forth in Neb. Rev. Stat. § 13-910 (Reissue 1997) are affirmative defenses to claims brought pursuant to the Political Subdivisions Tort Claims Act.
13. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Phillip G. Wright, of Wright & Associates, for appellant.

David L. Welch, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee Omaha Housing Authority.

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

GERRARD, J.

The appellant, Debora Harris, was allegedly injured in a slip-and-fall accident on January 18, 1999, on premises owned and controlled by the Omaha Housing Authority (OHA). OHA is a public housing agency operating pursuant to the Nebraska Housing Agency Act (NHAA), Neb. Rev. Stat. § 71-1572 et seq. (Reissue 2003). The question presented in this appeal is whether the 2-year statute of limitations of the Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997), applies to Harris' cause of action against OHA, despite the fact that the PSTCA was not made explicitly applicable to housing agencies until January 1, 2000. We conclude the PSTCA applies and affirm the judgment of the district court dismissing Harris' complaint.

BACKGROUND

Harris' operative complaint alleges that she was injured on January 18, 1999, when she was walking through an OHA parking lot and slipped and fell on ice. Harris' complaint alleges, generally, that her fall occurred because of negligence on the part of OHA.

Harris' initial complaint was filed in the district court on January 15, 2003. OHA filed a motion to dismiss pursuant to

Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003), asserting that Harris' complaint was barred by § 13-919, because she failed to file her claim with OHA within 1 year and did not file her lawsuit within the 2-year statute of limitations. In response, Harris filed an affidavit, attached to a letter from OHA's insurer dated July 8, 1999, indicating that OHA and its insurer were made aware of Harris' claim less than 6 months after Harris' accident. After further proceedings not relevant to this appeal, Harris filed her operative second amended complaint, and OHA again filed a rule 12(b)(6) motion to dismiss, now grounded solely in the statute of limitations.

The district court entered an order dismissing Harris' complaint as to OHA, concluding that Harris' complaint was time barred pursuant to § 13-919. The court indicated that Harris' action could continue against Harris' employer at the time of the accident, made a party to the action by virtue of workers' compensation payments it made to Harris. See Neb. Rev. Stat. § 48-118 (Reissue 1998). Harris' appeal from that order was dismissed by the Nebraska Court of Appeals for lack of a final, appealable order, and we denied Harris' petition for further review. On remand, the district court dismissed Harris' complaint as to all parties. The court again determined that Harris' complaint was time barred, and Harris perfected this appeal.

ASSIGNMENTS OF ERROR

Harris assigns, restated, that the district court erred in (1) determining that OHA was a political subdivision for purposes of the PSTCA on January 18, 1999; (2) finding that the PSTCA applied to Harris' case; and (3) determining that Harris' claim did not fall within (a) the "discretionary function" or "snow and ice" exceptions to the PSTCA set forth in §§ 13-910(2) and 13-910(10) or (b) the insurance exception to the claim requirement of the NHAA set forth in § 71-15,168.

STANDARD OF REVIEW

[1,2] A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient facts to constitute a cause of action. *Becker v. Hobbs*, 256 Neb. 432, 590 N.W.2d 360 (1999). A district court's grant of a motion to dismiss for failure to state a claim under rule 12(b)(6)

is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Anderson v. Wells Fargo Fin. Accept., ante* p. 595, 694 N.W.2d 625 (2005). See, also, *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004) (when it appears from face of complaint that limitation period has run, statute of limitations defense may be asserted by Fed. R. Civ. P. 12(b)(6) motion to dismiss).

[3,4] Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Nuss v. Alexander, ante* p. 101, 691 N.W.2d 94 (2005). The meaning of a statute is also a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made by the court below. See *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004).

ANALYSIS

Retroactive Applicability of PSTCA

Prior to January 1, 2000, housing authorities in Nebraska were created and operated pursuant to the Nebraska Housing Authorities Law (NHAL), Neb. Rev. Stat. §§ 71-1503, 71-1509, and 71-1518 to 71-1554 (Reissue 1996). Generally stated, the NHAL authorized cities, villages, and counties in Nebraska to create housing authorities and joint housing authorities. See § 71-1519. The commissioners for these housing authorities were appointed by the political subdivisions that created the housing authorities, and the commissioners were subject to removal for misconduct in office by the same political subdivisions. See §§ 71-1523 and 71-1526. However, the NHAL did not specify whether housing authorities were agencies of the political subdivisions that created them, political subdivisions in their own right, or some other form of public corporation. See, generally, *Fisher v. Housing Auth. of City of Omaha*, 214 Neb. 499, 503, 334 N.W.2d 636, 639 (1983) (concluding Administrative Procedure Act did not apply to OHA because "housing authorities in Nebraska are units of local government rather than state government"). Compare *Lock v. City of Imperial*, 182 Neb. 526, 531, 155 N.W.2d 924, 927 (1968) (concluding municipal airport

authorities are not agencies of city, but "supplementary, separate, and independent public corporation[s]").

Under the NHAL, a person who had a tort claim against a housing authority was required to file that claim in writing with the executive director or secretary of the authority. § 71-1553(1). If the claimant was unsatisfied with the disposition of his or her claim, or if the claim was not paid or satisfied within 90 days of the filing, the claimant was entitled to request a hearing before the board of commissioners of the authority. *Id*. The board of commissioners was required to dispose of the claim within 6 months of the filing of the claimant's written request for hearing. *Id*. The procedure for judicial review of disputed claims was not specified by the NHAL.

The NHAL was repealed in 1999 and replaced by the NHAA. See 1999 Neb. Laws, L.B. 105. Section 71-1553 was recodified as § 71-15,168, except that operative January 1, 2000, § 71-15,168(1) expressly provided that "[a]ll tort claims against a housing agency shall be governed by the Political Subdivisions Tort Claims Act." Subject to certain exceptions that are not relevant to this case, all suits permitted under the PSTCA "shall be forever barred unless begun within two years after such claim accrued." § 13-919(1).

It is not disputed in this case that Harris' claim accrued when she was injured on January 18, 1999. However, her complaint was not filed until January 15, 2003. This would be within the 4-year statute of limitations generally applicable to tort actions, see Neb. Rev. Stat. § 25-207 (Reissue 1995), but outside the 2-year statute of limitations prescribed by § 13-919(1). If the PSTCA applies to Harris' claim against OHA, her complaint is untimely, as the district court found.

In her first and second assignments of error, Harris contends that OHA was not a political subdivision when she was injured on January 18, 1999, and that the subsequent incorporation of the PSTCA by the NHAA does not operate retroactively to bar her cause of action. We do not determine whether the OHA was a political subdivision, or an agency of a political subdivision, prior to January 1, 2000, because we conclude that in any event, the statute of limitations imposed by § 13-919(1) applies to Harris' action.

[5,6] Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not. *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999), citing *Oviatt v. Archbishop Bergan Mercy Hospital*, 191 Neb. 224, 214 N.W.2d 490 (1974); *Haiar v. Kessler*, 188 Neb. 312, 196 N.W.2d 380 (1972). See, also, *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). Statutes of limitations are generally considered procedural, and legislative changes to limitation periods operate on all proceedings instituted after passage, whether the rights accrued before or after that date. *Kratochvil, supra*. See, also, *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994); *Cedars Corp. v. Swoboda*, 210 Neb. 180, 313 N.W.2d 276 (1981); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979); *Denver Wood Products Co. v. Frye*, 202 Neb. 286, 275 N.W.2d 67 (1979).

[7,8] This is because a substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. *Kratochvil, supra*, quoting *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988). A procedural right, on the other hand, is simply the method by which an already existing right is exercised. *Id*. Laws prescribing the time within which particular rights may be enforced generally relate to remedies only and not substantive rights. *Id*., quoting *Whitten v. Whitten*, 250 Neb. 210, 548 N.W.2d 338 (1996).

The situation presented in *Kratochvil, supra*, is comparable to the instant case. In *Kratochvil*, an insured brought an action against an insurer to recover uninsured motorist benefits. The insured had been injured on May 15, 1991, and his action against the insurer was filed on May 14, 1996. However, the Uninsured and Underinsured Motorist Insurance Coverage Act (UUMICA), Neb. Rev. Stat. § 44-6401 et seq. (Reissue 2004), had become operative on January 1, 1995, and had created a specific limitation period as to when actions against insurers for uninsured motorist benefits could be maintained. See *id*. The insured's action had been filed outside that period. We concluded that the provisions of the UUMICA applied to bar the insured's cause of action, because, "[a]s a legislative change of

a procedural limitation period," it "operate[d] on all proceedings instituted after its passage." *Kratochvil*, 255 Neb. at 985, 588 N.W.2d at 572.

Similarly, in the instant case, the incorporation of the PSTCA's procedures into the NHAA did not serve to create or change the right to a remedy for tort claims against a housing agency. In conjunction, §§ 13-919(1) and 71-15,158 operate as a statute of limitations for a tort claim against a housing agency, as they prescribe the period within which an action may be brought upon such a claim. See *Kratochvil, supra.* Incorporation of the PSTCA was not, therefore, an alteration of a substantive right, but, rather, a procedural change that merely related to the remedy.

[9,10] The Legislature's power to change limitation periods is subject to two restrictions. First, the Legislature may not deprive a defendant of a bar which has already become complete. Second, the Legislature may not deprive a plaintiff of an already accrued cause of action without providing the plaintiff a reasonable time in which to file the action. *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999). The "reasonable time" restriction is intended to ensure that a plaintiff is not denied his or her constitutional right to due process of law; the question is whether the time afforded the plaintiff to file his or her claim was "reasonable" in that no such constitutional violation occurred. See *id*.

[11] However, our decision in *Kratochvil, supra*, is also dispositive of this issue. A reasonable time for prosecution of a claim must be of sufficient duration to afford full opportunity to resort to the courts for enforcement of the rights on which the statute of limitations operates. *Id*. In *Kratochvil*, we concluded that 4½ months was a reasonable time for the plaintiff to file his claim after the UUMICA became operative. That being the case, it is clear that Harris, who had over a year to file her complaint after the NHAA became effective, was afforded a reasonable time to assert her claim before it became time barred.

For the foregoing reasons, Harris' first and second assignments of error are without merit. Section 13-919(1) was applicable to Harris' cause of action against OHA.

Exceptions to PSTCA

Harris next argues that the PSTCA does not apply to her claim because it falls within two statutory exceptions set forth in § 13-910, which provides, in relevant part:

> The Political Subdivisions Tort Claims Act . . . shall not apply to:
>
> . . . .
>
> (2) Any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused; [or]
>
> . . . .
>
> (10) Any claim arising out of snow or ice conditions or other temporary conditions caused by nature on any highway . . . bridge, public thoroughfare, or other public place due to weather conditions.

[12] Harris' argument is without merit, however, because she misapprehends the nature of the exceptions set forth in § 13-910. Harris contends that the requirements of the PSTCA do not apply to claims that fall within § 13-910. In fact, the exceptions set forth in § 13-910 are affirmative sovereign immunity defenses to claims brought pursuant to the PSTCA. See, generally, *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998). In other words, if a political subdivision proves that a plaintiff's claim comes within an exception pursuant to § 13-910, then the claim fails based on sovereign immunity, and the political subdivision is not liable.

Harris' second assignment of error provides no basis for reversing the judgment of the district court. Even if Harris is correct in contending that her claim falls within § 13-910, such a finding would require that her complaint be dismissed.

NHAA Insurance Exception

In support of her final assignment of error, Harris argues that her claim falls within the "insurance exception" of the NHAA. Section 71-15,168 provides, in relevant part:

> (1) *All tort claims against a housing agency shall be governed by the Political Subdivisions Tort Claims Act.*

> (2) Every person who has any claim against a housing agency, *other than a tort claim under subsection (1) of this section*, shall file the same, in writing, with the executive director or other person who may be acting as the secretary of such agency. If the claim is in contract, the claim shall state the services provided or articles furnished, as the case may be, and shall show the amount charged and claimed due and unpaid, allowing all just credits. *The procedures set forth in this section shall not be applicable to any claim against any agency if the agency advises the claimant in writing that the liability of the agency for such claim, if any, is covered by insurance in whole or in part.*

(Emphasis supplied.)

[13] As set forth above, § 71-15,168(2) expressly states that the claim procedures of the NHAA apply to a claim "other than a tort claim" under the PSTCA. The PSTCA contains its own, specific provisions governing the effect of a political subdivision's purchase of liability insurance. See § 13-916. There is no indication that the Legislature intended tort claims against housing agencies to be treated differently. In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001). When § 71-15,168 is read as a whole, it is plain that the Legislature intended the insurance exception to apply to claims "other than a tort claim," not to claims that would otherwise be governed by the PSTCA. Regardless of whether Harris' claim is covered by OHA's liability insurance, it is a tort claim against a housing agency and is subject to the PSTCA pursuant to the plain language of § 71-15,168(1). Harris' final assignment of error is without merit.

CONCLUSION

Harris' claim against OHA was subject to the 2-year statute of limitations of the PSTCA, and her complaint was time barred. The judgment of the district court is affirmed.

AFFIRMED.

EDWARD DIETZ, APPELLANT, V. YELLOW FREIGHT SYSTEMS, INC., APPELLEE.

697 N.W.2d 693

Filed June 17, 2005. No. S-04-1078.

1. **Workers' Compensation: Appeal and Error.** In reviewing decisions of the workers' compensation court, an appellate court will consider only those errors specifically assigned to the review panel and then reassigned on appeal.
2. **Workers' Compensation: Waiver: Appeal and Error.** A party appealing from an order of the Nebraska Workers' Compensation Court waives all allegations of error not assigned in its application for review.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Ryan C. Holsten and Ricardo Enriquez, of Atwood, Holsten & Brown Law Firm, P.C., L.L.O., for appellant.

Caroline M. Westerhold and John R. Timmermier, of Timmermier, Gross & Prentiss, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Edward Dietz appeals from the order of a Workers' Compensation Court review panel which affirmed, as modified, an order entered on remand by the trial court.

SCOPE OF REVIEW

[1] In reviewing decisions of the Workers' Compensation Court, an appellate court will consider only those errors specifically assigned to the review panel and then reassigned on appeal. See, *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990). See, also, *Faulhaber v. Roberts Dairy Co.*, 147 Neb. 631, 24 N.W.2d 571 (1946).

FACTS

Dietz was injured in the course of his employment with Yellow Freight Systems, Inc. (Yellow Freight), while operating a forklift. He suffered injuries to his lower back, right arm, and head.

Dietz filed a petition for benefits in the Workers' Compensation Court. The trial court subsequently entered an award finding that Dietz had suffered an accident while engaged in the duties of his employment with Yellow Freight. He was awarded 9 weeks of temporary total disability and 45 2/7 weeks of temporary partial disability. The court found that Dietz was currently totally disabled, and Yellow Freight was ordered to pay Dietz benefits for so long as he remained permanently and totally disabled. Yellow Freight was also ordered to pay $568 in medical bills, and Dietz was awarded attorney fees of $10,833.

In addition, the trial court found that Dietz had been assessed an 8-percent permanent partial disability rating as to his right arm and that he was entitled to benefits for 18 weeks for this permanent partial disability. The court concluded that Yellow Freight had improperly delayed the payment of benefits for the member impairment. It ordered Yellow Freight to pay such benefits and assessed a 50-percent waiting-time penalty plus interest on any unpaid compensation.

Yellow Freight appealed the entire award to a review panel of the compensation court. Dietz cross-appealed, alleging that the trial court erred in failing to make a reasoned decision concerning his entitlement to attorney fees and interest on the penalty for late payment of benefits for the impairment to his right arm.

The review panel affirmed the award in all but two respects. It found that the trial court had erred in failing to state whether any portion of the attorney fees was related to the late payment of benefits for Dietz' member impairment. The review panel also found that the imposition of $10,833 in attorney fees for the late payment of $568 in medical expenses was unreasonable. It remanded the matter and directed the trial court to determine attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Reissue 2004) for the late payment of benefits for the impairment rating and the late payment of medical expenses described in the original award.

On remand, the trial court found that attorney fees of $2,500 should be awarded to Dietz for the late payment of medical expenses and benefits for his member impairment; however, the court did not specify how much of the total was allocated to the medical expense claim versus the member impairment claim.

Yellow Freight appealed the amount of attorney fees awarded, and Dietz cross-appealed. While the record does not disclose the exact nature of this cross-appeal, it can be inferred that Dietz claimed the trial court erred in failing to award interest pursuant to § 48-125(2) when awarding attorney fees.

The review panel subsequently affirmed the award of $2,500 in attorney fees and imposed additional attorney fees of $1,500 for the appeal. Addressing Dietz' cross-appeal, the review panel noted that, as in the original award, the trial court's order on remand contained language to the effect that Dietz was entitled to interest on any unpaid compensation. The review panel held that Dietz was entitled to interest pursuant to § 48-125(2) because he was awarded attorney fees. Accordingly, the review panel modified the order on remand to clarify that pursuant to § 48-125(2), Dietz was entitled to interest for the late payment of benefits for the member impairment. Dietz perfected a timely appeal.

ASSIGNMENT OF ERROR

On appeal, Dietz assigns as error that the review panel erred in limiting the assessment of interest to the late payment of benefits for his member impairment, rather than assessing interest on the entire award.

ANALYSIS

The original award of the trial court ordered Yellow Freight to pay Dietz for past temporary total disability, past temporary partial disability, and future permanent total disability. The court also awarded Dietz past permanent partial disability benefits for his member impairment, a waiting-time penalty, and interest on any unpaid compensation. In addition, Dietz was awarded attorney fees related to the late payment of certain medical expenses.

Section 48-125(2) states in relevant part: "When an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained . . . ." Dietz contends that pursuant to § 48-125(2), he is entitled to interest on the entire amount of the "final award obtained." Thus, he claims that the review panel should have assessed interest on both the late payment of benefits for the member impairment and the difference between the permanent partial disability benefits paid by Yellow Freight prior

to entry of the original award and the permanent total disability award that was ultimately granted. The question before this court is whether Dietz has properly preserved this issue on appeal.

Generally, the rule has been that an appellate court will consider only those errors specifically assigned in the lower court and again assigned as error on appeal to the appellate court. See *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990). In *Erlewine*, we stated that the Supreme Court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the Supreme Court. This rule is also applicable to appeals in workers' compensation cases.

Neb. Rev. Stat. § 48-179 (Reissue 2004) states in part:

> Either party at interest who refuses to accept the final findings, order, award, or judgment of the Nebraska Workers' Compensation Court on the original hearing may, within [14] days after the date thereof, file with the compensation court an application for review before the compensation court, plainly stating the errors on which such party relies for reversal or modification and a brief statement of the relief sought.

Workers' Comp. Ct. R. of Proc. 12 (2004) states that the party or parties appealing to the three-judge panel will be bound by the allegations of error contained in the application for review and will be deemed to have waived all others.

In *Faulhaber v. Roberts Dairy Co.*, 147 Neb. 631, 24 N.W.2d 571 (1946), we were presented with a situation similar to the appeal at bar. The plaintiff's application for workers' compensation benefits was originally denied for insufficiency of the evidence. Under the procedure then in effect, the plaintiff obtained a rehearing and was granted an award for temporary total disability. The defendant appealed to the district court, which affirmed the award. The defendant then appealed to this court, and the plaintiff cross-appealed.

On cross-appeal, one of the plaintiff's contentions was that the district court should have awarded him attorney fees for services rendered in the compensation court. As to this contention, we stated that the record did not disclose that the plaintiff had raised

the issue either in the compensation court or in a cross-appeal to the district court. We concluded the issue was not presented for decision and required no further discussion.

In the case at bar, Yellow Freight timely appealed from the original award, and Dietz cross-appealed. Dietz argued on cross-appeal that he was entitled to additional attorney fees for the late payment of benefits for the member impairment. Dietz did not complain that the trial court should have awarded interest on the entire award in addition to attorney fees.

The review panel found that Dietz was entitled to attorney fees for the late payment of medical expenses and the benefits arising from his member impairment. However, it remanded the cause for a determination of the amount of attorney fees only. On remand, the trial court determined that Dietz should be awarded $2,500 in attorney fees. Yellow Freight appealed the award of attorney fees, and Dietz cross-appealed, asserting for the first time that the trial court should have awarded interest pursuant to § 48-125(2). The review panel affirmed the award of attorney fees and assessed additional attorney fees for the appeal. For purposes of clarification, the review panel modified the order on remand to provide for interest with respect to the late payment for the member impairment. Dietz now assigns as error the review panel's failure to award interest on his entire award.

When the review panel remanded the case to the trial court, it did so only for the determination of attorney fees. Therefore, the award of attorney fees is the only issue which could be considered by this court on appeal. On appeal from the original award, Dietz could have raised the issue he attempts to raise in this appeal. He could have argued that the award of attorney fees for late payment of medical expenses entitled him to interest on the entire amount of the "final award obtained," pursuant to § 48-125(2). He could have argued, as he does now, that the award of attorney fees entitled him to interest for the late payment of benefits for the member impairment and the difference between the permanent partial disability benefits paid prior to entry of the original award and the permanent total disability award that was ultimately granted. We do not imply that this position has merit, but, rather, point out that the issue should have been raised on appeal from the original award.

[2] Rule 12 dictates that a party appealing from an order of the Workers' Compensation Court waives all allegations of error not assigned in its application for review. If an issue arises from the original award, it should be raised in the hearing before the review panel. Since Dietz did not argue that he was entitled to interest on the entire award in his original cross-appeal, he has failed to preserve the issue for appellate review.

It is true that in the appeal from the order on remand, the review panel addressed Dietz' argument concerning interest. The review panel modified the order on remand to clarify that pursuant to § 48-125(2), Dietz was entitled to interest for the late payment of benefits for the member impairment.

CONCLUSION

In his original cross-appeal to the review panel, Dietz did not assign as error the failure of the trial court to assess interest on the entire award. His failure to do so precludes him from raising the issue in this appeal. We therefore affirm the order of the review panel.

AFFIRMED.

IN RE APPLICATION OF RICHARD GLUCKSELIG FOR ADMISSION TO THE NEBRASKA STATE BAR ON EXAMINATION.

697 N.W.2d 686

Filed June 17, 2005. No. S-34-050001.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** The Nebraska Supreme Court will consider the appeal of an applicant from a final adverse ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.
3. **Rules of the Supreme Court: Attorneys at Law: Waiver.** The Nebraska State Bar Commission does not have the authority to waive the application of Neb. Ct. R. for Adm. of Attys. 5C (rev. 2005); that power lies with the Nebraska Supreme Court.

4. ____: ____: ____. The Nebraska State Bar Commission's function in cases where waiver of Neb. Ct. R. for Adm. of Attys. 5C (rev. 2005) is at issue is to provide the applicant with the opportunity for a hearing before the commission which the Nebraska Supreme Court can review de novo on the record. The commission should also make a recommendation regarding whether it feels that waiver of rule 5C should be granted.
5. **Rules of the Supreme Court: Attorneys at Law: Waiver: Proof: Costs.** When a foreign-educated attorney seeks a waiver in order to sit for the Nebraska bar examination, the burden at all times will be on the applicant to affirmatively show that the education he or she received was equivalent to that of a law school approved by the American Bar Association, and the applicant will be responsible for the costs of providing such information.
6. **Rules of the Supreme Court: Attorneys at Law: Waiver.** Following the denial of an application and a hearing before the Nebraska State Bar Commission, the Nebraska Supreme Court will consider a waiver of Neb. Ct. R. for Adm. of Attys. 5C (rev. 2005) in cases where a strict application of that rule would result in denying admission to a qualified graduate of a foreign law school for arbitrary reasons unrelated to the essential purpose of rule 5C.

Original action. Application granted.

Richard Gluckselig, pro se.

Jon Bruning, Attorney General, Jennifer Tomka, and Heidi Karr Sleper, Senior Certified Law Student, for Nebraska State Bar Commission.

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

HENDRY, C.J.

INTRODUCTION

Richard Gluckselig filed an application with the Nebraska State Bar Commission (Commission) seeking admission to the bar on examination. The Commission denied Gluckselig's application. Thereafter, at Gluckselig's request, a hearing was held before the Commission on December 14, 2004. At that hearing, Gluckselig introduced evidence regarding his educational qualifications. On December 16, the Commission again denied Gluckselig's request "on the basis that [Gluckselig] lack[ed] a first professional degree from a law school approved by the American Bar Association." See Neb. Ct. R. for Adm. of Attys. 5C (rev. 2005). Gluckselig appeals. See Neb. Ct. R. for Adm. of Attys. 10 and 15 (rev. 2000).

FACTUAL BACKGROUND

Gluckselig is a citizen of the Czech Republic, and at the time of the hearing, he was present in the United States on a student visa. Gluckselig testified that he was engaged to be married to a Lincoln, Nebraska, resident and that they intended to settle in Nebraska.

Gluckselig graduated from Masaryk University Law College (Masaryk) in the Czech Republic with a master's degree in law and legal science in 2003. This was a 5-year program. Gluckselig graduated in the top 2 percent of his class.

During the 2000-2001 academic year, while still enrolled at Masaryk, Gluckselig studied at the University of Nebraska College of Law (Nebraska) as a "Paul J. Robitchek Scholar." While at Nebraska, Gluckselig took a total of 19 credit hours, earning a grade point average (GPA) of 7.842 on a 9.0 scale. Gluckselig's transcript shows that he took courses in contracts, constitutional law, unfair competition, law of patient and provider, commercial law: sales, and international business transactions. Gluckselig achieved the highest class grade in his commercial law course.

In addition, the record reveals that during the summer following his semester at Nebraska, Gluckselig worked as a research assistant for a professor at that same institution. In a letter supporting Gluckselig's application, that professor wrote that he had found "[Gluckselig] to be one of the most capable and qualified law students I have ever had the privilege to teach" and that he "would have great confidence as a client in having [Gluckselig] as my lawyer."

In April 2003, following his graduation from Masaryk, Gluckselig was admitted and enrolled in a master of laws (LL.M.) program at the University of Michigan Law School (Michigan). Gluckselig graduated with his LL.M. in May 2004. The record indicates Gluckselig took the following classes while at Michigan: civil procedure, enterprise organization, jurisdiction and choice of law, constitutional interpretation, mergers and acquisitions, securities regulation, international arbitration, and anatomy of a deal. Gluckselig received the highest class grade in his course on jurisdiction and choice of law, and graduated with a GPA of 3.732 on a 4.0 scale. It was noted by

one visiting professor who taught Gluckselig at Michigan that "[Gluckselig's] course selection was unique for an LLM, as he focused primarily on core classes rather than electives." That same professor observed that "[i]n his written work on his final exams, [Gluckselig] displayed strong analytical and writing skills. Although he has not completed a JD [juris doctor degree] from an American law school, his work as an LLM student at Michigan was better than virtually any JD student I have encountered in my career." Another professor at Michigan stated that he was "confident that [Gluckselig's] legal training [had] given him a legal education superior to that of the great majority of law students who graduate from [American Bar Association]-accredited law schools." A third Michigan professor noted that "[i]f I needed a lawyer—in Nebraska or elsewhere—I would hire Gluckselig with confidence."

In addition to his academic credentials, Gluckselig also performed duties as a law clerk from May to September 2002 with a Lincoln law firm. During the course of this employment, Gluckselig conducted legal research, wrote memoranda, and drafted pleadings. In support of Gluckselig's application, an attorney at that firm wrote that "[Gluckselig] functioned just as any other law clerk for our firm functions. No different standard was applied nor different work assigned because of his foreign legal education. . . . Gluckselig's work for our firm can only be described as outstanding." He further wrote that the firm has "observed no weakness of any nature in his knowledge of the fundamentals of U.S. law."

In August 2004, following the receipt of his LL.M., Gluckselig accepted employment as a law clerk with another Lincoln law firm, Scudder Law Firm, P.C., L.L.O. (Scudder), focusing primarily on corporate and business issues. At the time of the hearing before the Commission, Gluckselig was still employed with Scudder and had been offered a position with the firm. An attorney at Scudder, in support of Gluckselig's application, observed that Gluckselig had "demonstrated superior analytical and writing skills, excellent judgment, a strong work ethic, and an advanced understanding of the law for his level of experience" and that "[b]ased on [the experience of Scudder's principals, Gluckselig] performs in the upper tier of new attorneys we have seen."

In July 2004, Gluckselig sat for and passed the New York bar examination. As part of that examination, he took the Multistate Bar Examination (MBE). The record indicates that Gluckselig's scaled MBE score was a 168.1. In a nationwide comparison, Gluckselig scored higher than 90 percent of the 66,690 applicants who took the MBE in 2003.

Gluckselig also took and passed the Multistate Professional Responsibility Examination (MPRE) with a score of 133, which placed Gluckselig in the 90th percentile nationally. This court's required minimum score for the MPRE is 85. Neb. Ct. R. for Adm. of Attys. 16 (rev. 2004).

ASSIGNMENT OF ERROR

Gluckselig requests, restated, that this court determine his education to be the equivalent of a juris doctor degree available at an American Bar Association (ABA) approved school, and waive rule 5C, allowing him to sit for the Nebraska bar examination.

STANDARD OF REVIEW

[1] The Nebraska Supreme Court will consider the appeal of an applicant from a final adverse ruling of the Commission de novo on the record made at the hearing before the Commission. *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998); rule 15.

ANALYSIS

[2] The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar. *In re Application of Collins-Bazant, supra*. See Neb. Const. art. II, § 1, and art. V, §§ 1 and 25.

Rule 5 allows applicants to be admitted without examination if they (1) have been admitted to and are active and in good standing in the bar of another state, territory, or district of the United States; (2) have attained educational qualifications at least equal to those required for admission by examination to the Nebraska bar; and (3) have passed an examination equivalent to the Nebraska bar examination. See rule 5A(1)(a), (b), and (c). Rule 5 also allows licensed attorneys who are active and in good standing in another state, territory, or district of the United States, and

who have been actively engaged in the practice of law for 5 of the preceding 7 years, to be admitted without examination if they have attained educational qualifications at least equal to those required for admission by examination to the Nebraska bar. See rule 5A(2)(a) and (b). All other applicants, which on the record currently before us includes Gluckselig, must take a written examination. See rule 5A(4).

Prior to sitting for the Nebraska bar examination, applicants required to take the examination must meet the following educational qualifications:

> All applicants must have received at the time of the examination *their first professional degree from a law school approved by the American Bar Association*. An applicant without a first degree from an approved law school shall be permitted to take the examination if such applicant will receive a first degree from an approved law school within 60 days after the date of the examination taken. In cases of hardship, the Supreme Court may, upon written application stating the nature and reason for the hardship to the applicant, permit the examination to be taken by an applicant before all other requirements have been fulfilled.

(Emphasis supplied.) Rule 5C.

[3,4] We pause for a moment to review the procedural aspects of this appeal. As conceded by the Commission during oral argument, the Commission does not have the authority to waive rule 5C. See, generally, *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998); Neb. Ct. R. for Adm. of Attys. 9 (rev. 2000). The Commission's function in the circumstance presented by this appeal, following denial, is to simply provide the applicant with the opportunity for a hearing before the Commission which this court can review de novo on the record. See, *In re Application of Collins-Bazant, supra*; rules 10 and 15. We view the actions taken by the Commission with respect to Gluckselig's appeal as being consistent with that authority. In future cases, however, we request that the denial of the Commission made after the applicant's hearing include the Commission's recommendation as to whether this court should waive rule 5C, and the basis of such recommendation. This court will thereafter consider both the Commission's recommendation and the record

made before the Commission de novo. We now consider whether to waive rule 5C.

This court's rules for admission clearly state that in order to be eligible to sit for the bar examination, an applicant must have obtained his or her first professional degree from an ABA-approved law school. However, we have waived the requirement in rule 5C for a foreign-educated applicant who shows that his or her education is equivalent to the education available at an ABA-approved law school. See *In re Application of Collins-Bazant, supra.*

[5] In *In re Application of Collins-Bazant*, we were asked to waive the requirements of rule 5C in the case of Gail Collins-Bazant, a Canadian law school graduate who had practiced law in Canada for a number of years. In *In re Application of Collins-Bazant*, we recognized that although we had previously noted that rule 5 should generally be applied uniformly, "a strict application of rule 5 may be unfair in some circumstances involving attorneys educated at foreign law schools." 254 Neb. at 622, 578 N.W.2d at 44. We reasoned that admission rules were intended to "weed" out unqualified applicants, not to prevent qualified applicants from taking the bar. While recognizing that ABA accreditation serves as a useful criterion for evaluating graduates of U.S. law schools, we concluded that the same criterion can work an arbitrary hardship for some foreign-educated graduates and defeat the rule's purpose of allowing qualified applicants to sit for the examination. We then concluded:

> [W]e will consider a waiver of rule 5C to allow a graduate of a foreign law school based on the English common law to take the Nebraska bar examination upon proof that the education he or she received was equivalent to that for a juris doctorate available at an ABA-approved law school. In addition, when a foreign-educated attorney seeks a waiver in order to sit for the Nebraska bar examination, the burden at all times will be on the applicant to affirmatively show that the education he or she received was equivalent to that of an ABA-approved law school, and the applicant will be responsible for the costs of providing such information.

In re Application of Collins-Bazant, 254 Neb. 614, 623, 578 N.W.2d 38, 44 (1998).

This court then waived the applicability of rule 5C as applied to Collins-Bazant and granted her application. We concluded that Collins-Bazant had met her burden of proving that she had received an education functionally equivalent to the education available at an ABA-approved law school. In so concluding, we noted that Collins-Bazant had been educated at an English-speaking school whose teaching was based on the English common law, had taken courses similar to those taught in U.S. law schools, had 15 years of professional experience, and had taken affirmative steps to educate herself regarding the Nebraska and U.S. laws.

[6] The Commission distinguishes *In re Application of Collins-Bazant, supra*, by noting that Collins-Bazant's foreign education was based on English common law, while Gluckselig's was based on Roman civil law. However, we believe this distinction is not dispositive. If it were, it would greatly diminish the principle set forth in *In re Application of Collins-Bazant*. That principle, simply stated, is that this court will not apply a strict application of rule 5C if in doing so, it would " ' "operate in such a manner as to deny admission to a [qualified graduate of a foreign law school] arbitrarily and for a reason unrelated to the essential purpose of the rule." ' " *In re Application of Collins-Bazant*, 254 Neb. at 621, 578 N.W.2d at 43. However, in order for this court to consider a waiver of rule 5C, the burden is on the applicant to affirmatively show that his or her education, considered as a whole, was equivalent to the education that would have been received from an ABA-approved law school. We therefore turn to an examination of that record.

Our de novo review of the record before us indicates that Gluckselig has an extensive legal education which includes significant exposure to U.S. law. While enrolled at Masaryk, Gluckselig took several international law classes focusing in part on U.S. law, and he also completed a 112-page thesis, in English, which involved a comprehensive comparison of the European Union and U.S. laws on the topic of choice-of-law and forum clauses in Internet-based transactions. Further, Gluckselig spent a year of study at Nebraska and Michigan, both ABA-approved law schools, earning a total of 44 credit hours. A review of Gluckselig's transcripts from Nebraska and Michigan shows that

he successfully completed courses in, among others, civil procedure, jurisdiction, choice of law, constitutional law, contracts, torts, commercial law, and international business. Gluckselig's GPA for these courses was exemplary.

In noting that Gluckselig's education at Masaryk was not based on the English common law, the Commission directs us to both *In re Application of Collins-Bazant*, 254 Neb. 614, 578 N.W.2d 38 (1998), and *In re Appeal of Dundee*, 249 Neb. 807, 545 N.W.2d 756 (1996). In *In re Appeal of Dundee*, this court was presented with an applicant who contended that his LL.M. in taxation was a first professional degree for the purposes of our admission rules. We disagreed, noting that the applicant's specific LL.M. program was specialized and did not include examples of specific core coursework that one might expect to be " 'necessary to be a properly-trained attorney.' " *Id*. at 811, 545 N.W.2d at 759. In *In re Application of Collins-Bazant*, this court distinguished *In re Appeal of Dundee* by noting, inter alia, that Collins-Bazant had taken a course in each subject noted in *In re Appeal of Dundee*.

The Commission points out that although Gluckselig has completed a number of the courses enunciated in *In re Appeal of Dundee, supra*, at Nebraska and Michigan, he has not completed all of them. In this assertion, the Commission is correct. However, our distinction of *In re Appeal of Dundee* in *In re Application of Collins-Bazant, supra*, should not be read as a "bright line" determination of what courses one must have taken as a prerequisite to a waiver of rule 5C. In *In re Appeal of Dundee*, we were presented with an LL.M. program specializing in taxation. As noted previously, Gluckselig's LL.M. program was "unique [in that it] focused primarily on core classes rather than electives."

In our de novo review, we determine that notwithstanding the fact that Gluckselig has not taken each of the courses listed in *In re Appeal of Dundee, supra*, his education as a whole is equivalent to that of an ABA-approved school. Such conclusion is supported by an academic background which includes the equivalent of 2 years of study at ABA-approved law schools, studies at Masaryk that focused on U.S. law, and Gluckselig's sitting for and passing the New York bar examination. We note that the New York bar examination included the MBE, which is a component

of the testing this court uses in assessing the proficiency of those who wish to be admitted to the Nebraska bar. Neb. Ct. R. for Adm. of Attys. 1 (rev. 2000). Further, Gluckselig has also passed the MPRE, another testing component used by this court in assessing the qualifications of applicants seeking admission to the practice of law in Nebraska. *Id.*

Upon our de novo review, we determine that Gluckselig has met his burden of affirmatively showing that he received an education functionally equivalent to the education available at an ABA-approved law school. As such, a waiver of rule 5C is appropriate. Accordingly, we will waive rule 5C as it applies to Gluckselig and allow him to sit for the Nebraska bar examination.

APPLICATION GRANTED.

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