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SANITARY AND IMPROVEMENT DISTRICT NO. 57 OF DOUGLAS COUNTY, NEBRASKA, A CORPORATION, ET AL., APPELLANTS, V. CITY OF ELKHORN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

IN RE SANITARY AND IMPROVEMENT DISTRICT NO. 157 OF DOUGLAS COUNTY, NEBRASKA.

SANITARY AND IMPROVEMENT DISTRICT NO. 157 OF DOUGLAS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, AND CITY OF ELKHORN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEES AND CROSS-APPELLANTS, V. SANITARY AND IMPROVEMENT DISTRICT NO. 57 OF DOUGLAS COUNTY, NEBRASKA, A CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES.

SANITARY AND IMPROVEMENT DISTRICT NO. 57 OF DOUGLAS COUNTY, NEBRASKA, A CORPORATION, ET AL., APPELLANTS, V. CITY OF ELKHORN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

536 N.W.2d 56

Filed August 18, 1995. Nos. S-94-869, S-94-983, S-94-995.

1. **Public Officers and Employees: Actions: Collateral Attack.** In Nebraska, the general rule is that the title to an office can be litigated only in a proceeding brought directly for that purpose and cannot be determined by a collateral attack in another proceeding.
2. **Municipal Corporations: Annexation.** A municipality cannot annex property for revenue purposes only.
3. ____: ____. 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.
4. **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.
5. **Summary Judgment: Appeal and Error.** To review 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.
6. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the pleaded facts, 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.
7. **Actions: Municipal Corporations: Injunction: Proof.** A party seeking to restrain an act of a municipal body must show some special injury peculiar to himself aside from a general injury to the public. It is not sufficient that the party bringing the suit has merely a general interest common to all members of the public.

8. **Actions: Pleadings.** When a party does not allege a special injury different from that suffered by the general public, but instead alleges that an action is brought on behalf of himself and all others similarly situated, the general allegation of his pleading disputes and forecloses any claim of special injury peculiar to the party aside from the general injury to the public.
9. **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.
10. **Statutes.** Effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, JAMES M. MURPHY, JOHN D. HARTIGAN, and LAWRENCE J. CORRIGAN, Judges. Affirmed.

Thomas J. Guilfoyle, of Frost, Meyers, Guilfoyle & Govier, for appellants.

Malcolm D. Young and Jeff C. Miller, of Young & White, and Robert T. Peterson for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WHITE, C.J.

Sanitary and Improvement District No. 57 (Chapel Hill) et al. and various others filed three separate actions, which are consolidated herein, to enjoin the total annexation of the Chapel Hill community and the partial annexation of Sanitary and Improvement District No. 157 (Skyline Ranches) by the City of Elkhorn (City). The cases—*SID No. 57 v. City of Elkhorn* (S-94-995 (*SID 1*)), *SID No. 57 v. City of Elkhorn* (S-94-869 (*SID 2*)), and *In re SID No. 157* (S-94-983 (*SID 3*))—challenge the validity of the City's annexation by arguing generally (1) that any attempted annexation was invalid because the City's council was elected improperly and (2) that the City was motivated to annex Chapel Hill and Skyline Ranches solely to increase revenue. Specifically, in *SID 1*, Chapel Hill and others challenge the district court's determination to grant summary judgment in favor of the City; in *SID 2*, Chapel Hill and others challenge the district court's determination to grant a demurrer in favor of the City; and in *SID 3*, Chapel Hill and others

challenge the validity of the partial annexation of Skyline Ranches. In each case, we affirm.

As a preliminary matter, we consider Chapel Hill's contentions that the City's council was illegitimate under Nebraska law and that the council acted to annex Chapel Hill and Skyline Ranches solely to increase revenue.

In each of the three cases, Chapel Hill contends that any annexation ordinance passed by the City's council is void because the council was not elected properly. Chapel Hill maintains that the council was not elected by wards as required by Neb. Rev. Stat. §§ 17-102 and 17-104 (Reissue 1991), but instead by the constituents of the City on an at-large basis.

Assuming, without deciding, that the City's council was elected improperly, the council members nevertheless remain de facto public officers. A de facto public officer is a person who exercises the duties of a public office under the color of a known public election which was void because of ineligibility or some defect or irregularity in the election. *Prucka v. Eastern Sarpy Drainage Dist.*, 157 Neb. 284, 59 N.W.2d 761 (1953). Furthermore, the acts of a de facto public officer are valid and binding as if performed by a duly elected public officer whose title is beyond dispute. *ConAgra, Inc. v. Cargill, Inc.*, 223 Neb. 92, 388 N.W.2d 458 (1986); *State v. Birdwell*, 188 Neb. 116, 195 N.W.2d 502 (1972). See, *State ex rel. Weiner v. Hans*, 174 Neb. 612, 119 N.W.2d 72 (1963); *State v. Kidder*, 169 Neb. 181, 98 N.W.2d 800 (1959). Additionally, in Nebraska, the general rule is that the title to an office can be litigated only in a proceeding brought directly for that purpose and cannot be determined by a collateral attack in another proceeding. *Atkins v. Department of Motor Vehicles*, 192 Neb. 791, 224 N.W.2d 535 (1974); *State ex rel. Weiner, supra*. See *Birdwell, supra*.

Chapel Hill asks this court to declare any annexation ordinance passed by the City's council to be void on the grounds that such an ordinance is the product of improperly elected officials. However, Chapel Hill raised its contention in the context of a challenge to the legality of land annexation. Thus, Chapel Hill's assertion that the council was elected improperly cannot be determined in this proceeding because such an assertion is a collateral attack. Therefore, Chapel Hill's

contention is without merit because this court, in this proceeding, will not permit Chapel Hill to mount a collateral attack on the propriety of the election that brought the City's council members to their jobs in order to invalidate annexation ordinances the council passed.

Next, Chapel Hill contends that the City undertook the annexation of Chapel Hill and a part of Skyline Ranches solely to increase revenue. It is true that a municipality cannot annex property for revenue purposes only. *S.I.D. No. 95 v. City of Omaha*, 221 Neb. 272, 376 N.W.2d 767 (1985). See, *United States v. City of Bellevue, Nebraska*, 334 F. Supp. 881 (D. Neb. 1971), *aff'd* 474 F.2d 473 (8th Cir. 1973), *cert. denied* 414 U.S. 827; *Witham v. City of Lincoln*, 125 Neb. 366, 250 N.W. 247 (1933). However, it is likewise true that the evidence in this case does not support that claim. By annexing Chapel Hill and a part of Skyline Ranches, the City assumed the obligation for all of their liabilities. No doubt the City considered seriously the question of revenue because under the annexation plan, the City assumed the responsibility of providing all necessary improvements and services to Chapel Hill and Skyline Ranches. Prudent annexation planning compels the City to consider any revenue to be engendered by an annexation, in light of the liabilities to be incurred. To suggest that the City acted unlawfully by considering the revenues that would result from an annexation is to fail to recognize that the City would incur substantial obligations to Chapel Hill and Skyline Ranches as a result of an annexation. Therefore, Chapel Hill's contention that the City annexed all of Chapel Hill and a part of Skyline Ranches solely for revenue purposes is without merit.

In *SID 1*, the district court's decision to sustain the City's motion for summary judgment and to overrule the appellants' motion for summary judgment is appealed. Appellants (Chapel Hill, Billy D. Duncan, and Timothy V. Grove) assigned five errors, which may be consolidated into two. Appellants contend that the district court erred (1) in determining that land annexed by the City met the statutory contiguity requirement and (2) in failing to grant appellants' motion for summary judgment. We affirm.

The record contains the following facts: On August 10, 1993,

the City's council approved ordinance No. 280. The ordinance called for the annexation of the Chapel Hill community. Prior to the passage of the ordinance, Chapel Hill shared a common border with the City via the Elkhorn school district's Skyline Elementary School. The school is connected to the City by a strip of land surrounding and including Highway 31. The common border had existed since March 1984.

During early 1984, the City's council had approved ordinance No. 208. That ordinance extended the City's corporate limits south along Highway 31 to Pacific Street and west along Roundup Circle and Corral Road up to and including Skyline Elementary School. This 1984 annexation included land within Skyline Ranches. As a result, the City and Skyline Ranches had entered into an agreement concerning a division of assets and liabilities and a change of boundaries. Following the agreement, the City and Skyline Ranches filed in Douglas County District Court an "Application Re Partial Annexation" as required by Neb. Rev. Stat. § 31-766 (Reissue 1993). On March 24, 1984, the district court entered a decree on partial annexation, which stated that the territory sought to be annexed by ordinance No. 208 had become a part of the City. No appeal was taken from that proceeding. Specifically, neither Chapel Hill nor Skyline Ranches contested the 1984 annexation, as they supported the annexation. The statute of limitations to control the annexation ran in the spring of 1985. Neb. Rev. Stat. § 18-1718 (Reissue 1991).

Concerning the 1993 ordinance (No. 280), the district court held hearings on April 14 and 21, 1994, to determine the disposition of the case, in light of competing summary judgment motions. The parties submitted evidence and agreed that no substantial issues of fact existed which required a trial.

On September 19, 1994, the district court entered an order sustaining the City's motion for summary judgment and overruling the appellants' motion. In so ruling, the court found that Chapel Hill was contiguous and adjacent to the City as a matter of law and had been annexed properly. The district court's determination is appealed.

Elkhorn is a city of the second class. See Neb. Rev. Stat. § 17-101 (Reissue 1991). Neb. Rev. Stat. § 17-405.01 (Reissue

1991), which grants cities of the second class the power to extend city limits, states:

> The mayor and council of any city of the second class or the chairman and members of the board of trustees of any village may by ordinance, except as provided in sections 13-1111 to 13-1118, and amendments thereto, at any time, include within the corporate limits of such city or village 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. Such grant of power shall not be construed as conferring power to extend the limits of any municipality over any agricultural lands which are rural in character.

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*, 241 Neb. 291, 488 N.W.2d 20 (1992); *Plumfield Nurseries, Inc. v. Dodge County*, 184 Neb. 346, 167 N.W.2d 560 (1969). The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring such power, because a municipal corporation has no power to extend or change its boundaries other than as provided by constitutional enactment or as it is empowered by the Legislature by statute to do. *Johnson, supra*; *Doolittle v. County of Lincoln*, 191 Neb. 159, 214 N.W.2d 248 (1974); *Village of Niobrara v. Tichy*, 158 Neb. 517, 63 N.W.2d 867 (1954); *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952).

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. *Swedlund v. City of Hastings*, 243 Neb. 607, 501 N.W.2d 302 (1993); *Johnson, supra*; *Bierschenk v. City of Omaha*, 178 Neb. 715, 135 N.W.2d 12 (1965).

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. *Swedlund, supra*; *Johnson, supra*; *Tichy, supra*.

To review 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. *Krohn v. Gardner, ante* p. 210, 533 N.W.2d 95 (1995); *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995); *Huntwork v. Voss*, 247 Neb. 184, 525 N.W.2d 632 (1995); *New Light Co. v. Wells Fargo Alarm Servs.*, 247 Neb. 57, 525 N.W.2d 25 (1994). A summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Krohn, supra*; *Gravel, supra*; *Heath Consultants v. Precision Instruments*, 247 Neb. 267, 527 N.W.2d 596 (1995); *Huntwork, supra*. Thus, the question at issue in a summary judgment motion is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 523 N.W.2d 27 (1994); *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994). With this in mind, we turn to whether the district court erred in granting summary judgment in favor of the City.

There is no dispute about the character of the land the City sought to annex: it is not rural land. Appellants' contention is that the City and Chapel Hill are not contiguous. Appellants rely on dicta from this court to assert reasons to reject the annexation. However, the piece of land connecting the City and Chapel Hill is not simply a means, i.e., an illegal corridor or strip annexation, cf. *Johnson, supra*, to annex Chapel Hill; the land had been a part of the City since 1984. Although the land connecting Chapel Hill and the City does have an armlike quality, appellants' knowledge of and acquiescence in the 1984 annexation process notified them that the City's expansion would permit the municipality to annex land contiguous to the new boundaries in the future.

A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented for summary judgment remains uncontroverted, the

moving party is entitled to judgment as a matter of law. *Krohn, supra*; *Gravel, supra*; *Schlake v. Jacobsen*, 246 Neb. 921, 524 N.W.2d 316 (1994); *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994).

After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Krohn, supra*; *Gravel, supra*; *Schlake, supra*; *In re Estate of Wagner, supra*. A summary judgment involves a judicial evaluation of evidence to determine whether an issue of material fact exists and, therefore, is a factual determination resulting in a disposition of the factual merits of a controversy. *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993).

There was no genuine issue of material fact to decide in this case. Under Nebraska law, a city of the second class can annex contiguous land. In the case at bar, the City is contiguous with Chapel Hill by virtue of an annexation conducted in 1984. A district court had countenanced the 1984 annexation; subsequently, that order went unchallenged and the statute of limitations ran. This court will neither disturb an unchallenged court order on which the statute of limitations has run nor accept new argumentation in opposition to a final judgment by a court of competent jurisdiction. See, *Kuskie v. Adams Bank & Trust of Madrid, ante* p. 18, 531 N.W.2d 921 (1995); *Hangman v. Bruening*, 247 Neb. 769, 530 N.W.2d 247 (1995). The City produced evidence demonstrating that it was contiguous to Chapel Hill. Appellants did not establish that that evidence was invalid; thus, the City's uncontroverted evidence entitled it to judgment as a matter of law. Accordingly, the district court did not err by granting the City's motion for summary judgment while overruling appellants' similar motion.

Next, in *SID 2*, the district court's decision to sustain the City's amended demurrer and to dismiss appellants' amended petition is appealed. Appellants (Chapel Hill, Duncan, Grove, and Helga Withem) assigned six errors, which may be consolidated into three. Appellants contend that the district court erred in determining (1) that three of the appellants had no standing to sue, (2) that the property to be annexed was

contiguous and adjacent to the City, and (3) that appellants did not allege facts sufficient to state a cause of action. We affirm.

The record contains the following facts: On March 8, 1994, the City's council passed ordinance No. 288. The ordinance called for the partial annexation of Skyline Ranches. The City had shared a common border with Skyline Ranches since March 1984. The corporate limits of the City also included land within Skyline Ranches—Skyline Elementary School and the road serving it.

All appellants are residents of Chapel Hill, a community adjacent to Skyline Ranches. Skyline Ranches was not a party to the suit.

In considering a demurrer, a court must assume that the pleaded facts, 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. *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995); *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994); *First Nat. Bank in Morrill v. Union Ins. Co.*, 246 Neb. 636, 522 N.W.2d 168 (1994). If from the facts stated in the petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie. *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993). However, an order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Gallion v. Woytassek*, 244 Neb. 15, 504 N.W.2d 76 (1993).

In the district court, pursuant to Neb. Rev. Stat. § 25-806 (Reissue 1989), the City contended (1) that the appellants lacked standing to sue, (2) that there was a defect of parties, (3) that the petition did not state facts sufficient to constitute a cause of action, and (4) that the court lacked jurisdiction.

Before a party is entitled to invoke a court's jurisdiction, that party must have standing to sue, which involves having some real interest in the cause of action; in other words, to have standing to sue, a plaintiff must have some legal or equitable

right, title, or interest in the subject matter of the controversy. The purpose of the inquiry is to determine whether the party has a legally protected interest or right in the controversy that would benefit by the relief to be granted. *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995).

In addition, a party seeking to restrain an act of a municipal body must show some special injury peculiar to himself aside from a general injury to the public. It is not sufficient that the party bringing the suit has merely a general interest common to all members of the public. *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 371 N.W.2d 258 (1985). If such an action involves an illegal expenditure of public funds or an increase in the burden of taxation, the plaintiff must be a taxpayer of the governmental body. *Rexroad, Inc. v. S.I.D. No. 66*, 222 Neb. 618, 386 N.W.2d 433 (1986).

In this case, the district court found that three appellants, Chapel Hill, Duncan, and Grove, had no standing to contest the validity of the partial annexation of Skyline Ranches. We agree because neither the entity, Chapel Hill, nor the individuals, Duncan and Grove, are residents, property owners, taxpayers, or electors of Skyline Ranches. They therefore have no standing to claim that ordinance No. 288 is void and illegal. Thus, the district court did not err in granting the City's demurrer under § 25-806 because the interests of Chapel Hill, Duncan, and Grove as property owners and taxpayers of Chapel Hill were not jeopardized or affected directly when the City attempted a partial annexation of Skyline Ranches.

Although the fourth appellant, Withem, resides in Chapel Hill, she owns property located within Skyline Ranches. However, Withem did not contend that she suffered a special injury as a result of the City's partial annexation of Skyline Ranches. Instead, she petitioned the court for redress

> as (a) a duly qualified elector of both SID No. 57 and SID No. 157 and for and on behalf of all persons similarly situated; and (b) as an owner of real property located within SID No. 57 and within SID No. 157 and a taxpayer of SID No. 57 and a taxpayer of SID No. 157, for and on behalf of all persons similarly situated.

We have held that when a party does not allege a special

injury different from that suffered by the general public, but instead alleges that an action is brought on behalf of himself and all others similarly situated, the general allegation of his pleading disputes and forecloses any claim of special injury peculiar to the party aside from the general injury to the public. *Schroder v. City of Lincoln*, 155 Neb. 599, 52 N.W.2d 808 (1952).

A cause of action accrues when the aggrieved party has the right to institute and maintain suit. *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993). A cause of action consists of the fact or facts which give one a right to judicial relief against another. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993). A theory of recovery is not itself a cause of action. *St. Paul Fire & Marine Ins. Co., supra.*

Although this court accepts the truth of facts well pled when reviewing an order sustaining a demurrer, Withem did not allege that she suffered a special or particular injury that would give rise to a right to judicial relief. Instead, she alleged the kind of general injury that this court has rejected previously. In addition, the character of the land to be annexed met the requirements of § 17-405.01 because, according to a 1984 district court order, the land was both urban and contiguous.

A statement of "facts sufficient to constitute a cause of action," as used in § 25-806(6), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Carlson v. Metz, ante* p. 139, 532 N.W.2d 631 (1995); *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994); *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994).

Thus, the district court did not err in granting the City's demurrer under § 25-806(6) because Withem did not demonstrate the existence of any special injury resulting from the City's partial annexation of Skyline Ranches. Under the circumstances, Withem presented no issue of liability to be adjudicated. Therefore, despite the fact that Withem owns property within Skyline Ranches, her claim is without merit because she presented no justiciable injury to herself.

Finally, neither Skyline Ranches nor any resident thereof was a party to this declaratory judgment action. Under Nebraska law, "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration . . . ." Neb. Rev. Stat. § 25-21,159 (Reissue 1989). In addition, we have said that the presence of necessary parties is jurisdictional and cannot be waived, and if such persons are not made parties then the district court has no jurisdiction to determine the controversy. *Redick v. Peony Park*, 151 Neb. 442, 37 N.W.2d 801 (1949).

The residents of Skyline Ranches no doubt have an interest in the outcome of a declaratory judgment action seeking to enjoin the partial annexation of their sanitary and improvement district. Thus, appellants' claim that the district court erred by granting the demurrer is also without merit under § 25-806 because appellants' declaratory judgment action lacked the presence of a significant necessary party.

Next, in *SID 3*, both parties to the proceedings appealed. Appellants, Douglas County, Chapel Hill, Duncan, Grove, and Withem, assigned three errors, which may be consolidated into one. Appellants contend that the district court erred in determining that the partial annexation of Skyline Ranches was valid, fair, and reasonable.

For their part, the City and Skyline Ranches contend that the district court erred in permitting appellants to intervene in the proceedings concerning the partial annexation of Skyline Ranches. We affirm.

The record contains the following facts: On March 8, 1994, the City's council passed ordinance No. 288. The ordinance called for the partial annexation of Skyline Ranches. Following the passage of the ordinance, the City and Skyline Ranches agreed to terms concerning the annexation. Under the agreement, the City succeeded to all assets, contracts, property, and property rights belonging to Skyline Ranches and assumed liability for all debts, contracts, and obligations.

The City and Skyline Ranches presented their agreement to the district court for approval. During the proceedings on the agreement, the district court took judicial notice of the proceedings in *SID 2*. At the conclusion of the proceedings on

the agreement, the district court entered a decree on partial annexation, which determined (1) that a portion of Skyline Ranches had become a part of the City, (2) that the new boundaries of SID No. 157 consisted of the Skyline Ranches territory not annexed by the City, (3) that the agreement concerning the distribution of assets and liabilities was fair and reasonable, and (4) that the agreement was effective.

On September 23, appellants filed a motion for leave to intervene. On October 14, the district court issued an order allowing the parties leave to intervene so that they would "have an opportunity to participate in the case at the appellate level." However, the judge made a docket entry stating, "Intervenor's request to set aside final decree denied."

Appellants contend that the district court erred by authorizing partial annexation. Specifically, appellants contend that Nebraska law required the district court to conduct the proceedings according to Neb. Rev. Stat. § 31-765 (Reissue 1993), which provides in relevant part:

> The merger shall be effective thirty days after the effective date of the ordinance annexing the territory within the district; *Provided*, if the validity of the ordinance annexing the territory is challenged by a proceeding in a court of competent jurisdiction, the effective date of the merger shall be thirty days after the final determination of the validity of the ordinance.

(Emphasis in original.)

Appellants argue that under the provisions of § 31-765 the district court cannot make effective the City's partial annexation of Skyline Ranches until 30 days after all proceedings concerning the annexation end. Therefore, appellants maintain that the district court erred by ratifying the agreement on partial annexation while other proceedings involving the annexation were pending.

On the other hand, the City contends that a partial annexation is properly made effective under § 31-766 (Cum. Supp. 1994). The statute provides in relevant part:

> If only a part of the territory within any sanitary and improvement district . . . is annexed by a city . . . the sanitary and improvement district acting through its

> trustees or administrator and the city . . . acting through its governing body may agree between themselves as to the division of the assets, liabilities, maintenance, or other obligations of the district for a change in the boundaries of the district so as to exclude the portion annexed by the city . . . or may agree upon a merger of the district with the city . . . . No agreement between the district and the city . . . shall be effective until submitted to and approved by the district court . . . . In every case such decree or order shall require a change of the district boundaries so as to exclude from the district that portion of the territory of the district which has been annexed. Such change of boundaries shall become effective on the date of entry of such decree. Only the district and the city . . . shall be necessary parties to such an action.

The City argues that the order of the district court was valid and final because the court complied with the provisions of § 31-766. Specifically, because ordinance No. 288 called for a partial annexation, and subsequently the City and Skyline Ranches agreed to a division of assets, the district court did not err in signing a decree of partial annexation.

This court has acknowledged a distinction between § 31-765 and § 31-766. In *Sanitary & Improvement Dist. v. City of Ralston*, 182 Neb. 63, 152 N.W.2d 111 (1967), a case involving an appeal from a summary judgment determination that the city of Ralston had conducted an invalid annexation of the Wildewood Addition, we stated that § 31-765 applies to an ordinance designed to annex "the [entire] territory," while § 31-766 applies to an ordinance designed to annex "only a part of the territory within any sanitary and improvement district . . . annexed by a city . . . ."

Furthermore, in *Abernathy v. City of Omaha*, 183 Neb. 660, 163 N.W.2d 579 (1968), a case questioning the validity and enforceability of the collection of a 5-mill levy by a sanitary and improvement district on property annexed by the city of Omaha, we stated that although § 31-766 must be construed in light of § 31-765 for the purpose of determining the expediency of a filing action, Neb. Rev. Stat. § 31-764 (Reissue 1993) and § 31-765 govern proceedings concerning the annexation of an

entire district, while § 31-766 governs proceedings concerning the annexation of a part of any sanitary and improvement district. Thus, as acknowledged in our previous decisions, § 31-766 is applied appropriately to annexations of less than an entire sanitary and improvement district. See, also, *Millard Rur. Fire Prot. Dist. No. 1 v. City of Omaha*, 226 Neb. 50, 409 N.W.2d 574 (1987); *City of Bellevue v. Eastern Sarpy County S. F. P. Dist.*, 180 Neb. 340, 143 N.W.2d 62 (1966).

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. *George Rose & Sons v. Nebraska Dept. of Revenue, ante* p. 92, 532 N.W.2d 18 (1995); *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995); *Rust v. Buckler*, 247 Neb. 852, 530 N.W.2d 630 (1995). Effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. *George Rose & Sons, supra*; *State ex rel. Perkins Cty. v. County Superintendent*, 247 Neb. 573, 528 N.W.2d 340 (1995); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993).

Appellants did not contend that the partial annexation of Skyline Ranches by the City was invalid under § 31-766. Instead, they asked this court to superimpose the requirements of § 31-765 onto § 31-766. Such a request is without merit for two reasons. First, it ignores a distinction previously drawn by this court as to the kind of annexation proceedings to which §§ 31-765 and 31-766 apply. Second, it does not comport with the distinction the Legislature established in constructing §§ 31-765 and 31-766 separately.

Construing § 31-765 to the wishes of appellants permits § 31-765 to subsume § 31-766 and rob the latter of its independent meaning. We have recognized previously the distinction between the two. By recognizing such a distinction, we acknowledged that the Legislature created two different standards to process two different kinds of annexations. Although this court has construed § 31-766 in light of § 31-765 for the purpose of filing expediency, we refuse to extend the cross-applicability of § 31-765 entirely. We continue to

recognize that § 31-766 governs proceedings arising from partial annexations. Therefore, appellants' desired construction of § 31-765 is without merit.

As we apply these considerations to the events in the district court, it is clear that the court acted to ratify an agreement made between Skyline Ranches and the City according to the guidelines of § 31-766. As that was the applicable statute, the court did not err in so proceeding. Having determined that appellants' assignment of error is without merit, we need not consider the City and Skyline Ranches' cross-appeal.

AFFIRMED.

LANPHIER, J., not participating in the decision.

CONNOLLY, J., concurs in the result.

DARREN M. GLASS, APPELLEE, V. NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

536 N.W.2d 344

Filed August 25, 1995. No. S-93-542.

1. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
2. ____: ____. 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.
3. **Jurisdiction: Waiver.** While the lack of subject matter jurisdiction cannot be waived nor the existence of subject matter jurisdiction conferred by the consent or conduct of the parties, lack of personal jurisdiction may be waived and such jurisdiction conferred by the conduct of the party.
4. **Jurisdiction: Appeal and Error: Words and Phrases.** In its strict sense, appellate jurisdiction is the power and authority conferred upon a superior court to reexamine and redetermine causes tried in inferior courts.
5. **Actions: Appeal and Error: Words and Phrases.** The institution of a suit to obtain judicial-branch review of a nonjudicial-branch decision does not constitute an appeal.
6. **Jurisdiction.** One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person.

7. ____. A party who does more than call a court's attention to the lack of personal jurisdiction by asking for affirmative relief will not later be heard to claim that the court lacked jurisdiction over that party.
8. **Jurisdiction: Motions to Dismiss.** A motion to dismiss invokes the power of the court on an issue other than jurisdiction and constitutes a general appearance.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Don Stenberg, Attorney General, and Lauren L. Hill for appellant.

Arthur S. Wetzel for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and GRANT, J., Retired.

PER CURIAM.

The appellee, Darren M. Glass, was arrested for driving a motor vehicle while under the influence of alcohol. Through an administrative hearing, the Nebraska Department of Motor Vehicles revoked Glass' license for 90 days.

Glass then sought review by the district court, which reversed the department's order and directed that Glass' driving privileges be restored. The department thereupon appealed to the Nebraska Court of Appeals. On our own motion, we removed the case to this court in order to regulate the caseloads of the two appellate courts.

The department assigns and argues but a single claim of error, the district court's determination that "it had *subject matter* jurisdiction over" the proceeding. (Emphasis supplied.) Thus, the merits of the district court's decision are not before us.

The record shows that after the department suspended Glass' license, he filed a "Petition for Review of Administrative Agency's Decision" in the district court, naming as defendant "Nebraska Department of Motor Vehicles, Administrative License Revocation Hearing Agency/Respondent." The summons on this district court petition was served only on the director of the department.

The department filed a special appearance, contending that the district court lacked "*personal* jurisdiction" over the agency

because Glass failed to serve a copy of the summons on the Attorney General. (Emphasis supplied.) Glass successfully moved to strike the special appearance on the ground that it was not timely filed, whereupon the department unsuccessfully moved to dismiss the petition "on the same grounds alleged in the Special Appearance."

At the relevant time, Neb. Rev. Stat. § 39-669.18 (Reissue 1988) provided, as Neb. Rev. Stat. § 60-6,208 (Reissue 1993) now provides, that one aggrieved by the department's revocation may "appeal . . . in accordance with the Administrative Procedure Act." The Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 through 84-920 (Reissue 1994), grants persons aggrieved by certain nonjudicial determinations the right to obtain judicial review of those decisions. §§ 84-901 and 84-917. It further provides that such a

> review shall be instituted by filing a petition in the district court . . . . All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record. Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action.

§ 84-917(2)(a).

Neb. Rev. Stat. § 25-510.02 (Reissue 1989) states that the "State of Nebraska [and] any state agency . . . may be served by leaving the summons at the office of the Attorney General" in a specified variety of ways. Thus, when § 25-510.02 applies, as by its terms it does here, in order to institute judicial review under the act, a summons must be served on the Attorney General. *Twiss v. Trautwein*, 247 Neb. 535, 529 N.W.2d 24 (1995).

Although, as noted earlier, in the court below the department thought it was dealing with an issue of personal jurisdiction, it now urges that because the Attorney General was not served with summons as required by § 84-917(2)(a), the district court lacked jurisdiction over the subject matter of Glass' district court petition.

The two types of jurisdiction are far different. Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. See *Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109 (Colo. 1991). Subject matter jurisdiction, on the other hand, 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. See *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994). While the lack of subject matter jurisdiction cannot be waived nor the existence of subject matter jurisdiction conferred by the consent or conduct of the parties, *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994), lack of personal jurisdiction may be waived and such jurisdiction conferred by the conduct of the party, see *Egan v. Bunner*, 155 Neb. 611, 52 N.W.2d 820 (1952).

In taking its present position, the department relies on two of our prior decisions: *McCorison v. City of Lincoln*, 218 Neb. 827, 359 N.W.2d 775 (1984), and *Norris P.P. Dist. v. State ex rel. Jones*, 183 Neb. 489, 161 N.W.2d 869 (1968). In *McCorison*, we ruled that where the aggrieved party failed to file a so-called notice of appeal from the decision of a city board within the time set by the relevant statute, the district court acquired no jurisdiction to entertain the matter. In so ruling, we wrote that if "statutory requirements are not met, the district court acquires no jurisdiction and may not enter any order other than an order of dismissal." *Id.* at 828-29, 359 N.W.2d at 776. Although we did not therein specify the type of jurisdiction involved, it is clear that we were not dealing with personal jurisdiction, for without the timely filing of the so-called notice of appeal, the district court did not acquire the power to hear and determine the board's decision.

In *Norris P.P. Dist.*, without specifying the type of jurisdiction involved, we held that the district court lacked jurisdiction because of the failure to serve a summons within 30 days as required. However, it must be remembered that this holding was made under a statute providing that "without the issuance of a summons" there was no "commencement of an action." *Id.* at 493, 161 N.W.2d at 872. Thus, for the same reason that without a timely filing of the document invoking

judicial review there could be no jurisdiction in *McCorison* to consider the matter, neither without the service of summons in *Norris P.P. Dist.* did the district court acquire power to consider the matter. In each case, the situation was as if nothing had been filed in the district court.

Although this case was not cited by either party, we also declared in *Nebraska Dept. of Correctional Servs. v. Carroll*, 222 Neb. 307, 383 N.W.2d 740 (1986), that to acquire jurisdiction over the subject matter of the action, there must be strict compliance with the requirements of the statute granting the right of appeal. *Carroll* arose upon the application to the district court to recover attorney fees for services rendered the claimant in proceedings held before state agencies. Because under the circumstances the district court could not reach the substantive issues considered by the agencies and the relevant statute permitted the district court to award only those fees incurred in determining issues the district court could reach, we determined that the district court had no power to hear and determine the matter of fees for services before the agencies. The question in *Carroll* thus was clearly one of subject matter jurisdiction.

Additionally, in another case not noted by the parties, we, in the context of reviewing the appropriateness of a sanction for the failure to timely prepare a transcript, wrote that the "filing of the petition and the service of summons are the two actions that are necessary to establish jurisdiction pursuant to the" act. *James v. Harvey*, 246 Neb. 329, 332, 518 N.W.2d 150, 152 (1994). However, the *Harvey* dictum did not distinguish between the steps required for obtaining subject matter jurisdiction under the act and those required for obtaining personal jurisdiction.

The key to understanding the distinction between personal jurisdiction and subject matter jurisdiction in this case is to first recognize the nature of the proceeding before us. While § 39-669.18 inartfully referred to an "appeal" from the department's decision, the act makes clear that we are dealing not with an appeal, in the technical sense, but with the initiation of a proceeding to obtain judicial-branch review of the decision of another branch of government. §§ 84-901 and 84-917. In contrast, § 39-669.18 and the act grant the district court the

original power and authority to determine whether the department's decision should stand. Thus, we are not dealing with "appellate jurisdiction," which in the strict sense is the power and authority conferred upon a superior court to reexamine and redetermine causes tried in inferior courts. See *Waters-Pierce Oil Co. v. State of Texas*, 107 Tex. 1, 106 S.W. 326 (1907). Rather, we are dealing with the institution of a suit to obtain judicial-branch review of a nonjudicial-branch decision; such a proceeding does not constitute an appeal. See, *Warren v. Indiana Telephone Co.*, 217 Ind. 93, 26 N.E.2d 399 (1940) (strictly speaking, there is no such thing as "appeal" from administrative agency, but to meet requirements of "due process of law," there must be "judicial review" of orders of administrative body, for purpose of adjudication that agency has acted within scope of its powers, that substantial evidence supports factual conclusions, and that determination comports with law applicable to facts found); *Commercial Standard Insurance Company v. Cotton*, 443 S.W.2d 423 (Tex. Civ. App. 1969) (suit to set aside award of board is "suit" and not "appeal," and when suit is filed, subject matter is withdrawn from board); *Broughton's Est. v. Central Or. Irr. Dist.*, 165 Or. 435, 108 P.2d 276 (1940) (under statute providing that any person aggrieved by order of state engineer in connection with water rights shall have right to appeal to circuit court, "appeal" contemplated by statute is to be regarded as original proceeding in circuit court); *DeFlumeri v. Sunderland*, 109 Conn. 583, 145 A. 48 (1929); *Norwalk Street Ry. Co.'s Appeal*, 69 Conn. 576, 37 A. 1080 (1897); *Plummer v. Johnson*, 61 N.M. 423, 301 P.2d 529 (1956).

As a consequence, we are here concerned not with whether Glass properly perfected an appeal from the department and thereby invoked the district court's appellate jurisdiction over the subject matter, but with whether the district court, either through the proper service of summons or through some other means, obtained jurisdiction over the "person" of the department.

The answer to the question before us is foreshadowed by a case not cited by either party: *Pointer v. State*, 219 Neb. 315, 363 N.W.2d 164 (1985). Therein, the plaintiff had filed a claim

for damages resulting from an automobile accident with the State Claims Board, as required by the State Tort Claims Act. Upon the board's denial of the claim, the plaintiff filed a petition for judicial review in the district court and caused summons to be served on the State by delivery to the Secretary of State. However, the relevant statute required service to be made on the Attorney General. After making several other general appearances in the district court, the Attorney General, by filing a motion to dismiss, claimed lack of jurisdiction because of the improper service of summons. In reversing the district court's order of dismissal, we, overruling precedent, held that in those instances where the Legislature has waived the State's sovereign immunity as to a particular cause of action and has designated a person or official as the agent of the State upon whom summons may be served, that person or official validly may enter a voluntary appearance for the State, thereby waiving the issue of in personam jurisdiction.

Just as is the situation here, the district court in *Pointer* had been asked to judicially review a nonjudicial-branch decision; just as is the situation here, the *Pointer* summons giving notice of that action was not properly served; and just as is the situation here, the improperly noticed party in *Pointer* sought affirmative relief from the district court by asking for a dismissal of the proceeding for judicial review. Consequently, *Pointer* dictates that we hold here that the department submitted its person to the jurisdiction of the district court, and we hereby do so.

This ruling comports with the long-settled law that one who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person. *Eliason v. Devaney*, 228 Neb. 331, 422 N.W.2d 356 (1988); *Cropsey v. Wiggenhorn*, 3 Neb. 108 (1873). That is to say, a party who does more than call a court's attention to the lack of personal jurisdiction by asking for affirmative relief will not later be heard to claim that the court lacked jurisdiction over that party.

Thus, irrespective of whether the district court here lacked personal jurisdiction over the department when overruling the

department's special appearance, the department submitted itself to the personal jurisdiction of the court when it elected to move for a dismissal rather than to stand on and appeal the district court's ruling on the special appearance. See Neb. Rev. Stat. § 25-516.01 (Reissue 1989). In so writing, we are not unmindful that pretrial motions to dismiss are not properly a part of our pleading practice, *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994); however, the relevant fact is that regardless of whether it did so properly, by moving for a dismissal the department invoked the power of the court on an issue other than personal jurisdiction and thereby made a voluntary appearance with the result that it submitted itself to the binding effect of the district court's judgment, *Pointer, supra*; *Eliason, supra* (motion to dismiss invokes power of court on issue other than jurisdiction and constitutes general appearance); § 25-516.01.

For the foregoing reasons, the judgment of the district court must be, and hereby is, affirmed.

AFFIRMED.

CONNOLLY, J., not participating.

WRIGHT, J., dissenting.

I respectfully dissent from the majority's opinion and would reinstate the revocation issued by the Nebraska Department of Motor Vehicles. In my opinion, the department has correctly asserted that because the Attorney General was not served with summons, as required by Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1994), the district court lacked jurisdiction over the subject matter of Glass' petition for review.

In the present case, Glass' petition for review was filed on March 9, 1993. No summons was served on the Attorney General. On March 10, summons was served by mail on the head of the department. On April 27, the department filed a special appearance, alleging that the district court lacked jurisdiction because the Attorney General had not been served with summons and that Glass had failed to comply with Neb. Rev. Stat. § 25-510.02(1) (Reissue 1989). The district court denied the special appearance "for the reason that it was not timely filed." The department then filed a motion to dismiss on

the same grounds alleged in the special appearance, which motion was overruled. The district court then ordered the department to reinstate Glass' driving privileges effective immediately.

Although the department initially filed a special appearance because the Attorney General was not served and now argues that the district court lacked subject matter jurisdiction, it is not only within the power, but is the duty, of an appellate court to determine whether such appellate court has jurisdiction over the subject matter. See *Jones v. State, ante* p. 158, 532 N.W.2d 636 (1995). Subject matter jurisdiction cannot be created by waiver, estoppel, consent, or conduct of the parties. See *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994).

Regardless of whether Glass' action is an appeal or a petition for judicial review under the Administrative Procedure Act, the requirements for instituting the review are set forth in § 84-917(2)(a):

> Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. . . . Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action.

"The filing of the petition and the service of summons are the two actions that are necessary to establish jurisdiction pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 [(Reissue 1994)]." *James v. Harvey*, 246 Neb. 329, 332, 518 N.W.2d 150, 152 (1994). Both of those actions must be completed before the district court has authority to hear the petition for judicial review, and if those actions are not timely accomplished, the court is not given authority to conduct judicial review.

I disagree with the majority that the requirement of serving summons within 30 days of the filing of the petition is a matter involving personal jurisdiction, which may be waived or may be conferred upon the court by the conduct of a party. Glass' failure to properly serve the Attorney General within 30 days of the filing of the petition was fatal to his right to seek judicial review under the Administrative Procedure Act.

In my opinion, *Norris P.P. Dist. v. State ex rel. Jones*, 183 Neb. 489, 161 N.W.2d 869 (1968), controls. In that case, we held that the district court lacked jurisdiction because of the failure to serve summonses within 30 days as required. At that time, § 84-917(2) (Reissue 1966) provided:

> "Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. Summons shall be served as in other actions except that a copy of the petition shall be served upon any such agency together with the summons. The court, in its discretion, may permit other interested persons to intervene."

Norris P.P. Dist., 183 Neb. at 490, 161 N.W.2d at 870.

In that case, the administrative agency's order was entered on June 29, 1967. On July 26, Norris Public Power District (Norris) filed its petition on appeal in the district court. A praecipe for service of summons on Consumers Public Power District was filed by Norris on July 28, and summons was issued. Summonses for the remaining 26 public power districts were neither issued nor served within 30 days after the time for appeal commenced.

The primary question before this court in *Norris P.P. Dist.* was whether the district court obtained jurisdiction of the appeal under § 84-917(2). "The only issue is whether or not the controlling statute required the issuance of such summonses within the 30-day appeal period." *Norris P.P. Dist.*, 183 Neb. at 492, 161 N.W.2d at 871. We held:

> The subsection of the statute by its first sentence states that proceedings for review shall be instituted by filing a petition in the district court after service of the final decision of the agency. The second sentence provides that all parties of record shall be made parties to the proceedings for review. *In other words, the clear meaning is that the parties appealing are not only required to file a petition in the district court, but they must file a petition making all parties of record parties to the appeal proceeding. But the statute requires more to lodge*

jurisdiction of the appeal in the district court. It requires that summons issue as in other cases. This simply means that a summons must be served which will be valid under the general rules of law governing the validity of a summons and its service. *All these requirements must be met to invoke the jurisdiction of the district court on an appeal from an adverse decision of an administrative agency.* The last sentence of the subsection makes it clear that the requirements for invoking the jurisdiction of the district court do not prevent the district court from permitting other interested parties to intervene in the proceedings on appeal. *In summary, the statute requires the filing of a petition, with all parties of record made parties, and the service of summons on such parties, all within 30 days from the service of the final decision of the agency, after which the district court gains jurisdiction of the appeal.*

The plaintiffs contend that the words, "Proceedings for review shall be instituted by filing a petition in the district court," mean that the jurisdiction of the district court is complete with the filing of the petition. With this we cannot agree. It is true that in common usage the words "shall be instituted" mean "to commence" or "to begin." But it has a literal meaning of broader import that is applicable here. Its authoritative meaning is "to inaugurate or originate a design, plan, or purpose." . . . See Webster's Third New International Dictionary. We think that the words "shall be instituted by filing a petition" is [sic] used in the sense that it originates a procedure that is further spelled out in the language which follows it in the same paragraph of the statute.

. . . .

We think, further, that it was the intention of the Legislature that a suit in which all parties of record are parties be commenced within 30 days from date of the service of the final decision of the Department of Water Resources on the aggrieved party in order to secure a review. The filing without the issuance of a summons is not the commencement of an action. § 25-217, R. R. S.

> 1943. *We necessarily conclude that it was the intention of the legislative act to require within 30 days the filing of a petition with all parties of record made parties to the suit and the issuance of summons subsequently served to confer jurisdiction on the district court.*

(Emphasis supplied.) *Norris P.P. Dist.*, 183 Neb. at 492-93, 161 N.W.2d at 871-72.

At the time of *Norris P.P. Dist.*, § 84-917(2) did not contain the requirement that summons be issued within 30 days of the filing of the petition. Now, the Legislature has made it mandatory that summons be issued within 30 days of the filing of the petition.

The department moved to dismiss on the grounds that it had not been properly served with process. After the 30 days elapsed and summons was not issued, the department could properly move to dismiss the case. The district court had no jurisdiction in this case, and I would reinstate the revocation issued by the department.

GRANT, J., Retired, joins in this dissent.

GRANT, J., Retired, dissenting.

I respectfully dissent. First, I do not think the distinction made by the majority between an "appeal" and a "petition for review" is correct or necessary to a proper disposition of this cause. Without specifically discussing each case cited by the majority concerning the different ways in which other states (under different statutes) treat attempted reviews of administrative orders by courts, I note that *Commercial Standard Insurance Company v. Cotton*, 443 S.W.2d 423 (Tex. Civ. App. 1969), is cited with approval in *White v. State*, 543 S.W.2d 366 (Tex. Crim. App. 1976). The Texas criminal appellate court states:

> Our research reveals that the word "appeal" has not been construed in Texas by an appellate court having criminal jurisdiction since 1840. In that year, in *Republic v. Smith*, Dallam 407, the Supreme Court of the Republic of Texas defined an appeal (quoting Blackstone) as "a complaint to a superior court of injustice done by an inferior one." Mr. Black gives a similar definition. Black's

Law Dictionary, supra, at 124 [rev. 4th ed. 1968].
543 S.W.2d at 368.

I respect precedent, but I have difficulty relying on a case decided 5 years before Texas became a state. I note that "Mr. Black" now, in Black's Law Dictionary 88-89 (5th ed. 1979) and in Black's Law Dictionary 96 (6th ed. 1990), defines "appeal" as follows: "Resort to a superior (*i.e.* appellate) court to review the decisions of an inferior (*i.e.* trial) court or administrative agency. . . . In addition, an appeal may be taken from an administrative agency to a trial court (*e.g.* from Appeals Council in social security case to U.S. district court)."

Additionally, as noted in the majority opinion, Neb. Rev. Stat. § 60-6,208 (Reissue 1993) and its predecessor statute provide for an "appeal." Further, Neb. Rev. Stat. § 84-917(7) (Reissue 1994) provides: "The review provided by this section shall not be available in any case where other provisions of law prescribe the method of appeal." I believe a fair interpretation of subsection (7) is that a petition for review is one form of an appeal.

I believe that the difference between a petition for review and an appeal is a difference without a distinction, and if that were the only issue before us, there would be no necessity for dissent. It is what happens, however, when the petition for review is treated as an entirely new lawsuit, apparently to be governed by the provisions of chapter 25, articles 1 through 10, of the Nebraska Revised Statutes, that concerns me. Those provisions govern the instituting of new actions by a plaintiff. I do not think the petition for review is an entirely new lawsuit, because no evidence can be adduced in that suit and the entire record to be considered is the record before the agency.

Glass' "Petition for Review of Administrative Agency's Decision" was filed on March 9, 1993. The petition sought the review of the department's order of suspension of February 16. The petition for review, among other requests, sought a stay of Glass' suspension. The district court ordered a stay of the suspension order on March 11. Whether this stay was granted "after notice . . . to all parties of record" and whether the court made findings, all as required by § 84-917(3), need not be determined, but the district court did, ex parte, and without

compliance with the statute, suspend an apparently valid order of the department.

No summons was ever served on the Attorney General of Nebraska. On March 10, 1993, summons was served, by mail, on the head of the department. On April 27, "State of Nebraska Department of Motor Vehicles, Appellee" filed a special appearance alleging that the district court had no jurisdiction because the Attorney General had not been served a summons and that Glass had failed to comply with Neb. Rev. Stat. § 25-510.02(1) (Reissue 1989). The majority holds that in this case, "in order to institute judicial review under the act, a summons must be served on the Attorney General."

The district court, apparently relying on Nebraska's general rules of pleading in the filing of cases in the district court, denied the special appearance "for the reason that it was not timely filed." The jurisdiction issue was apparently not considered, but the department was apparently held in default because of the lack of timely pleading.

This disposition was set out in a district court order of May 24, 1993, at the time when "THIS MATTER came on for hearing on the Petitioner's Petition for Review . . . ."

In the district court's May 24 order, in the next sentences after disposition of the special appearance, the court stated: "The Respondent [department] then filed a Motion to Dismiss the Petition for Administrative Agency's Decision [sic] on the same grounds alleged in the Special Appearance. The Court being duly advised in the premises finds and Orders that said Motion to Dismiss is hereby overruled."

The district court then ordered the department "to reinstate the Petitioner's driving privileges effective immediately." The majority holds that by moving for dismissal, "the department invoked the power of the court [and] submitted itself to the binding effect of the district court's judgment."

For the purposes of this dissent, I raise no question as to how the district court exercised jurisdiction over the department at the instant the department's motion was made and immediately set aside the department's order without giving the department a chance to raise a defense to the petition. After all, the department had apparently been in the case about 10 minutes

when it had to defend this new lawsuit.

I dissent because the record is clear that no service of summons was made on the Attorney General. Section 84-917(2)(a) provides that proceedings for review shall be instituted by filing a petition within 30 days after the agency decision and that "[s]ummons *shall* be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action." (Emphasis supplied.) Glass' petition for review was filed on March 9, 1993. The last day for service of summons was April 8. No proper service of summons was ever made. This so-called voluntary appearance was made on May 24. In *James v. Harvey*, 246 Neb. 329, 332, 518 N.W.2d 150, 152 (1994), we stated: "The filing of the petition and the service of summons are the two actions that are necessary to establish jurisdiction pursuant to the Administrative Procedure Act."

I would construe the requirement of service of summons of the petition within 30 days as mandatory. If not, the department's order of suspension remains in limbo, or perhaps vanishes into a legal "black hole," between April 8, 1993, the time 30 days after the filing of the petition, and the date the State of Nebraska allegedly entered its inadvertent "voluntary appearance" on May 24. To adopt the majority ruling severely damages the chances of a valid administrative order becoming final at any known certain time.

In summary, I note that in *Twiss v. Trautwein*, 247 Neb. 535, 536, 529 N.W.2d 24, 25 (1995), we referred to the fact that petitioners "appealed the [Nebraska Accountability and Disclosure Commission's] decision to the Lancaster County District Court." In *Twiss v. Trautwein*, the district court determined that the Attorney General had not been served with summons and "dismissed the appeal." *Id.* We stated:

> On further review, petitioners argue that both the district court and the Court of Appeals erred in ruling that they were *required* to serve summons upon the Attorney General even though they had complied with Neb. Rev. Stat. § 25-505.01(1) (Reissue 1989). In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil

> cases, and the judgment rendered or final order entered by the district court may be affirmed, or it may be reversed, vacated, or modified for errors appearing on the record, or the case may be remanded for further proceedings. *James v. Harvey*, 246 Neb. 329, 518 N.W.2d 150 (1994); *Davis v. Wright*, 243 Neb. 931, 503 N.W.2d 814 (1993).
>
> Both parties agree that the NADC is a state agency and that this appeal is governed by the Administrative Procedure Act. Neb. Rev. Stat. § 84-917(2)(a) (Reissue 1994) provides that in a review of proceedings under the Administrative Procedure Act, "[s]ummons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action." Therefore, we must look to Neb. Rev. Stat. § 25-501 et seq. (Reissue 1989) to determine the statutory criteria for serving summons in a civil action.

247 Neb. at 536-37, 529 N.W.2d at 25-26.

I see no reason to depart at this time from the statements in, and the holding of, *Twiss v. Trautwein*.

I think the issue in this case should be determined within the concept of "appellate" jurisdiction and that if the summons on the petition for review is not filed within 30 days, the district court loses whatever appellate jurisdiction it has. I would dismiss the appeal from the district court to this court and order the cause remanded by the district court to the department for enforcement of the department's suspension order.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. MICHAEL J. GUYERSON, RESPONDENT.

536 N.W.2d 67

Filed August 25, 1995. No. S-95-805.

Original action. Judgment of disbarment.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

On February 13, 1990, Michael J. Guyerson was admitted to

the practice of law in the State of Nebraska, having previously been admitted to the practice of law in the State of Colorado on October 19, 1981.

On June 30, 1995, the Supreme Court of the State of Colorado issued an opinion disbarring Guyerson from the practice of law in Colorado, effective 30 days from the issuance of the opinion.

In disbarring Guyerson, the Colorado Supreme Court stated that Guyerson "converted a large amount of law firm and client funds by fraudulent billing practices." The Colorado court noted that Guyerson was charged with, and pleaded guilty to, felony theft and received a 1-year unsupervised deferred judgment.

On July 28, 1995, the Nebraska State Bar Association's Assistant Counsel for Discipline filed a reciprocal discipline motion asking this court to enter an order disbarring Guyerson from the practice of law in the State of Nebraska. The motion alleged that Guyerson had engaged in conduct in violation of Canon 1, DR 1-102(A)(4) and (6) of the Code of Professional Responsibility. DR 1-102(A)(4) provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation and DR 1-102(A)(6) provides that a lawyer shall not engage in any conduct that adversely reflects on the lawyer's fitness to practice law.

Accompanying the motion filed in this court was Guyerson's signed and notarized "Voluntary Surrender of License." In surrendering his license to practice law in this state, Guyerson admitted that he had engaged in conduct in violation of DR 1-102(A)(4) and (6) and that he had been disbarred from practicing law in the State of Colorado. Guyerson acknowledged that he freely, knowingly, and voluntarily surrendered his license to practice law and consented to the entry of an order of disbarment by this court. He also freely, knowingly, and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment.

We accept Guyerson's surrender of his license to practice law in Nebraska and order him disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

FAHRNBRUCH, J., not participating.

OMAHA PUBLIC POWER DISTRICT, A NEBRASKA POLITICAL SUBDIVISION, APPELLEE, V. NEBRASKA DEPARTMENT OF REVENUE AND M. BERRI BALKA, TAX COMMISSIONER, APPELLANTS. NEBRASKA PUBLIC POWER DISTRICT, A NEBRASKA PUBLIC CORPORATION AND POLITICAL SUBDIVISION, APPELLEE, V. NEBRASKA DEPARTMENT OF REVENUE AND M. BERRI BALKA, TAX COMMISSIONER, APPELLANTS.

537 N.W.2d 312

Filed September 8, 1995. No. S-93-1100.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Statutes: Taxation.** Tax exemption provisions are strictly construed, and their operation will not be extended by construction. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
3. **Statutes: Taxation: Proof.** Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to the exemption.
4. **Statutes.** A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous.
5. **Statutes: Legislature: Intent.** The interpretation of a statute requires the court to 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. Effect must be given, if possible, to all the several parts of a statute.
6. ____: ____: ____. To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question.
7. **Administrative Law: Statutes.** Although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has failed to take any action to change such an interpretation.
8. **Administrative Law.** Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.
9. **Administrative Law: Appeal and Error.** Deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent.
10. **Statutes.** Effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
11. ____. In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
12. **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 an act are consistent, harmonious, and sensible.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded with directions.

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

Norman H. Wright and Michael J. Mooney, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee Omaha Public Power District.

Robert A. Green for appellee Nebraska Public Power District.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

WRIGHT, J.

Omaha Public Power District (OPPD) and Nebraska Public Power District (NPPD) filed claims for tax credits under the Employment Expansion and Investment Incentive Act (the Act). The state Tax Commissioner (Commissioner) denied the claims. On appeal, the district court for Lancaster County reversed the orders of the Commissioner and remanded the matters for a determination of the amount of credits, if any, to which OPPD and NPPD might be entitled. The Commissioner and the Department of Revenue (Department) appeal.

SCOPE OF REVIEW

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Vervaecke v. State*, 247 Neb. 707, 529 N.W.2d 779 (1995); *State ex rel. Perkins Cty. v. County Superintendent*, 247 Neb. 573, 528 N.W.2d 340 (1995); *In re Application of City of Grand Island*, 247 Neb. 446, 527 N.W.2d 864 (1995).

Tax exemption provisions are strictly construed, and their operation will not be extended by construction. Property which is claimed to be exempt must clearly come within the provision

granting exemption from taxation. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991); *Indian Hills Comm. Ch. v. County Bd. of Equal.*, 226 Neb. 510, 412 N.W.2d 459 (1987); *Bethphage Com. Servs. v. County Board*, 221 Neb. 886, 381 N.W.2d 166 (1986). Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to the exemption. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal., supra*; *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989). See *Bethphage Com. Servs. v. County Board, supra.*

FACTS

The basic facts in this case are not in dispute. OPPD and NPPD (collectively referred to as "the utilities") are political subdivisions of the State of Nebraska. The utilities were created and operate by virtue of chapter 70, article 6, of the Nebraska Revised Statutes, each providing electrical power within its chartered territory.

NPPD operates an electrical utility system and generates, transmits, distributes, and sells electricity within its chartered territory, which comprises 86 of Nebraska's 93 counties and portions of 5 other counties. NPPD pays Nebraska sales and use taxes upon taxable products and services it purchases. During 1989, NPPD increased the number of employees in its business by 46 new full-time employees, as determined in accordance with Neb. Rev. Stat. § 77-27,190 (Reissue 1990), and increased its capital investment in Nebraska by $33,778,915, as determined in accordance with Neb. Rev. Stat. § 77-27,191 (Reissue 1990). Pursuant to the Act, Neb. Rev. Stat. §§ 77-27,187 to 77-27,196 (Reissue 1990), NPPD filed a claim for tax credits in the amount of $519,000 for taxes paid during 1990.

OPPD was chartered for the purpose of generating, distributing, and selling electricity to consumers in a 13-county area in eastern Nebraska. In 1989, OPPD increased its average number of employees by 163 full-time employees and increased its qualified investment by $125,219,587.81. In 1990, OPPD

increased its employees by 81 full-time employees and increased its qualified investment by $85,374,048.90. In 1991, OPPD increased its employees by 37 full-time employees and increased its qualified investment by $78,039,515.95. Based upon these increases in employees and capital investment, OPPD filed a claim for refund of sales and use taxes paid during 1990, 1991, and 1992 in the amount of $4,268,500.

M. Berri Balka is the Commissioner, and the Department is an agency of the state created pursuant to Neb. Rev. Stat. § 77-360 (Reissue 1990). The Department contested the utilities' claims, asserting that their activities involved the generation and distribution of electricity and, therefore, did not constitute the "manufacture" of "tangible personal property" under the Act and that the generation and distribution of electricity is not a "qualifying business" under the Act. The Department also contested the claims on the basis that the utilities improperly calculated credits claimed due on a statewide basis. The Department argued that because the utilities' business operations are conducted in multiple locations, they do not constitute a single business location for purposes of computing credits in accordance with the Act.

A consolidated hearing on the claims was held before the Department's designated hearing officer. Following the hearing, the Commissioner denied the claims. The Commissioner found that the generation of electricity is considered a service and, therefore, is not a "qualifying business" for purposes of the Act. The Commissioner did not address whether the activities of the utilities constituted a single business location for purposes of calculating credits under the Act.

The utilities sought judicial review in the district court under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 through 84-920 (Reissue 1994). The court concluded that in Nebraska, electricity is considered a product or commodity which is manufactured. The court reversed the Commissioner's orders and remanded the matters to the Commissioner for a determination as to the amount of credits, if any, to which the utilities might be entitled. The court also noted that the issue of whether the utilities' activities constituted a single business location had not been addressed by the Commissioner.

ASSIGNMENTS OF ERROR

The Commissioner and the Department allege that the district court erred in finding that the generation of electricity constituted the manufacture of tangible personal property, in finding that the utilities were engaged in a qualifying business under the Act, and in remanding the actions for further proceedings before the Commissioner to determine whether the utilities' activities were conducted at a single business location or multiple business locations for purposes of computing credits under the Act.

ANALYSIS

The issue presented is whether the generation and distribution of electricity by the utilities constitute the manufacture of tangible personal property within the meaning of the Act. Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Vervaecke v. State*, 247 Neb. 707, 529 N.W.2d 779 (1995). We note that tax exemption provisions are strictly construed. See *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991). One claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to the exemption. *Id.*

The Act originated in 1986 Neb. Laws, L.B. 1124. Section 77-27,188 provides for credits against taxes imposed by the Nebraska Revenue Act of 1967 to any taxpayer engaged in a qualifying business described in § 77-27,189, which stated:

> A qualifying business shall mean any business engaged in the activities listed in subdivisions (2)(a) to (g) of this section or in the storage, warehousing, distribution, transportation, or sale of tangible personal property, except that qualifying business shall not include any business activity in which eighty percent or more of the total sales are sales to the ultimate consumer of tangible personal property which is not (1) assembled, fabricated, manufactured, or processed by the taxpayer or (2) used by the purchaser in any of the following activities:

(a) The assembly, fabrication, manufacture, or processing of tangible personal property;

(b) The feeding or raising of livestock;

(c) The conducting of research, development, or testing for scientific, agricultural, animal husbandry, or industrial purposes;

(d) The performance of data processing, telecommunication, insurance, or financial services;

(e) Farming or ranching;

(f) The administrative management or the headquarters of any of the activities listed in subdivisions (a) to (e) of this subdivision or any activity excluded solely because of its retail sales; or

(g) Any combination of the activities listed in this section.

The Commissioner concluded that the generation of electricity is a service and, therefore, not a qualifying business under the Act. The district court concluded, as a matter of statutory interpretation, that the generation of electricity is the manufacture of tangible personal property as contemplated by the Act. To decide this case, we must determine whether the generation and distribution of electricity is a service or is the manufacture of tangible personal property.

The district court relied upon *State, ex rel. Spillman, v. Interstate Power Co.*, 118 Neb. 756, 226 N.W. 427 (1929). The district court concluded that it was required to follow our holding that electricity is a commodity, interpreting our holding to mean that the generation of electricity by OPPD and NPPD is the manufacture of tangible personal property. The district court then concluded that OPPD and NPPD are qualifying businesses under the Act.

Analysis of *Spillman*

Whether electricity is tangible personal property for purposes of the Act is not controlled by our decision in *Spillman*, which must be observed in its particular setting. In *Spillman*, we held that electricity was a commodity "in the language of everyday life and in the strictly commercial sense of the term." 118 Neb. at 771, 226 N.W. at 433. The plaintiff's petition sought to

enjoin the defendants from putting into force a schedule of rates for electricity for the unlawful purpose of destroying the business of a competitor. The statute upon which the plaintiff relied was directed against those

> "engaged in the production, manufacture or distribution of any commodity in general use that shall intentionally, for the purpose of destroying the business of a competitor in any locality, discriminate between different sections, communities, or cities of this state by selling such commodity at a lower rate in one section, community or city, than is charged for said commodity by said party in another section, community or city, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation from the point of production . . . ."

Spillman, 118 Neb. at 765, 226 N.W. at 431. Interstate Power Company contended that electricity or electrical energy which was supplied by them was not a commodity or a manufactured product as the terms were employed in the provisions of the laws of Nebraska upon which the State relied. We concluded that

> in the language of everyday life and in the strictly commercial sense of the term, "electricity" is "produced," "stored," "measured," "bought and sold." It is moved or transported from place to place in containers or by cable. It is something that one trades or deals in. We buy it and pay for it and determine the amount of our purchases by definite and well-understood "standard."

Id. at 771, 226 N.W. at 433. We noted that as a matter of strict definition, electricity, in the commercial sense of the term, was included within the literal terms of the statute upon which the State relied. However, neither the statute relied on in *Spillman* nor the term "commodity" applies to the case at bar.

Our definition of electricity in *Spillman* does not make clear whether electricity falls within the general definition of tangible personal property for purposes of the Act. As noted by the Commissioner, electricity is a physical phenomenon; it is energy, not matter, and has no mass. Electricity can hardly be called "tangible," which means "capable of being touched." See Webster's Encyclopedic Unabridged Dictionary of the English

Language 1452 (1989). A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous. *State v. Melcher*, 240 Neb. 592, 483 N.W.2d 540 (1992).

Even if we accepted the definition of electricity in *Spillman* as authoritative, the Legislature has since changed the law. *Spillman* was issued in 1929. In 1967, the Legislature enacted the Nebraska Revenue Act of 1967. The Legislature did not use the term "commodity" to describe electricity. It treated public utilities separately from the manufacture of tangible personal property within the provisions of chapter 77. It is obvious that the Legislature, in adopting the Nebraska Revenue Act of 1967, intended to make some change in the existing law. See *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994).

AMBIGUITY OF § 77-27,189

Neb. Rev. Stat. § 77-101 (Cum. Supp. 1994) provides: "For purposes of Chapter 77 and any statutes dealing with taxation, unless the context otherwise requires, the definitions found in sections 77-102 to 77-122 shall be used." Tangible personal property is defined in Neb. Rev. Stat. § 77-105 (Cum. Supp. 1994) as follows: "[T]angible personal property includes all personal property possessing a physical existence, excluding money." However, neither electricity nor tangible personal property is defined in the Act itself.

Since electricity is not specifically included or excluded as tangible personal property within the Act, we must interpret the Act. The interpretation of a statute requires the court to "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. . . . [E]ffect must be given, if possible, to all the several parts of a statute." *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 299, 363 N.W.2d 362, 365 (1985). In order for the utilities to qualify under the provisions of the Act, the purpose of the Legislature must have been to treat the generation and distribution of electricity as the manufacture of tangible personal property. If the generation of electricity is a service, then the

utilities are not qualifying businesses within the meaning of the Act.

Whether the generation of electricity is the manufacture of tangible personal property is a question of first impression in Nebraska. A scientific discussion of the properties of electricity, while informative, is legally inconclusive and is not the way in which we will consider the question. Instead, we will consider the legislative history of the Act, and chapter 77 of the Nebraska Revised Statutes, in which the Act is found.

LEGISLATIVE HISTORY

"To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question." *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 28, 430 N.W.2d 34, 39 (1988). The purpose of the Act is to encourage and reward the development and expansion of business in the state. The Act was not intended to provide a tax credit for all businesses that increased employment and investment, but was limited to those businesses specifically described in § 77-27,189. When the Act was amended in 1987, the Legislature's intent was discussed at the Revenue Committee hearing.

> In recent years, not too many new manufacturers, assemblers, or food processors have come into our state. So, actually, we're . . . we're offering this tax incentive to a few people. Most growth in recent years has been in services and retailers. By excluding retailers and service businesses we are preserving the opportunity for growth in our tax base. It has been said that new employees coming into manufacturing take five more people in services and in the retail sector to support them.

Revenue Committee Hearing, L.B. 270, 90th Leg., 1st Sess. 37 (Feb. 19, 1987). The Act was thereafter amended by 1987 Neb. Laws, L.B. 270. At the same time, the Legislature also passed 1987 Neb. Laws, L.B. 775, the Employment and Investment Growth Act, now codified as Neb. Rev. Stat. §§ 77-4101 to 77-4112 (Reissue 1990 & Cum. Supp. 1994).

A comment by Senator Elroy Hefner during the floor debate on L.B. 270 reads as follows:

> This will give incentive to potential investment to create new jobs in Nebraska at a time when the state badly needs a boost in its economy. It requires a present or a new employer to make a significant investment initially. This would be the $100,000 minimum, and at the same time requires that at least two new jobs be created. These would be primary jobs. We know when we create primary jobs it adds to the secondary jobs. . . . It's the creation of primary jobs that will allow for the . . .
>
> . . . .
>
> . . . creation of other jobs which serves [sic] the primary jobs. Let's remember that these new employees have to pay income tax and sales tax on the services that they use. Those employees will need services, and in turn those services will hire other people. So it really does have a multiplying effect.

Floor Debate, 90th Leg., 1st Sess. 3725 (Apr. 22, 1987).

In passing the Act, the Legislature intended to encourage the creation of what were referred to as "primary jobs," as opposed to the services that would support the primary jobs. The credits were to be used to provide an incentive to create new jobs in Nebraska and boost its economy. Our reading of the legislative history leads us to conclude that the Legislature's purpose in passing and amending the Act was to benefit those businesses that would increase Nebraska's capacity to produce economic goods rather than services.

Interpretation of Chapter 77

As pointed out by the Commissioner, the Legislature has historically treated public utilities separately from retailers of tangible personal property within the context of the Nebraska sales and use tax laws. In 1967, in the original draft of a bill defining tangible personal property, the Legislature included electricity within the definition of tangible personal property, but later amendments to the bill eliminated electricity from the definition. See 1967 Neb. Laws, ch. 487, § 2, p. 1543. Sales made by utilities and sales made by retailers are treated as separate types of transactions. The sales tax is imposed separately on sales of tangible personal property and the gross

receipts from public utilities.

For example, Neb. Rev. Stat. § 77-2703(1) (Cum. Supp. 1992) provides: "There is hereby imposed a tax at the rate provided in section 77-2701.02 upon the gross receipts from all sales of tangible personal property sold at retail in this state, the gross receipts of every person engaged as a public utility . . . ." Neb. Rev. Stat. § 77-2705(2) (Cum. Supp. 1992) provides: "Every person furnishing public utility service as defined in subsection (2) of section 77-2702.07 shall register with the Tax Commissioner . . . ." Neb. Rev. Stat. § 77-2704.13 (Cum. Supp. 1992) provided:

> Sales and use taxes shall not be imposed on the gross receipts from the sale . . . of:
>
> . . . .
>
> (2) Sales and purchases of such energy sources or fuels made before October 1, 1991, or after September 30, 1992, when more than fifty percent of the amount purchased is for use directly in processing, manufacturing, or refining tangible personal property, in the generation of electricity, or by any hospital.

This section lists the generation of electricity separately from the processing, manufacturing, or refining of tangible personal property and contains a ceiling on the amount of tax that applies to manufacturers of tangible personal property, but not on taxes applying to generators of electricity. Had the Legislature considered the operation of utilities to be the same as the business of manufacturing tangible personal property, there would have been no reason to separate utilities from the general language relating to tangible personal property.

The Department has paralleled the Legislature's intent to treat electricity as a service in Nebraska Sales and Use Tax Regulation 1-066.01, 316 Neb. Admin. Code, ch. 1, § 066.01 (1983):

> The sales or use tax applies to all retail sales of gas (natural or artificial), electricity, sewer, and water by a public utility except for certain enumerated exemptions under the Nebraska Revenue Act of 1967, as amended. "Public utility" for purposes of this regulation, shall mean any person transmitting, distributing, or furnishing gas,

electric, sewer, and water service to the public over or through a distribution system of wires, cables, conduits, pipes, mains, services, bottles, etc.

Nebraska Department of Revenue Ruling 1-86-1 (Jan. 7, 1986) states that electricity is not considered tangible personal property for purposes of the Nebraska sales and use tax laws. In *McCaul v. American Savings Co.*, 213 Neb. 841, 331 N.W.2d 795 (1983), we held that although construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has failed to take any action to change such an interpretation.

The Department classifies electricity as a service and applies a use tax. See 316 Neb. Admin. Code, ch. 1, §§ 066.01 and 066.02 (1983). Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law. *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995). Deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent. *Id.*

At this point, we must consider the burden that the utilities must sustain to prevail in their arguments. In the present case, although the Act describes a tax credit, for purposes of our analysis, we treat it the same as a tax exemption. Tax exemption provisions are strictly construed, and their operation will not be extended by construction. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991). Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation. *Id.* Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption must establish entitlement to the exemption. *Id.*

As we look at the manner in which electricity has been treated for taxation purposes within chapter 77, we find that the Legislature has categorized utilities as a service rather than tangible personal property. Effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. *State ex rel. Perkins Cty. v. County Superintendent,*

247 Neb. 573, 528 N.W.2d 340 (1995). Had the Legislature intended to treat electricity as tangible personal property, then the parallel provisions of chapter 77 would be superfluous.

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. See *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994). "Further, 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 an act are consistent, harmonious, and sensible." *Fecht v. The Bunnell Co.*, 243 Neb. 1, 3, 497 N.W.2d 50, 52 (1993). We conclude that as a general rule, chapter 77 singles out the generation of electricity for treatment separate from the treatment afforded tangible personal property. We cannot escape the conclusion that the Legislature intends the generation of electricity to be treated as a service.

CONCLUSION

Our review of the statutes, the interpretation of such statutes by regulation, and the legislative history of the Act indicate that electricity is not tangible personal property for tax purposes. We find that for purposes of the Act, the generation of electricity is a service, not the manufacture of tangible personal property, and that the utilities are not entitled to tax credits pursuant to the Act.

The Commissioner correctly determined that the generation of electricity is a service and, therefore, not a "qualifying business," and the Commissioner was correct in disallowing the credits claimed by the utilities. The district court erred in determining that for purposes of the Act, electricity was tangible personal property. The judgment of the district court is reversed, and the cause is remanded to that court with directions to affirm the orders denying the claims of the utilities.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPORALE, J., concurring.

While I agree with the majority's judgment, and agree as well that *State, ex rel. Spillman, v. Interstate Power Co.*, 118

Neb. 756, 226 N.W. 427 (1929), does not apply, I respectfully disagree with the remainder of the majority's analysis; thus, I write separately.

The adjudication of this case rests on a far simpler rationale than that employed by the majority. Given the rule that absent anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995), there is no ambiguity in the definition of the phrase "tangible personal property" contained in Neb. Rev. Stat. § 77-105 (Cum. Supp. 1994).

In the ordinary sense, the phrase "tangible property" describes objects having a physical substance apparent to the senses. Webster's Third New International Dictionary, Unabridged 2337 (1981). Electricity, that is to say, electrical energy, has no such physical substance in the sense that those two words are commonly understood in everyday parlance. While under certain circumstances one can feel the presence of electricity, and it can be stored and measured, it has no readily discernible physical form in the sense that do items such as axes, books, cloth, desks, elevators, fiddles, gavels, and the like. To paraphrase a justice of the U.S. Supreme Court,

> [O]ur job is not to scavenge the world of English usage to discover whether there is any possible meaning of "[tangible personal property]" which . . . includes [electricity]; our job is to determine whether the *ordinary* meaning includes [it], and if it does not, to ask whether there is any solid indication in the text or structure of the statute that something other than ordinary meaning was intended.

(Emphasis in original.) *Chisom v. Roemer*, 501 U.S. 380, 410, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991) (Scalia, J., dissenting).

The ludicrous results obtainable by relying upon legislative sources to examine the meaning of unambiguous statutory language are illustrated by one writer thusly:

> Consider, for example, whether a statute providing for the leashing of "dogs" also requires the leashing of cats (because the statute really covers the category "animals")

> or wolves (because the statute really covers the category "canines") or lions ("dangerous animals"). Most people would say that the statute does not go beyond dogs, because after all the verbal torturing of the words has been completed it is still too plain for argument what the statute means. Perhaps it is a quibble, but in my terminology this becomes a decision that the statute "applies" only to dogs. For rules about the rest of the animal kingdom we must look elsewhere.

Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 535 (1983).

In this case, there is no statutory indication that anything other than the ordinary meaning of tangible personal property was intended. That being so, the majority's analysis should have ended with the determination that electricity is not tangible personal property as such is defined in § 77-105. See *State v. Chambers*, 242 Neb. 124, 493 N.W.2d 328 (1992) (when words of statute not ambiguous, interpretation not only not necessary but will not be indulged).

However, because the majority elected to refer to what it characterizes as the "legislative history" in order to ascertain the meaning of the words used in § 77-105, more must be written about the nature of legislative sources and their use by courts in the process of construing ambiguous statutory language.

I agree that changes made in statutory wording and the treatment afforded a topic in related enactments constitute a legislative history which provides reliable insights as to the intended meaning of ambiguous legislation. However, I respectfully submit that the situation is otherwise with respect to the remaining general record made by a legislature in the process of enacting a statute. Other than amendments actually made to the proposed statutory language during the process of its enactment and the enacted language itself, the general legislative record provides no such reliable insights.

For example, the majority's reliance upon the general legislative record includes a citation to a committee hearing report and a comment made during the floor debate of the statute. Neither is a reliable source for determining the intent of

the Legislature as a body. As for committee reports, to again paraphrase the same U.S. Supreme Court justice referred to previously:

> Assuming that all the members of the . . . committees in question . . . actually adverted to the interpretive point at issue here—which is probably an unrealistic assumption—and assuming further that they were in *unanimous* agreement on the point, they would still represent [a vast minority]. It is most unlikely that many [legislators] read the pertinent portions of the Committee Reports before voting on the bill—assuming (we cannot be sure) that the Reports were available before the vote.

(Emphasis in original.) *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 620, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991) (Scalia, J., concurring in the judgment). As it is doubtful that the details set forth in a committee report come to the attention of the entire Legislature, it is even more doubtful that they are approved by it. *Hirschey v. F.E.R.C.*, 777 F.2d 1 (D.C. Cir. 1985) (Scalia, J., concurring).

Far less reliable, as sources of statutory meaning,

> are remarks made during floor debate—even "authoritative" explanations offered by a bill's sponsors. While a sponsor's statements may reveal *his* understanding and intentions, they hardly provide definitive insights into [the legislative body's] understanding of the meaning of a particular provision. Few of his fellow legislators will have been on hand to hear the gloss the sponsor may have placed on a particular provision. Thus members of [the body], in voting on a measure, must be presumed to have relied on the meaning of the words read in context on a printed page. Moreover, a statute's sponsor may well be pursuing a political agenda in his floor discussion that judges are ill-equipped to detect.

(Emphasis in original.) *Overseas Educ. Ass'n, Inc. v. FLRA*, 876 F.2d 960, 975 (D.C. Cir. 1989) (Buckley, J., concurring). See W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 Stan. L. Rev. 383 (1992). In the words of one jurist, "To single out a senator's statement in the legislative chamber and then

transform that statement into the collective voice of the Legislature is unquestionably farfetched." *Bahensky v. State*, 241 Neb. 147, 151, 486 N.W.2d 883, 886 (1992) (Shanahan, J., dissenting).

As a consequence, I have come to understand and agree with the observation that "[i]f one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history." (Emphasis in original.) *Conroy v. Aniskoff*, 507 U.S. 511, 113 S. Ct. 1562, 1567, 123 L. Ed. 2d 229 (1993) (Scalia, J., concurring in the judgment).

Equally bothersome is that the use of the general legislative record provides an incentive for legislators to distort it. It allows for the injection of their own desired interpretations on the meaning of a particular statute while evading the normal democratic process. *Int. Broth. of Elec. Wkrs., Loc. U. 474 v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987) (Buckley, J., concurring); *Wallace v. Christensen*, 802 F.2d 1539 (9th Cir. 1986) (Kozinski, J., concurring in the judgment). Once legislators and lobbyists know that the general legislative record will be used in construing statutes, they have great incentives to make comments or statements in the record solely to influence the judicial process. Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 Harv. L. Rev. 1005 (1992). See, also, Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 Duke L.J. 371, 377 ("It is well known that technocrats, lobbyists and attorneys have created a virtual cottage industry in fashioning legislative history so that [a legislature] will appear to embrace their particular view in a given statute"). Thus, the harm that results from reliance on the general legislative record is not undone by the fact that the same result can be reached without such reliance.

Even more troubling is that reference by the judiciary to the general legislative record provides a corrupting influence not only on the legislative process but on the judicial process as well, for the general legislative record can be manipulated to support almost any proposition. It has been likened to entering a crowded cocktail party and looking over the heads of the guests for one's friends. *Conroy v. Aniskoff, supra*. See William

N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990). One court put it this way:

> Often there is so much legislative history that a court can manipulate the meaning of a law by choosing which snippets to emphasize and by putting hypothetical questions—questions to be answered by inferences from speeches rather than by reference to the text, so that great discretion devolves on the (judicial) questioner. Sponsors of opinion polls know that a small change in the text of a question can lead to large differences in the answer. Legislative history offers wilful judges an opportunity to pose questions and devise answers, with predictable divergence in results.

Matter of Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989). Indeed, in condemning our use of a discussion between three legislators to ascertain the meaning of statutory language, it was written:

> The action of the majority in this case is . . . the most dangerous precedent in statutory construction ever rendered by this court. If the precedent is followed in the future, any isolated phrase uttered by one legislator can be used as a scalpel to excise a provision this court deems unwise, unjust, or simply undesirable, or to change what, in this court's opinion, ought to have been done some other way.

Wang v. Board of Education, 199 Neb. 564, 572, 260 N.W.2d 475, 480 (1977) (Clinton, J., dissenting; C. Thomas White, J., joins).

The regrettable fact is that through the years, we have become sloppy and moved from reliance upon what our Legislature as a body did in the course of enacting ambiguous statutory language, *State, ex rel. Winnett, v. Omaha & C. B. Street R. Co.*, 96 Neb. 725, 148 N.W. 946 (1914) (change in wording during course of enactment), to reliance upon what a selected legislator or fractional group of such said during that process, e.g., *Chrysler Motors Corp. v. Lee Janssen Motor Co., ante* p. 322, 534 N.W.2d 309 (1995); *George Rose & Sons v. Nebraska Dept. of Revenue, ante* p. 92, 532 N.W.2d 18 (1995); *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452,

528 N.W.2d 285 (1995); *Iverson v. City of North Platte*, 243 Neb. 506, 500 N.W.2d 574 (1993); *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991); *Rodriquez v. Prime Meat Processors*, 228 Neb. 55, 421 N.W.2d 32 (1988); *County of Lancaster v. Maser*, 224 Neb. 566, 400 N.W.2d 238 (1987).

The former and tighter practice was reliable, the current and looser practice is not; we should therefore abandon the current practice and confine ourselves to studying what the Legislature as a whole did and ignore what any one legislator or fractional group of them said. See *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (in declaring statute not retroactive, Court relied not upon congressional statements, but upon removal of retroactivity language during course of enactment).

FAHRNBRUCH and LANPHIER, JJ., join in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY PIERCE, APPELLANT.

537 N.W.2d 323

Filed September 15, 1995. No. S-94-398.

1. **Circumstantial Evidence.** A fact proven by circumstantial evidence is nonetheless a proven fact.
2. ____. Circumstantial evidence is not inherently less probative than direct evidence.
3. **Criminal Law: Evidence: Appeal and Error: Case Overruled.** To the extent that previous Nebraska Supreme Court cases require an appellate court to construe evidence in favor of the accused, whether the evidence be solely circumstantial, direct, or a combination thereof, they are overruled.
4. **Convictions: 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 properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and MUES, Judges, on appeal thereto from the District Court for Scotts Bluff County, ALFRED J. KORTUM, Judge. Judgment of Court of

Appeals reversed, and cause remanded.

Leonard G. Tabor for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

LANPHIER, J.

Appellant, Timothy Pierce, was convicted by a jury in Scotts Bluff County District Court of forcibly breaking and entering with the intent to commit a felony or steal property, in violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1989). He was also found to be a habitual criminal and was sentenced to an indeterminate term of 14 to 17 years' imprisonment. Upon review, the Nebraska Court of Appeals concluded that Pierce's conviction was based solely upon circumstantial evidence. The Court of Appeals then determined that the inference of nonguilt arising from the circumstantial evidence was stronger than that of guilt and that the case should not have been submitted to the jury. The Court of Appeals, making all reasonable inferences in favor of the accused, held that the evidence was insufficient to sustain the conviction. The Court of Appeals, therefore, reversed the conviction and remanded the cause with directions that the information be dismissed. See *State v. Pierce*, 3 Neb. App. 440, 527 N.W.2d 872 (1995). We granted the State's petition for further review. Because the Court of Appeals applied the wrong standard of review and since we find the evidence sufficient to sustain the conviction upon the appropriate standard of review, we reverse and remand.

BACKGROUND

On August 25, 1993, at about 1:49 a.m., Julie Pengelly awoke in her bed to find a man with his hands on her shoulders. She screamed and pulled her knees to her chest and kicked the intruder in the chest, catapulting him across her bedroom. He hit the opposite wall and fell into a chair. Pengelly then ran out of her house to a neighbor's, Bonnie Wickard's. Pengelly testified that as she fled, a dog named "Bear," owned by Pierce, chased her. When she got to Wickard's, she knocked on the wall under Wickard's bedroom window and told Wickard she needed

to be let in right away because there was a man in her house. When she got inside, she went straight to the phone and dialed 911.

Vern Hessler, a deputy sheriff, arrived shortly after Pengelly phoned. When Pengelly returned to her house with the deputy, she noticed that the door toward the lake, which had been closed, was open. She also noticed that a screen for a floor-to-ceiling window had been removed from the window and was leaning against a hutch, near the window.

Pengelly and the deputy found a beer bottle outside her house, near the window with the screen removed. Pengelly noticed the beer was cold and still had foam in it. Deputy Hessler testified that he thought that the beer bottle had recently been placed near the window because it appeared as though some of the beer had spilled. Deputy Hessler did not seize the bottle at that time. The next morning, Pengelly retrieved the bottle from where it had originally been found. The bottle was later turned over to an investigator with the Scotts Bluff County Sheriff's Department. The investigator sent the bottle to the Nebraska State Patrol's Criminalistics Laboratory. Linda Brokofsky, a fingerprint examiner for the State Patrol, testified that a latent print on the bottle matched the fingerprint of Pierce's right ring finger.

After the inspection of the premises with Deputy Hessler, Pengelly gave a description of the intruder. At trial, Deputy Hessler testified that Pengelly described the intruder as follows:

> white male suspect, 5'6" tall, average, indicating not muscular build, late 20's to early 30's in age, dishwater blond hair, ear lobe length parted down the middle. She said he had no mustache or beard, no chest hair, no alcohol on his breath, she said he was wearing no shirt or cap, and she was unaware if he had anything below — on below the waist, she didn't observe that.

Pengelly told Deputy Hessler that a neighbor, Pierce, might match the description. Shortly after 3 a.m., Deputy Hessler went two doors down to the house where Pierce was staying. Deputy Hessler testified that Pierce was wearing blue jeans and no shirt, and appeared to have just awakened. Deputy Hessler observed that Pierce had chest hair, a mustache, and a beard.

When questioned, Pierce told Deputy Hessler he had been asleep for several hours.

At trial, Katherine Carmodie Pierce, who was living with Pierce at the time of the break-in, and who had by the time of trial married Pierce, testified that shortly after 12:30 a.m., she and Pierce went to sleep. She also testified that Pierce was with her until Deputy Hessler arrived around 3:15 a.m.

This testimony of Katherine Carmodie Pierce conflicts somewhat with the testimony of Edward Gonzales. Gonzales was at a party on the beach near Pengelly's house the night of the break-in. Gonzales and others at the party testified that Pierce had been at the party on and off during the evening. Gonzales testified that he knew that Pierce left the party around 2 a.m. because it was past the time when beer could be bought. However, on cross-examination Gonzales was asked to read the following portion of his deposition:

> "Okay. And how long did he stay, do you remember? Well, he was sitting down there putting wood into the fire and that, and he talked to Cenovio for a while, I was already inside the tent with Lori and I didn't know when he had left, I didn't know, I have no recall of when he left."

Others at the party were Lori Gonzales, Cenovio Gonzales, Juanita Martinez, Arthur Rivera, Tom Jiminez, Jessica Gomez, and a man named "Jeff" whose last name does not appear in the record. Rivera, Jiminez, and Jeff did not testify. Of those who did testify, only Lori Gonzales and Cenovio Gonzales were asked when Pierce last left the party. Cenovio Gonzales testified that Pierce left the party once and returned with beer. He also testified that Pierce left a second time. Cenovio Gonzales testified that "[w]hen he [Pierce] left the second time he said he was going home because everybody else was going to sleep." After Pierce left this second time, Cenovio Gonzales testified, he went to sleep. Lori Gonzales, however, testified that after Pierce left the second time, he returned to the campsite. She testified that she did not see Pierce leave for the evening because she went to sleep in a tent before he left.

Reynaldo Ramirez was the general manager of Gilligan's, an establishment near the lake which sells beer. He testified that Pierce occasionally worked for him stocking the store's beer

coolers, among other odd jobs. Ramirez testified that single beers were stocked in the coolers and that on August 24, 1993, Pierce worked at the store.

ASSIGNMENTS OF ERROR

On petition for further review, the State of Nebraska claims the Court of Appeals erred in determining that the inference of nonguilt was stronger than that of guilt, and consequently in making all reasonable inferences in favor of the accused rather than the State.

STANDARD OF REVIEW

The State, in its assignment of error and brief on its petition for further review, argues that the Court of Appeals erred in applying the standard of review outlined in *State v. Skalberg*, 247 Neb. 150, 526 N.W.2d 67 (1995). Thus, the threshold question to be determined in this appeal is, What is the appropriate standard of review?

The character of the case and the assigned errors and the issues raised therein determine an appellate court's standard of review. Therefore, to determine whether the Court of Appeals applied the appropriate standard of review, we must look to appellant's assignments of error in the court below. Appellant, Pierce, assigned the following errors:

> 1. Failure of the Court to sustain defendant's Motions for directed verdict at the close of the evidence.
>
> 2. The evidence was insufficient as a matter of law to sustain a finding of guilt.
>
> 3. The State failed to prove all the essential elements of the crime charged.
>
> 4. The Trial Court erred in admitting, over defense objection, Exhibits numbered 8, 12, 13, 14, 15, 16 and 18.
>
> 5. Failing to grant Appellant's Motion for New Trial.
>
> 6. The sentences imposed by the Court are excessive and an abuse of discretion.

The Court of Appeals did not state which assignment of error its opinion addressed, nor did it address all the assignments of error, having resolved the case on one issue. See *State v. Pierce*, 3 Neb. App. 440, 527 N.W.2d 872 (1995). Its opinion,

nonetheless, concerned each of the first three assignments of error, which, despite each being phrased differently, effectively raises the identical issue: whether the trial court should have directed a verdict of acquittal in Pierce's case, given the evidence adduced. More specifically, then, we must decide relative to those assigned errors what standard governs an appellate court's review of a trial judge's determination in a jury trial of whether to direct a judgment of acquittal.

As will become apparent, this is a complex issue. Thus, the discussion has been divided into separate sections. First, we will attempt to clarify the issue by consolidating the various cases where this issue was raised under different labels. Next, we will discuss the standard used by the Court of Appeals. We will then address the State's contention that the standard used is inconsistent with other rules of law. A discussion of the historical context of this area of law will follow. The historical analysis is necessary to illustrate how perceived prior inconsistencies in the standards of review can be made coherent. Finally, we will state the standard of review applicable to this case.

CLARIFICATION

We first wish to clarify. Whether the error assigned is stated as the failure to direct a verdict, a claim of insufficiency of the evidence, or failure to grant a motion to dismiss for the failure of the State to present a prima facie case, the standard is the same, although the motions may be made at different times. This is because the issue raised is the same. We often cite a particular variation of phrasing to describe our standard of review based upon how the error has been labeled. The standard is the same. In the following cases, the same phrasing was used to describe our standard of review, regardless of how that issue was labeled by the appellant: *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995) (sufficiency of the evidence); *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994) (directed verdict); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993) (motion to dismiss). See, also, *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991) (motion to dismiss for failure to make a prima facie case substantially

identical to motion for directed verdict).

STANDARD USED BY THE COURT OF APPEALS

As stated above, the Court of Appeals applied the standard of review outlined in *State v. Skalberg*, 247 Neb. 150, 526 N.W.2d 67 (1995), quoting the following passages from that opinion:

> "[T]he appellate court must first independently decide as a matter of law whether the circumstantial evidence is reasonably susceptible of two interpretations and whether the inference of nonguilt is stronger than or equal to the inference of guilt. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review."

(Emphasis omitted.) *State v. Pierce*, 3 Neb. App. at 447, 527 N.W.2d at 877.

> "In *Covarrubias*, 244 Neb. at 374, 507 N.W.2d at 253, we explained our earlier holding in *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992): '*LaFreniere* holds that in determining the sufficiency of circumstantial evidence to support a conviction, any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. *LaFreniere* requires a reasonable inference from circumstantial evidence to be taken most favorably to the accused when circumstantial evidence is the only basis upon which to support a conviction and the circumstantial evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt, and neither inference is stronger than the other. See, also, *State v. Ruiz*, 241 Neb. 693, 489 N.W.2d 865 (1992); *State v. Dawson*, 240 Neb. 89, 480 N.W.2d 700 (1992).' "

State v. Pierce, 3 Neb. App. at 447–48, 527 N.W.2d at 877.

Skalberg also contains the following language pertinent to an appellate review:

> On appeal, the appellate court must first independently decide as a matter of law whether the circumstantial evidence is reasonably susceptible of two interpretations and whether the inference of nonguilt is stronger than or

> equal to the inference of guilt.

247 Neb. at 156, 526 N.W.2d at 71.

In interpreting *Skalberg*, the Court of Appeals stated the following:

> We read *Skalberg* as saying that the appellate courts are to *weigh* the inferences and judge their relative strength in order to reach an independent conclusion, as a matter of law, as to where the case falls among the three possibilities [(1) inference of guilt outweighs inference of nonguilt, (2) inference of nonguilt outweighs inference of guilt, and (3) inferences weigh the same] outlined herein.

(Emphasis supplied.) *State v. Pierce*, 3 Neb. App. at 448, 527 N.W.2d at 877.

Apparent Inconsistencies

The State urges that to the extent that *Skalberg* requires a weighing of competing inferences deducible from circumstantial evidence, this court is usurping the jury's role as fact finder. The State argues that when there is conflicting evidence presented by multiple witnesses, the jury's resolution of an issue turns upon a credibility determination. Likewise, the State argues that when evidence is conflicting and competing inferences are deducible, an appellate court must make a credibility determination in order to assign a relative weight to each of the competing inferences as *Skalberg* requires.

This court has consistently and repeatedly held for over 100 years that on review of a criminal conviction, an appellate court will not pass on the credibility of witnesses.

> 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.

(Emphasis supplied.) *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 337, 526 N.W.2d 657, 660 (1995). See, also, *Murphy v. State*, 15 Neb. 383, 19 N.W. 489 (1884)

(no standard by which to weigh or measure the testimony of witnesses can be established by the court).

If *Skalberg* were read to require an appellate court to assign a relative weight to inferences deducible from circumstantial evidence (the inference of guilt being stronger, equal to, or weaker than an inference of nonguilt) and require a credibility determination when the testimony of various witnesses conflicts, it would be inconsistent with our longstanding rule against making credibility determinations. See, *State v. One 1985 Mercedes 190D Automobile, supra*; *Murphy v. State, supra.*

Additionally, if *Skalberg* were read to permit a directed verdict of acquittal when "circumstantial evidence is *reasonably susceptible of two interpretations*, one of guilt and the other of nonguilt," it would be contrary to our decisions which hold that "a directed verdict is proper only where *reasonable minds cannot differ and can draw but one conclusion from the evidence,* where an issue should be decided as a matter of law." (Emphasis supplied.) *State v. Hirsch*, 245 Neb. 31, 45, 511 N.W.2d 69, 79 (1994). Likewise, this court has stated, "*It is neither for the trial court nor for this court on appeal to draw conclusions of fact when two reasonable inferences may be drawn from the evidence.*" (Emphasis supplied.) *State v. Rowe*, 210 Neb. 419, 426, 315 N.W.2d 250, 256 (1982).

Finally, as previously noted in *State v. Covarrubias*, 244 Neb. 366, 507 N.W.2d 248 (1993), the rule requiring that reasonable inferences be taken most favorably to the accused when reviewing the sufficiency of evidence appears inconsistent with the rule in numerous other cases that an appellate court take the view of circumstantial evidence most favorable to the State.

Historical Review

At least as early as 1914, this court had a rule governing appellate review which required an appellate court to take the inference most favorable to the accused when confronted with two inferences deducible from circumstantial evidence. See *Hayward v. State*, 97 Neb. 9, 149 N.W. 105 (1914). There, it was stated: "When two equal presumptions—one in favor of innocence, the other in favor of guilt—are presented, the one in favor of innocence is to be preferred and applied." *Id.* at 12,

149 N.W. at 106. This rule is referred to as the "accused's rule."

Another line of authority appears to have begun with *State v. Fowler*, 193 Neb. 420, 227 N.W.2d 589 (1975). There, relying upon *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), and *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974), this court held the following: "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the State to support it." *State v. Fowler*, 193 Neb. at 426, 227 N.W.2d at 593. This rule is referred to as the "State's rule."

We have recently attempted to reconcile these two lines of authority. See, *State v. Skalberg*, 247 Neb. 150, 526 N.W.2d 67 (1995); *State v. Covarrubias, supra*; *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992). However, these attempts at reconciliation have left the questions in the "Apparent Inconsistencies" section unanswered. More importantly, our attempts at reconciliation may have been unnecessary, as we have previously overruled the accused's rule as discussed below.

The accused's rule and the State's rule coexisted until 1981, when *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981), was decided. In *Buchanan*, we overruled the accused's rule, which required the State to disprove every hypothesis of nonguilt in order to convict. However, subsequent to our decision in *Buchanan*, the accused's rule was referred to and relied upon in *State v. Trimble*, 220 Neb. 639, 371 N.W.2d 302 (1985). In *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), we again attempted to exorcise from the halls of justice the accused's rule, referring to it therein as a "dead rule of law" and a "mischievous spirit."

> [I]n *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981), this court, in an opinion which thoroughly examined the issue, abandoned the rule that a criminal conviction could not be based solely on circumstantial evidence unless the State disproved every hypothesis but that of guilt. *Thenceforth, in criminal cases, circumstantial evidence has usually been treated the same as direct evidence; the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, viewed in its favor.*

(Emphasis supplied.) *State v. Morley*, 239 Neb. at 148–49, 474 N.W.2d at 666. *Trimble* was thus overruled.

Considering that the accused's rule is the primary issue of this appeal, it is apparent our earlier attempts at clarifying this issue failed. In *State v. Dawson*, 240 Neb. 89, 480 N.W.2d 700 (1992), we again repeated the accused's rule, citing as authority *State v. Earlywine*, 191 Neb. 533, 215 N.W.2d 895 (1974). However, according to *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983), the accused's rule contained in *Earlywine* had been overruled by *State v. Buchanan, supra*. In *Evans*, this court stated the following:

> As to the sufficiency of the evidence, the defendant argues principally that since the facts and circumstances are reasonably susceptible of two interpretations, they must be resolved in favor of the accused and therefore the evidence is insufficient to convict him.
>
> In making that argument he relies principally upon *State v. Earlywine*, 191 Neb. 533, 215 N.W.2d 895 (1974). In so arguing he overlooks the clear import of the later case of *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981), which acknowledges that while some decisions of this court may be found which create confusion as to the State's burden in such a case, the better reasoned decisions of other courts, and the reasoning adopted in *Buchanan*, are that one accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt.

215 Neb. at 442–43, 338 N.W.2d at 794.

Thus, to the extent *Dawson* relies on *Earlywine*, an overruled case, as authority for the accused's rule, it is an inaccurate statement of the law. Likewise, our more recent cases citing *Dawson*, or its progeny, as authority for the accused's rule do so improvidently. See *State v. Morley, supra*.

As we have twice previously decided, the line of cases following the State's rule is the better reasoned of the two. See, *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981); *State v. Evans, supra*. We still find the rationale of those cases persuasive.

The accused's rule would require the State to disprove

alternative explanations of circumstantial evidence in order to maintain a conviction. This practice, alternatively known as the "reasonable hypothesis" standard, has been widely abandoned. See 1 Clifford S. Fishman, Jones on Evidence Civil and Criminal § 5:16 (7th ed. 1992). In *Buchanan*, we quoted the following from a Ninth Circuit Court of Appeals opinion:

> "Moreover, the impression left by appellate court opinions is that the 'reasonable hypothesis' standard may lead to serious departures from the proper appellate role in evaluating the sufficiency of evidence. Courts following the rule exhibit a noticeable tendency to divide the evidence into separate lines of proof, and analyze and test each line of proof independently of others rather than considering the evidence as an interrelated whole. The sufficiency of the evidence is often tested against theoretical and speculative possibilities not fairly raised by the record, and inferences are sometimes considered which, though entirely possible or even probable, are drawn from evidence which the jury may have disbelieved."

210 Neb. at 26, 312 N.W.2d at 688, quoting *United States v. Nelson*, 419 F.2d 1237 (9th Cir. 1969).

Additionally, a fact proven by circumstantial evidence is nonetheless a proven fact. *Holland v. United States*, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 (1954). Circumstantial evidence is not inherently less probative than direct evidence. *State v. Buchanan, supra*. Whether evidence is circumstantial or direct, "a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference." *Holland v. United States*, 348 U.S. at 140. "If the jury is convinced beyond a reasonable doubt, we can require no more." *Id.*

Due process does not require an appellate court, upon review of a criminal conviction, to take the inference most favorable to the accused. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). When reviewing a criminal 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."

(Emphasis omitted.) 443 U.S. at 319. "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.*

APPROPRIATE STANDARD

For all of the above-stated reasons, we again overrule those cases espousing the accused's rule as an appropriate standard of review. Thus, the Court of Appeals erred in applying the standard of review outlined in *State v. Skalberg*, 247 Neb. 150, 526 N.W.2d 67 (1995). 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 properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

State v. One 1985 Mercedes 190D Automobile, 247 Neb. 335, 337, 526 N.W.2d 657, 660 (1995). Accord, *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994); *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993); *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992); *State v. Osborn*, 241 Neb. 424, 490 N.W.2d 160 (1992); *State v. 1987 Jeep Wagoneer*, 241 Neb. 397, 488 N.W.2d 546 (1992); *State v. Davis*, 240 Neb. 631, 483 N.W.2d 554 (1992); *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992); *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991); *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990); *State v. Nesbitt*, 226 Neb. 32, 409 N.W.2d 314 (1987); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981); *State v. Fowler*, 193 Neb. 420, 227 N.W.2d 589 (1975).

ANALYSIS

In this case, the properly admitted evidence, viewed and

construed most favorably to the State, is sufficient to sustain Pierce's conviction.

First, the evidence is uncontroverted that on August 25, 1993, at about 1:49 a.m., someone broke into and entered the home of Pengelly. That the breaking and entering was done with the intent to commit a felony can be inferred from the time of the break-in and the uncontroverted evidence that the intruder had placed his hands on Pengelly.

Pierce, however, claims the evidence was insufficient to prove beyond a reasonable doubt that he was the intruder. We disagree. Though each bit of evidence by itself may not conclusively show that Pierce was the intruder, when viewed in its entirety, it is clear that a rational trier of fact could have found beyond a reasonable doubt that Pierce was the intruder.

First, the evidence is uncontroverted that Pierce was in the neighborhood that night, whether he was on the beach at a party or at home sleeping.

Then, there is Pengelly's description of the intruder, coupled with her identification of Pierce as a possible suspect. At trial, Deputy Hessler testified that Pengelly described the intruder as follows:

> white male suspect, 5'6" tall, average, indicating not muscular build, late 20's to early 30's in age, dishwater blond hair, ear lobe length parted down the middle. She said he had no mustache or beard, no chest hair, no alcohol on his breath, she said he was wearing no shirt or cap, and she was unaware if he had anything below — on below the waist, she didn't observe that.

Deputy Hessler's description of Pierce, whom he saw later that same night, was somewhat different. Deputy Hessler testified that Pierce was wearing blue jeans and no shirt and appeared to have just awakened. Hessler observed that Pierce had chest hair, a mustache, and a beard. That Pengelly's description varied on some details is of little consequence. Pengelly testified that it was dark and that she had not seen much more than a silhouette. Additionally, on cross-examination, when asked whether she gave the description quoted above, Pengelly testified that she could not answer yes. She explained that the deputy asked her whether

she saw a particular feature on the intruder, and she would answer yes or no to seeing the feature. Thus, a rational juror could readily explain the discrepancies on the features which would be difficult to see at night when viewing a silhouette. Yet, the jury may have considered the description accurate with regard to the intruder's race, sex, height, and build.

Also indicating that Pierce was the intruder was the evidence showing that a beer bottle with Pierce's fingerprint on it was found near the window with the screen removed.

Finally, the jury could have considered the conflicting evidence concerning Pierce's whereabouts at the time of the break-in as indicative of guilt. The jury may well have chosen to believe that Pierce left the party near the time of the break-in, as Edward Gonzales testified during trial, rather than Katherine Carmodie Pierce's testimony that Pierce went to bed at 12:30 that night.

This evidence is, contrary to the conclusion drawn by the Court of Appeals, sufficient to sustain Pierce's conviction. The trial court, therefore, did not err in overruling Pierce's motion for a directed verdict. Likewise, the State did not fail to prove a prima facie case.

Though Pierce did not raise in this court the errors not addressed by the Court of Appeals, we find them meritless and without need of discussion.

CONCLUSION

Because the Court of Appeals applied the wrong standard of review and since we find the evidence sufficient to sustain the conviction upon the appropriate standard of review, we reverse the judgment and remand this cause.

REVERSED AND REMANDED.

WRIGHT, J., dissenting.

I respectfully dissent from the result reached by the majority, which reverses the decision of the Nebraska Court of Appeals and reinstates the judgment of conviction and sentence. In my opinion, the evidence was insufficient to submit the matter to the jury for its determination of Pierce's guilt or innocence.

The victim, Julie Pengelly, who had met Pierce several times before the incident, claimed she was awakened when someone

put his hands on her shoulders. She kicked the intruder in the chest, which sent him across the room. She got up and ran out of the house, at which time she heard a dog barking near her windows. She recognized the dog as "Bear," which belonged to Pierce. It was not contested that Pierce let his dog run loose during the night.

Pengelly had no interior lights on at the time of the incident, and her memories of the incident were in silhouette. She was unable to see the facial features of the intruder, but knew it was a male because of the flat chest. She said the intruder had no mustache, beard, or chest hair. She could not say whether the intruder had alcohol on his breath.

A police investigator found no fingerprints on the screen, window, hutch, kitchen counter, or door to the lake side of the house. Pengelly found a beer bottle outside, near the window through which the intruder had entered. A fingerprint was found at the base of the bottle, below the left-hand side of the label. A fingerprint technician from the state crime lab said the fingerprint on the bottle matched Pierce's right ring finger.

Reynaldo Ramirez, the manager of Gilligan's, said that Pierce ordinarily helped stock single bottles of beer when needed and that Pierce had worked on the day preceding the incident. Ramirez said Pierce had two or three beers at the store, and he could smell alcohol on Pierce. Ramirez stated that Pierce took a six-pack of beer when he left, which Ramirez presumed was Miller Genuine Draft because that was Pierce's preferred brand. Ramirez said he gave Pierce a ride from Gilligan's around 10:30 or 11 p.m.

Various witnesses testified that Pierce had come by their campsite on the night of the incident and asked whether they had seen a dog. The witnesses' versions conflicted as to when Pierce was there, how long he stayed, and whether he left and returned. Katherine Carmodie Pierce stated that she and Pierce had gone to bed at 12:30 a.m. and that Pierce did not get out of bed between then and the time that the deputy came to their house at 3:15 a.m.

Pierce had a mustache and chest hair. Pierce had been drinking prior to the time of the incident, yet Pengelly had no memory of alcohol on the intruder's breath. Other witnesses

testified that Pierce had been drinking during the evening, and one witness thought he was drunk. Pierce ordinarily stocked single bottles of beer at Gilligan's, where he worked on the day preceding the incident, and his fingerprints could have been transferred to the bottles at that time.

In my opinion, there was not sufficient evidence to submit the case to the jury.

STANDARD FEDERAL SAVINGS BANK, FORMERLY KNOWN AS STANDARD FEDERAL SAVINGS & LOAN ASSOCIATION, APPELLEE, V. STATE FARM FIRE & CASUALTY COMPANY, A CORPORATION, APPELLANT.

537 N.W.2d 333

Filed September 22, 1995. No. S-93-970.

1. **Insurance: Contracts: Appeal and Error.** The construction of an insurance contract or policy is a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Final Orders: Appeal and Error.** An order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for determination of matters incidental thereto.
3. **Insurance: Contracts: Mortgages.** A standard or union mortgage clause in a fire insurance policy creates a separate contractual relationship between the insurance company and the mortgagee. The mortgagee receives independent status so that it can recover even if the mortgagor would not be able to recover.
4. **Insurance: Contracts: Intent: Appeal and Error.** In 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 contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning.
5. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.

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

Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Thomas J. Young, of Young & LaPuzza, for appellee.

CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and BOSLAUGH, J., Retired.

WRIGHT, J.

Standard Federal Savings Bank, formerly known as Standard Federal Savings & Loan Association (Standard Federal), brought a declaratory judgment action against State Farm Fire & Casualty Company (State Farm) to determine entitlement to benefits under a fire insurance policy. The Sarpy County District Court entered declaratory judgment in favor of Standard Federal and entered judgment for Standard Federal in the amount of $55,200, plus prejudgment interest and attorney fees. State Farm appeals.

SCOPE OF REVIEW

The construction of an insurance contract or policy is a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Katskee v. Blue Cross/Blue Shield*, 245 Neb. 808, 515 N.W.2d 645 (1994); *Dalton Buick v. Universal Underwriters Ins. Co.*, 245 Neb. 282, 512 N.W.2d 633 (1994).

FACTS

This action arises following an explosion on December 22, 1991, which completely destroyed a house at 7504 Susan Court in LaVista, Nebraska. The property had been owned by John J. Steube and Patricia A. Steube, who had procured an insurance policy from State Farm insuring the property from loss by fire or explosion. Prior to the explosion, however, Standard Federal filed a foreclosure petition against the Steubes on July 12. A decree of foreclosure was entered by the Sarpy County District Court on September 20. The court found that Standard Federal was the present owner and holder of the mortgage on the property and that the amount due was $48,703.41 in principal, plus interest. The court ordered a sheriff's sale of the property

20 days after the entry of the decree.

Standard Federal purchased the property for $55,902.74 at the sheriff's sale on November 18, 1991, and filed a motion seeking confirmation of the sale on November 20. On November 25, Standard Federal notified State Farm that the sale had taken place on November 18 and that the title had changed ownership.

The district court confirmed the sale on December 13, 1991, and ordered delivery of the deed upon payment of the sheriff's commission and the filing of a satisfaction. However, no deed was recorded pursuant to that order. The initial confirmation order was vacated, and a second confirmation order was entered on February 21, 1992. Standard Federal filed a satisfaction, acknowledging the reduction of mortgage indebtedness upon the foreclosed mortgage in an amount equal to the foreclosure sale purchase price confirmed by the court. A deed was issued by the sheriff on February 25 and was recorded on March 4.

When State Farm refused to pay benefits based on the policy, Standard Federal filed a declaratory judgment action on June 26, 1992, against State Farm, seeking a declaration that the property was covered by the State Farm policy. Standard Federal alleged that it was the owner and holder of a mortgage securing an interest in real estate described as "Lot 702, in the City of LaVista, as surveyed, platted and recorded in Sarpy County, Nebraska." In its answer, State Farm denied that Standard Federal was the owner and holder of a mortgage at the time of the explosion.

The district court entered a declaratory judgment on August 11, 1993, in which it declared that Standard Federal was covered under the State Farm insurance policy and that coverage was limited to the lesser amount of $55,200 or the amount due on the Steubes' note as of December 22, 1991.

On September 13, 1993, Standard Federal filed an application for further relief, pursuant to Neb. Rev. Stat. § 25-21,156 (Reissue 1989), asking for a money judgment in the amount of $55,200, as well as interest, costs, and attorney fees. The application stated that the amount due Standard Federal under the note and mortgage as of December 22, 1991, was the amount of Standard Federal's bid at the sheriff's sale,

$55,902.74, which is an amount in excess of the limits of the policy.

On September 29, 1993, the district court entered a judgment, taking judicial notice of the August 11 declaratory judgment. The court found that the policy covered damage to the property to the extent of $55,200 and that Standard Federal, as mortgagee, was a loss payee and had commenced a foreclosure on the home. The explosion resulted in damages in excess of $55,200. The parties stipulated that at the time of the explosion, the amount due from the Steubes to Standard Federal under the terms of the note and mortgage was the same amount as that bid at the sheriff's sale, $55,522.83. The court found that Standard Federal should be awarded judgment of $55,200; prejudgment interest under Neb. Rev. Stat. § 45-103.02 (Reissue 1988) from October 30, 1992, to September 28, 1993, of $2,254.28; and an attorney fee of $4,800.

ASSIGNMENTS OF ERROR

State Farm asserts that the trial court's rulings are contrary to the law and the evidence and that the trial court erred in finding coverage under the policy, in finding that Standard Federal was a beneficiary, in striking a paragraph from its declaratory judgment, and in awarding judgment of $55,200, prejudgment interest of $2,254.20, and an attorney fee of $4,800 to Standard Federal.

JURISDICTION

We first address Standard Federal's contention that the notice of appeal was not filed within 30 days of the August 11, 1993, declaratory judgment. State Farm's notice of appeal was filed on October 29.

We find that the entry of declaratory judgment by the court on August 11, 1993, did not constitute a final, appealable order. An order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for determination of matters incidental thereto. *In re Estate of Mithofer*, 243 Neb. 722, 502 N.W.2d 454 (1993); *Properties Inv. Group v. JBA, Inc.*, 242 Neb. 439, 495 N.W.2d 624 (1993). The declaratory judgment in this case did not determine the entire action. Substantial rights of the parties

remained to be decided. No determination of damages had been made by the court.

Standard Federal filed an application for further relief, pursuant to § 25-21,156, which provides that further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. This court has found it proper to grant leave to a plaintiff, pursuant to § 25-21,156, to apply to the district court "for such further relief as may be deemed necessary to finally terminate the litigation . . . ." *Richardson v. Waterite Co.*, 169 Neb. 263, 276, 99 N.W.2d 265, 275 (1959). In a declaratory judgment action which seeks to determine the validity of a written contract and the rights of the parties to the contract, "the plaintiff may, after a determination thereof in his favor, obtain a judgment for the amount due him under the contract by original petition or by subsequent application in the same proceeding." *Id.* at 276-77, 99 N.W.2d at 275.

In the case at bar, Standard Federal sought further relief after the district court held that Standard Federal was entitled to coverage under the State Farm policy. State Farm timely appealed from the final judgment entered by the district court on Standard Federal's application for further relief, and this court has jurisdiction.

COVERAGE UNDER THE POLICY

We turn then to the merits of State Farm's appeal, in which the insurance company asserts that the trial court erred in finding coverage under the policy. The policy in question listed Standard Federal as the mortgagee on the declarations page and provided coverage of the dwelling in the amount of $55,200. The mortgage clause of the policy stated:

> 12. **Mortgage Clause**. The word "mortgagee" includes trustee:
>
> a. If a mortgagee is named in this policy, any loss payable under Coverage A shall be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment shall be the same as the order of precedence of the mortgages.
>
> b. If we deny your claim, that denial shall not apply to

a valid claim of the mortgagee, if the mortgagee:

(1) notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;

(2) pays any premium due under this policy on demand if you have neglected to pay the premium; or

(3) submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and Loss Payment apply to the mortgagee.

. . . .

d. If we pay the mortgagee for any loss and deny payment to you:

(1) we are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or

(2) at our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. In this event, we shall receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgage debt.

e. Subrogation shall not impair the right of the mortgagee to recover the full amount of the mortgagee's claim.

The dispute here concerns the interpretation of the mortgage clause. State Farm contends that it is a loss payable or open mortgage clause, because it provides that the loss is payable "as interests appear." Standard Federal asserts that it is a union or standard mortgage clause, which creates a separate and distinct contract between the parties.

We have found no Nebraska cases which address mortgage clauses in a fire insurance policy. Corpus Juris Secundum provides a useful summary of the general law regarding these clauses. An open loss payable mortgage clause provides that the proceeds go first to the mortgagee to the extent of its interest. The mortgagee's only right is to be repaid money it has loaned and to have security of the value of the undamaged mortgaged property as collateral. Under this clause, the mortgagee is not a party to the contract, and there is no separate contract between the mortgagee and the insurance company. The right of the

mortgagee to recover is contingent upon the right of the mortgagor to recover. The mortgagee is in effect an appointee of the mortgagor to receive the insurance money. If a loss occurs after foreclosure, the mortgagor is entitled to the insurance proceeds during the period of redemption, even if the mortgagee is the purchaser of the property. 46A C.J.S. *Insurance* § 1404 (1993).

Under a standard or union clause, the mortgagee is also protected against any loss from an act or neglect of the mortgagor or owner. The clause creates a separate contractual relationship between the insurance company and the mortgagee. The mortgagee receives independent status so that it can recover even if the mortgagor would not be able to recover. The mortgagee can enforce its rights of recovery regardless of any defenses of the insurance company. The mortgagee acquires the right to the insurance proceeds even though it has suffered no actual loss. The mortgagee is required to notify the insurance company of any change in ownership. This clause contemplates the possibility of foreclosure and provides full protection to the mortgagee during foreclosure. The mortgagee is entitled to the proceeds of the policy if the mortgagor fails to redeem, although the mortgagee is the purchaser, and if the insurance proceeds exceed the amount of the mortgage debt. *Id.* Under a standard mortgage clause, it is the mortgagor's, but not the mortgagee's, rights which are cut off by the institution of foreclosure proceedings.

> Moreover a change in the character of interest from that of mortgagee to that of owner, effected by a sale and purchase on foreclosure, is not sufficient to defeat the insurance granted the mortgagee, since it must likewise be considered that the possibility of such a change was within the contemplation of the parties when the contract was made.

10A George J. Couch, Cyclopedia of Insurance Law § 42:746 at 779 (rev. 2d ed. 1982).

Standard Federal points out that Nebraska law requires the use of a standard clause:

> No policy or contract of fire and lightning insurance, including a renewal thereof, shall be made, issued, used,

> or delivered by any insurer or by any agent or representative thereof on property within this state other than such as shall conform as nearly as practicable to blanks, size of type, context, provisions, agreements, and conditions with *the 1943 Standard Fire Insurance Policy of the State of New York*, a copy of which shall be filed in the office of the Director of Insurance as standard policy for this state, and no other or different provision, agreement, condition, or clause shall in any manner be made a part of such contract or policy or be endorsed thereon or delivered therewith except as provided in subdivisions (1) through (11) of this section.

(Emphasis supplied.) Neb. Rev. Stat. § 44-501 (Reissue 1993). We do not decide the matter upon whether the terms of the policy comply with the 1943 Standard Fire Insurance Policy of the State of New York, as required by § 44-501. This standard fire insurance policy is not part of the record, and we decline to judicially notice the terms of the policy.

We find that State Farm is obligated to provide coverage because the clause in this policy specifically provided that State Farm could not deny the claim of the mortgagee if the mortgagee complied with subparagraph b. Subparagraph b states that any denial of a claim shall not apply to a valid claim of the mortgagee, if the following conditions are met: (1) the mortgagee notified State Farm of any change in ownership, occupancy, or substantial change in risk of which the mortgagee is aware; (2) the mortgagee has paid any premium due under this policy on demand if the insured neglected to pay the premium; or (3) the mortgagee submitted a signed, sworn statement of loss within 60 days after receiving notice from State Farm of the insured's failure to so notify. Standard Federal's assertion that it complied with these requirements is supported by the record. Standard Federal notified State Farm on November 25, 1991, that the foreclosure sale had taken place on November 18 and that the title had changed ownership, and the record shows that State Farm was informed of the sheriff's sale. State Farm admitted that Standard Federal submitted a signed, sworn statement of loss. State Farm admitted that there were no premiums due prior to June 1, 1992, and the record

reflects that State Farm canceled the policy on April 27, 1992. Therefore, regardless of whether the clause is interpreted as a loss payable or standard clause, we find that State Farm could not deny coverage under subparagraph b of the mortgage clause.

In our review of an insurance policy, we must construe it as any other contract to give effect to the parties' intentions at the time the contract was made. Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning. *Katskee v. Blue Cross/Blue Shield*, 245 Neb. 808, 515 N.W.2d 645 (1994); *Dalton Buick v. Universal Underwriters Ins. Co.*, 245 Neb. 282, 512 N.W.2d 633 (1994). The construction of an insurance contract or policy is a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Katskee v. Blue Cross/Blue Shield, supra*; *Dalton Buick v. Universal Underwriters Ins. Co., supra*. We find that the district court was correct in finding coverage for Standard Federal under the policy.

CONCLUSION

State Farm has also asserted other errors related to the judgment, but these assignments are not argued in the brief. To be considered by the appellate court, an error must be assigned *and discussed in the brief* of one claiming that prejudicial error has occurred. *Pantano v. McGowan*, 247 Neb. 894, 530 N.W.2d 912 (1995); *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995). Therefore, we will not consider these alleged errors.

Neb. Rev. Stat. § 44-359 (Reissue 1993) provides that the appellate court shall grant an attorney fee for this type of appeal. Standard Federal filed a motion and affidavit pursuant to Neb. Ct. R. of Prac. 9F (rev. 1992). We grant a fee of $3,600 for services in this court.

For the reasons stated above, the judgment of the district court is affirmed.

AFFIRMED.

WHITE, C.J., participating on briefs.

MICHAEL J. MCPHERRIN, APPELLEE, V. JACK C. CONRAD, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, APPELLEE, AND DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

537 N.W.2d 498

Filed September 22, 1995. No. S-93-981.

1. **Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own independent conclusions.
2. **Licenses and Permits: Revocation.** A sworn statement containing the recitations required by Neb. Rev. Stat. § 39-669.15 (Cum. Supp. 1992) establishes a prima facie case under the provisions of the administrative license revocation statutes, Neb. Rev. Stat. § 39-669.15 through 39-669.17 (Cum. Supp. 1992).
3. **Actions.** Generally speaking, a suit against a state agency is a suit against the state itself.
4. **Evidence.** The State cannot frustrate the discovery of evidence merely because it has elected to operate through a number of agencies and directors.
5. **Administrative Law: Due Process: Evidence.** Due process in an administrative proceeding includes the reasonable opportunity to present evidence concerning the accusation.

Appeal from the District Court for Pawnee County: WILLIAM B. RIST, Judge. Affirmed.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellant.

Gerald M. Stilmock, of Brandt, Horan, Hallstrom & Sedlacek, for appellee McPherrin.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. INTRODUCTION

Following an administrative hearing, defendant-appellee, Jack C. Conrad, director of defendant-appellant, Nebraska Department of Motor Vehicles, revoked the driver's license previously issued to plaintiff-appellee, Michael J. McPherrin, on the ground that he had been driving while under the influence of intoxicating liquor. McPherrin then sought judicial review. The district court reversed the director's order and ordered that McPherrin's license be reinstated. The department thereupon appealed to the Nebraska Court of Appeals, asserting as operative claims of error that the district court (1) mistakenly

concluded its director failed to establish a prima facie case and (2) incorrectly determined that its director had improvidently deprived McPherrin of discovery. In order to regulate the caseloads of the two courts, we, on our own motion, removed the matter to this court. We now affirm the judgment of the district court.

II. SCOPE OF REVIEW

The issues present questions of law; thus, we have an obligation to reach our own independent conclusions. See *Ben Simon's, Inc. v. Lincoln Joint-Venture, ante* p. 465, 535 N.W.2d 712 (1995).

III. FACTS

The department claims that a chemical test performed after McPherrin's arrest on April 3, 1993, measured a higher-than-permitted level of alcohol in his blood. As a result, under the provisions of the administrative license revocation statutes, Neb. Rev. Stat. §§ 39-669.15 through 39-669.17 (Cum. Supp. 1992), the director served McPherrin with a notice of revocation and provided him a temporary license. McPherrin demanded an administrative hearing and, in order that he might obtain an independent test, moved that the director order production of McPherrin's blood sample, which was being stored at the Department of Health. The director denied the motion on the ground that he had no authority to issue an order directing another state agency to produce physical evidence.

At the commencement of the hearing held on May 28, 1993, the director, through his hearing officer, granted McPherrin's request that the Nebraska rules of evidence be applied. McPherrin then renewed his production motion and, upon its again being overruled, moved for a dismissal because in the absence of production of the sample, he had been unable to obtain an independent test. That motion was overruled as well, and the hearing proceeded.

Through the hearing officer, the director received in evidence a copy of the director's letter advising McPherrin that his driver's license had been revoked. The director also received in evidence, for the limited purpose of establishing his jurisdiction

and not "as proof of any of the statements made" therein, a copy of the single document containing the notice to McPherrin that his driver's license had been suspended, the officer's sworn statement, and McPherrin's temporary driver's license.

The arresting officer then testified that as a result of his contact with McPherrin, he filed a sworn report. After the officer's testimony that he had no personal knowledge of the reliability or validity of the testing procedures and that the information contained in his report was provided by the health department's laboratory, the report was received for the limited purpose of establishing that it had been provided and not "as subjective [sic] evidence of the statements therein . . . simply that the statements have been made to the [d]irector as required by 39-669.15(3)." The report recites, among other things, that at the time of arrest there existed reasonable grounds to believe McPherrin was operating a motor vehicle while under the influence of alcoholic liquor or drugs and that he was validly arrested because he had been observed speeding, smelled of alcohol, had bloodshot eyes, displayed a blank stare, failed field sobriety tests, failed the "PASS-WARN-FAIL BREATH TEST AND DIGITAL READ OUT BREATH TEST," and submitted to a blood-breath test which indicated an alcohol concentration of ten-hundredths or more, specifically, ".116 gram/100 ml blood or gram/210 L breath."

The defendants then rested; McPherrin offered no evidence.

IV. ANALYSIS

1. Prima Facie Case

In the first claim of error, the department challenges the district court's finding that the director failed to establish a prima facie case.

At the time of McPherrin's arrest, Neb. Rev. Stat. § 39-669.07(1) (Cum. Supp. 1992), made it unlawful, among other things, for one to drive with a concentration of ten-hundredths of 1 gram or more by weight of alcohol per 100 milliliters of blood, or with a concentration of ten-hundredths of 1 gram or more by weight of alcohol per 210 liters of breath. As the record stands, the evidence is only that the arresting officer swore in his report that at the time of arrest there was

reasonable ground to believe that McPherrin had been driving while the concentration of alcohol in his blood or breath exceeded the allowable limits, but there is no evidence that such a concentration in fact existed. McPherrin urges that because of the lack of such evidence, the district court's finding is correct. Because McPherrin's analysis is limited to that claimed lack of evidence, we so limit our review.

So limited, the pertinent parts of the relevant statute, § 39-669.15(6)(c)(ii), provided that in the event of a test disclosing "the presence of alcohol in a concentration specified in section 39-669.07," the issues at the hearing were limited to whether "(A) . . . the law enforcement officer [had] probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of section 39-669.07" and to whether "(D) . . . the person [was] operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of subsection (1) of section 39-669.07."

Prior to the adoption of the version of § 39-669.15 at issue, i.e., the version in force at the time of McPherrin's arrest and administrative hearing, which became effective January 1, 1993 (1992 Neb. Laws, L.B. 291), an earlier version was in force, which required the officer arresting a licensee to forward a sworn report to the director reciting that the licensee had been validly arrested and the reasons therefor, that the licensee was requested to submit to the mandated test, and that the licensee refused to submit thereto. 1992 Neb. Laws, L.B. 872. The pre-1993 version of § 39-669.16 (Reissue 1988) further provided for notice and an opportunity to be heard and that the director was to summarily revoke the license if it were not shown that such refusal was reasonable.

In like manner, the revocation scheme at issue required, in relevant part, as Neb. Rev. Stat. § 60-6,205 (Reissue 1993) presently requires, that the arresting officer forward a sworn report to the department stating that the licensee was validly arrested and the reasons therefor, that the licensee was requested to submit to the mandated test, and that the licensee refused to submit thereto. A licensee seeking to contest the revocation was required to "state the grounds on which [the licensee relied] to

prevent the revocation from becoming effective." § 39-669.15(6)(a) (Cum. Supp. 1992). As in the pre-1993 version, there was no language in the revocation scheme at issue requiring the director, upon receipt of the officer's report, to conduct an independent investigation into the events giving rise to the arrest. Rather, the statutory language in both instances presumed that the revocation would occur unless the licensee took affirmative action to prevent such from happening. Thus, in relevant aspects, the revocation scheme at issue was remarkably similar to the pre-1993 scheme.

In considering that prior statutory scheme, we determined in *Mackey v. Director of Department of Motor Vehicles*, 194 Neb. 707, 235 N.W.2d 394 (1975), that the burden of proof was on the State to make a prima facie case for revocation. We further held, however, that once the officer's sworn report was provided, the director's order of revocation had prima facie validity. It then became the licensee's burden to establish grounds for reversal by a preponderance of the evidence. See, also, *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986). Thus, reading the statutory scheme at issue in light of our holdings under the pre-1993 scheme, we must conclude that defendants made a prima facie case once they established the officer provided his sworn report containing the required recitations. The director was not required to prove the recitations were true. Rather, it became McPherrin's burden to prove that one or more of the recitations were false.

2. Discovery

In the second assignment of error, the department takes issue with the district court's ruling that the director had power to direct the Department of Health to produce the sample of McPherrin's blood obtained in the course of McPherrin's arrest.

The answer is found in our determination that generally speaking, a suit against a state agency is a suit against the state itself. While the pronouncement appears to have been first made in a case in which that point was conceded, *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), *overruled on other grounds, Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985), and *Pointer v. State*, 219 Neb. 315,

363 N.W.2d 164 (1985), we nonetheless recently applied the *Anstine* dictum in *State v. Schrein*, 247 Neb. 256, 526 N.W.2d 420 (1995).

Therein, the convict sought calculation of the good time the Department of Correctional Services was to credit against his sentence in accordance with newly enacted statutes. In rejecting the State's argument that the court below was without jurisdiction to order the calculation sought, we reasoned that the State could not at one and the same time admit it was itself a proper party to the case but argue that its own agency, the Department of Correctional Services, was not.

It therefore follows that the State cannot frustrate the discovery of evidence merely because it has elected to operate through a number of agencies and directors. Accordingly, the director did indeed have authority to direct the Department of Health to produce the sample of McPherrin's blood for independent testing.

Given that McPherrin had the burden of establishing that he did not have more than the allowable concentration of alcohol in his blood at the time he was operating, or in the actual physical control of, a motor vehicle, he correctly argues that the director's erroneous ruling deprived him of due process. As we observed in *Geringer v. City of Omaha*, 237 Neb. 928, 468 N.W.2d 372 (1991), due process in an administrative proceeding includes the reasonable opportunity to present evidence concerning the accusation.

V. JUDGMENT

Because the district court correctly ruled that the director erroneously refused to produce the sample of McPherrin's blood for independent testing, the judgment of the district court is correct and is therefore hereby affirmed.

AFFIRMED.

McCOOK NATIONAL BANK, A NATIONAL BANKING CORPORATION, APPELLEE, V. DAYLENE BENNETT, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOSEPH EDD CASE, ALSO KNOWN AS EDD CASE, APPELLANT.

537 N.W.2d 353

Filed September 22, 1995. No. S-93-1079.

1. **Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
3. **Statutes: Legislature: Intent: Appeal and Error.** In settling upon the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
4. ____: ____: ____: ____. In determining the meaning of a statute, an appellate court may conjunctively consider and construe a collection of statutes which pertain to a certain subject matter to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
5. **Legislature: Intent: Decedents' Estates: Claims: Liability.** The Legislature intended to define all liabilities, of which a personal representative may not be aware, as claims governed by the Nebraska Probate Code in order to facilitate efficient administration of an estate.
6. **Decedents' Estates: Liens: Claims.** The Nebraska Probate Code exempts liens in Neb. Rev. Stat. § 30-2209 (Reissue 1989) because a lien by definition is not a liability as that term is used in the definition of claims.
7. **Decedents' Estates: Claims.** A personal representative has discretion to satisfy an encumbrance immediately if it is in the best interests of the estate.

Appeal from the District Court for Hitchcock County: JOHN J. BATTERSHELL, Judge. Affirmed.

Daylene A. Bennett, pro se.

Stanley C. Goodwin, of Colfer, Wood, Goodwin and Lyons, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

McCook National Bank (Bank) obtained a judgment lien on

real estate owned by Edd Case at the time of his death. The Bank and Daylene Bennett, the personal representative of Case's estate (Personal Representative), disputed whether the Bank could proceed to execute on that real estate. The Personal Representative claimed that the Bank was required to file a claim in the probate proceedings. The real estate was sold by the Personal Representative, and the proceeds were deposited with the clerk of the district court for Hitchcock County subject to the outcome of these proceedings.

Following a bench trial before the district court, the district court clerk was ordered to dispense the proceeds, plus interest, to the Bank, the judgment lienholder. The Personal Representative appealed to the Nebraska Court of Appeals, and pursuant to our authority to regulate the caseloads of lower courts, we removed the case to our docket. Finding no merit in any of the assignments of error, we affirm the holding of the trial court.

BACKGROUND

The Bank secured a judgment against Case on January 30, 1989, in the amount of $207,603.12, plus interest. The judgment lien attached any real estate owned by Case in Hitchcock County by operation of law. See Neb. Rev. Stat. § 25-1504 (Reissue 1989). Case died on December 19, 1991, before the satisfaction of the judgment. Case had an interest in the real property in Hitchcock County at the time of his death. After Case's death, the action was revived against his Personal Representative.

The Bank did not make a claim in the probate proceedings pursuant to the Nebraska Probate Code. See Neb. Rev. Stat. § 30-2485 (Cum. Supp. 1994). The Personal Representative argues that enforcement of the lien is therefore barred by the nonclaims statute. The value of the real property was assessed at $34,053. The Personal Representative requested and received court authority and sold the real property for a fair and reasonable price. The Personal Representative and the Bank agreed that the Bank would release its judgment lien against the subject real property with the proceeds from the sale to be deposited with the clerk of the district court for Hitchcock

County. The parties stipulated that the Bank's judgment lien, if any, would continue on the proceeds pending further court order.

ASSIGNMENTS OF ERROR

The Personal Representative asserts that the trial court erred in (1) determining that the Nebraska Probate Code was not applicable and controlling in this matter, (2) ordering the proceeds held by the clerk of the district court to be paid directly to the Bank rather than finding the proceeds assets of the estate to be administered pursuant to the Nebraska Probate Code, (3) not finding that the Bank was required to comply with § 30-2485 and Neb. Rev. Stat. § 30-2486 (Reissue 1989) of the Nebraska Probate Code, and (4) not determining that Neb. Rev. Stat. § 30-2487 (Reissue 1989) of the Nebraska Probate Code was controlling when a decedent's estate is insolvent.

STANDARD OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995); *Dolan v. Svitak*, 247 Neb. 410, 527 N.W.2d 621 (1995); *Hausse v. Kimmey*, 247 Neb. 23, 524 N.W.2d 567 (1994).

In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Lincoln Lumber Co. v. Fowler, ante* p. 221, 533 N.W.2d 898 (1995); *First Westside Bank v. For-Med, Inc.*, 247 Neb. 641, 529 N.W.2d 66 (1995); *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995).

ANALYSIS

The dispositive issue in this case is whether the Bank's judgment lien on the proceeds from the sale is a claim on the estate and subject to the provisions of the Nebraska Probate Code. The Nebraska Legislature addressed this issue in the following sections of the Nebraska Probate Code: § 30-2485(c)(1) and Neb. Rev. Stat. §§ 30-2494, 30-2209(4), and 30-2496 (Reissue 1989).

In settling upon the meaning of a statute, an appellate court

must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *George Rose & Sons v. Nebraska Dept. of Revenue, ante* p. 92, 532 N.W.2d 18 (1995); *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995); *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994).

In determining the meaning of a statute, an appellate court may conjunctively consider and construe a collection of statutes which pertain to a certain subject matter to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Anderson v. Nashua Corp., supra*; *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994); *Metropolitan Life Ins. Co. v. Kissinger Farms*, 244 Neb. 620, 508 N.W.2d 568 (1993).

The Nebraska Probate Code addresses liens in three sections, in the context of the probate code's restrictions on claims. Two sections explicitly exempt liens from the effects of being a claim under the Nebraska Probate Code. The first section discussed is the nonclaims statute.

NONCLAIMS STATUTE

Judgment liens are not a liability of the estate within the definition of claims. The Nebraska Probate Code specifically excludes liens from claims. The first instance where liens are explicitly exempt is the nonclaims statute, § 30–2485, which states:

> (a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

. . . .

(c) *Nothing in this section affects or prevents:*

(1) *Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate*[.]

(Emphasis supplied.)

The provisions of the Nebraska Probate Code explicitly exempt liens from the definition of both a claim and a liability. A judgment lien is not a claim and is not subject to the provisions of the Nebraska Probate Code.

The Legislature apparently intended to define all liabilities, of which a personal representative may not be aware, as claims governed by the Nebraska Probate Code in order to facilitate efficient administration of an estate. In *In re Estate of Feuerhelm*, 215 Neb. 872, 874–75, 341 N.W.2d 342, 344 (1983), we stated:

> The purpose of the nonclaim statute, § 30–2485, is facilitation and expedition of proceedings for distribution of a decedent's estate, including an early appraisal of the respective rights of interested persons and prompt settlement of demands against the estate. As a result of the nonclaim statute, the probate court or the personal representative can readily ascertain the nature and extent of the decedent's debts, determine whether any sale of property is necessary to satisfy a decedent's debts, and project a probable time at which the decedent's estate will be ready for distribution.

A secured judgment lien poses no threat to the efficient administration of the estate. Its existence is public record.

§ 30–2494

The second section that explicitly excludes liens is § 30–2494, which states:

> No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, *but this section shall not be construed to prevent the enforcement of mortgages, pledges or other liens existing at the time of death upon real or personal property in an appropriate proceeding*.

(Emphasis supplied.)

The statute uses lien in the broadest sense of the word because the definition does not modify the term "lien" with any adjectives. A judgment lien against the decedent in existence prior to the death of the decedent also falls within this exclusion of the Nebraska Probate Code.

LIEN V. LIABILITY—§ 30-2209(4)

The Personal Representative argues that a lien is a claim as defined by § 30-2209(4). However, the Nebraska Probate Code exempts liens in § 30-2209 because a lien by definition is not a liability as that term is used in the definition of claims. Section 30-2209(4) states:

> Claims, in respect to estates of decedents and protected persons, includes *liabilities* of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(Emphasis supplied.)

The judgment is not a liability as that term is used in § 30-2209(4). A lien is a "claim, encumbrance, or charge on property for payment of some debt, obligation or duty." Black's Law Dictionary 922 (6th ed. 1990). A liability is "all character of debts and obligations." Black's Law Dictionary 914 (6th ed. 1990). A lien is security for a liability. It is not the liability itself. The judgment lien in this case was not a liability of the estate.

A personal representative has discretion to satisfy an encumbrance immediately if it is in the best interests of the estate. Section 30-2496 states:

> If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the

> encumbrance or convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has filed a claim, if it appears to be for the best interest of the estate. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration.

The Legislature clearly exempted attached judicial liens from the definition of a claim. The Bank, as the judgment debtor, was free to proceed in the district court without filing a claim in the probate proceedings. The obvious purpose of the nonclaims statute and other such provisions is to allow for a quick and effective distribution of the probate estate. The primary purpose is to quiet the estate and bar future suits from unsecured creditors. A judicial lienholder obviously satisfies the purposes of the nonclaims statute. The debt is known, settled, and secured by the laws of the state. It should already be taken into account by the time probate administration is commenced. The judgment lien held by the Bank is not a claim under the Nebraska Probate Code.

CONCLUSION

The judgment below is affirmed.

AFFIRMED.

FARM CREDIT BANK OF OMAHA, A CORPORATION, APPELLEE, V. ROYCE H. STUTE AND MARSHA A. STUTE, HUSBAND AND WIFE, APPELLANTS.

537 N.W.2d 496

Filed September 22, 1995. No. S-93-1102.

1. **Judgments: Collateral Estoppel.** The collateral estoppel doctrine precludes the same parties from retrying an issue of ultimate fact which has been determined by a valid and final judgment in another case.

2. **Collateral Estoppel.** For the doctrine of collateral estoppel to apply, four conditions must be met: (1) The identical issue must have been decided in the prior action, (2) there must have been a judgment on the merits which was final, (3) the party against whom the rule is to be applied must have been a party or in privity with a party to the prior action, and (4) there must have been an opportunity to fully and fairly litigate the issue in the prior action.
3. **Appeal and Error.** An issue not presented to the trial court may not be raised on appeal.

Appeal from the District Court for Dundy County: JOHN J. BATTERSHELL, Judge. Affirmed.

Lawrence C. Crosby, of Crosby & Associates, for appellants.

Tim W. Thompson, of Kelley, Scritsmier & Byrne, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

In a prior proceeding, the district court foreclosed the mortgage executed by the defendant-appellants herein, Royce H. Stute and Marsha A. Stute, husband and wife, and by the husband's mother, Mary A. Stute, and thereafter confirmed the sale of the mortgaged land. No appeal was taken from that prior proceeding. The plaintiff-appellee herein, Farm Credit Bank of Omaha, thereafter instituted this action on the underlying note the husband and wife had executed and obtained a deficiency judgment against them. The husband and wife appealed that judgment to the Nebraska Court of Appeals. In order to regulate our caseload and that of the Court of Appeals, we, on our own motion, removed the matter to our docket.

The husband and wife claim, in summary and effect, that the district court erred in (1) confirming the sale of the mortgaged lands and proceeding to adjudicate this action and (2) not permitting the assertion of an estoppel defense. The first claim finds its genesis in 12 U.S.C. § 2219a(a) (1994), which provides:

> Agricultural real estate that is acquired by an institution of the System as a result of a loan foreclosure or a voluntary conveyance by a borrower (hereinafter in this section referred to as the "previous owner") who, as

> determined by the institution, does not have the financial resources to avoid foreclosure (hereinafter in this section referred to as "acquired real estate") shall be subject to the right of first refusal of the previous owner to repurchase or lease the property, as provided in this section.

The husband and wife urge that as Farm Credit is part of the "System" to which § 2219a(a) applies, it was precluded from seeking foreclosure and a deficiency judgment because it did not first afford the husband, wife, and mother the right of first refusal to repurchase or lease the property.

However, in the prior foreclosure proceeding brought by Farm Credit against the husband, wife, and mother, the district court ruled that those defendants had not properly sought to bring themselves within the ambit of § 2219a(a). No appeal having been taken, the judgment embodying that finding became final.

The collateral estoppel doctrine precludes the same parties from retrying an issue of ultimate fact which has been determined by a valid and final judgment in another case. *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994); *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993).

For the doctrine of collateral estoppel to apply, four conditions must be met: (1) The identical issue must have been decided in the prior action, (2) there must have been a judgment on the merits which was final, (3) the party against whom the rule is to be applied must have been a party or in privity with a party to the prior action, and (4) there must have been an opportunity to fully and fairly litigate the issue in the prior action. *In re Estate of Wagner, supra*; *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994); *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994).

Since each of those conditions exists here, the husband and wife may not again raise the right of first refusal issue in this case.

In connection with the second claim of error, the husband and wife contend that the district court erred in failing to permit the mother to assert estoppel as a defense to her liability under the "pledge of her property." Whatever that may mean, the

issue is not available to the husband and wife here because, if for no other reason, they failed to present to the district court an estoppel defense in this action. An issue not presented to the trial court may not be raised on appeal. *K & K Farming v. Federal Intermediate Credit Bank*, 237 Neb. 846, 468 N.W.2d 99 (1991).

Accordingly, the judgment of the district court must be, and hereby is, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DARREN MCCRACKEN, APPELLANT.

537 N.W.2d 502

Filed September 22, 1995. No. S-94-916.

1. **Jurisdiction: Appeal and Error.** Whether or not a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but it is the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.
2. **Criminal Law: Jurisdiction: Appeal and Error.** Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1994) sets forth the only method by which a party may invoke the jurisdiction of an appellate court to review a criminal case.
3. **Jurisdiction: Time: Appeal and Error.** Timeliness of an appeal is jurisdictional.
4. **Criminal Law: Sentences: Judgments: Time: Appeal and Error: Words and Phrases.** The time for appeal runs from the date the judgment is rendered. In a criminal case, the judgment is the sentence.
5. **Judgments: Records: Words and Phrases.** Rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof.
6. **Criminal Law: Judgments: Motions for New Trial: Time.** In criminal cases, a motion for a new trial does not toll the running of the 30-day jurisdictional requirement of Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1994).
7. **Motions for New Trial: Appeal and Error.** A party may be able to preserve for appellate review issues which are presented to the district court in a timely filed motion for new trial although he failed to file a timely notice of appeal from the judgment entering the verdict and sentence.

Appeal from the District Court for Gosper County: JOHN J. BATTERSHELL, Judge. Appeal dismissed.

P. Stephen Potter for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

Darren McCracken appeals his conviction of first degree murder and a sentence of life imprisonment, both of which followed a jury trial in the district court for Gosper County. McCracken filed a motion for a new trial after conviction but before sentencing. In a criminal case, the sentence is the judgment. The appeal was filed 44 days after the sentencing. McCracken appealed the judgment as opposed to appealing the overruling of his motion for a new trial. McCracken has failed to comply with the requirements of Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1994) which provides that notice of intent to appeal must be filed in the district court within 30 days of the judgment. Therefore, no jurisdiction is conferred on this court, and McCracken's appeal must be dismissed.

BACKGROUND

On July 1, 1993, Darren McCracken shot his mother, Vicky Bray, twice in her head as she lay sleeping on the couch in their family home. At the time, McCracken was 13 years of age. Bray died of the gunshot wounds on July 15.

McCracken was charged as a juvenile pursuant to Neb. Rev. Stat. § 43-247(2) (Reissue 1993) on July 1, 1993, in the county court for Gosper County, sitting as a juvenile court. The juvenile petition alleged that McCracken had committed acts which would constitute attempted first degree murder. McCracken sought to admit the allegations to the petition in the juvenile court. The court would not accept such admission. While the petition was pending, the mother died. On November 3, the State moved to dismiss the juvenile petition because it had determined that criminal charges should be filed. The county court granted the State's motion to dismiss the juvenile petition over McCracken's objections.

On November 3, 1993, the State filed an information against

McCracken in the district court for Gosper County alleging that he had killed Bray purposely and with deliberate and premeditated malice, a crime punishable by Neb. Rev. Stat. § 28-303 (Reissue 1989). McCracken's motions to quash the information and for a transfer to juvenile court were overruled.

McCracken's jury trial began on May 24, 1994. The jury reached its verdict of guilty on May 26. On that date, McCracken's counsel made an oral motion for a new trial without specifying on what basis McCracken would seek a new trial. Counsel indicated that McCracken would submit a written motion but that McCracken did not want to take up the motion for a new trial until after sentencing. The court stated that it would deem May 26 as the date the motion for a new trial was made.

On May 31, 1994, McCracken filed a written motion for a new trial for the reasons that (1) the court abused its discretion in sentencing McCracken, (2) the sentence was not sustained by sufficient evidence, (3) the sentence was contrary to law, and (4) newly discovered evidence was available to McCracken. The claim of newly discovered evidence has been abandoned by McCracken.

The sentencing hearing was conducted on August 15, 1994. At the conclusion of the sentencing hearing, the district court decreed that McCracken was guilty of murder in the first degree and pronounced a life sentence. The district court entered its order on the trial docket.

On September 7, 1994, the district court conducted a hearing and denied McCracken's motion for a new trial.

On September 28, 1994, McCracken filed in the district court a notice of intent to appeal his conviction and the judgment imposed at the sentencing hearing held on August 15.

ASSIGNMENTS OF ERROR

McCracken asserts that the county court erred by refusing to accept his admissions to the allegations in the juvenile petition. McCracken asserts that the district court erred by refusing to grant his motion to quash the information, by refusing to waive jurisdiction and transfer the case back to juvenile court, and by failing to instruct the jury that malice was an element of first

degree murder. McCracken states that his fifth amendment rights to freedom from self-incrimination and to protection from double jeopardy were violated by the juvenile proceedings and the subsequent criminal trial.

STANDARD OF REVIEW

Whether or not a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but it is the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter. *State v. Schmailzl, ante* p. 314, 534 N.W.2d 743 (1995); *State v. Lynch, ante* p. 234, 533 N.W.2d 905 (1995).

Section 25-1912 sets forth the only method by which a party may invoke the jurisdiction of an appellate court to review a criminal case. *State v. Schmailzl, supra*; *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994). Timeliness of an appeal is jurisdictional. *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994); *State v. McCormick and Hall, supra*.

ANALYSIS

The appeal before us is an appeal from a conviction and sentence. All of the assignments of error relate to that conviction. McCracken has not appealed from the denial of his motion for a new trial.

Section 25-1912(1) provides for a 30-day period in which a criminal defendant must file a notice of appeal. The time for appeal runs from the date the judgment is rendered. *Id.* In a criminal case, the judgment is the sentence. *State v. McDowell, supra*; *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988); *State v. Long*, 205 Neb. 252, 286 N.W.2d 772 (1980).

"Rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof . . . ." Neb. Rev. Stat. § 25-1301(2) (Reissue 1989); *State v. McDowell, supra*. The district court pronounced a life sentence upon McCracken and entered that sentence on the trial docket on August 15, 1994. By filing his notice of intent to appeal on September 28, McCracken failed to comply with the 30-day filing requirement which began to run on August 15. In his notice of intent to

appeal, McCracken clearly stated that he was appealing his conviction and sentence rather than the denial of his motion for a new trial.

Further, McCracken's motion for a new trial failed to gain him additional time in which to perfect his appeal. In criminal cases, a motion for a new trial does not toll the running of the 30-day jurisdictional requirement of § 25-1912. *State v. Nash*, 246 Neb. 1030, 524 N.W.2d 351 (1994); *State v. McCormick and Hall, supra*.

Although McCracken failed to timely appeal from the judgment, he could have preserved issues for appellate review with a timely appeal from the denial of his motion for a new trial. See *State v. McCormick and Hall, supra*. The denial of a motion for a new trial is a separate proceeding from an order entering a judgment. A party may be able to preserve for appellate review issues which are presented to the district court in a timely filed motion for new trial although he failed to file a timely notice of appeal from the judgment entering the verdict and sentence. *State v. Nash, supra*; *State v. McCormick and Hall, supra*.

McCracken's motion for a new trial was not timely filed. McCracken's written motion for a new trial requested a new trial for the reasons that the court abused its discretion in sentencing the defendant, the sentence was not sustained by sufficient evidence, and the sentence was contrary to law. However, when McCracken filed his motion in May 1994, he had not yet been sentenced and the court's judgment had not been announced. A motion for a new trial filed before the judgment is announced is a nullity. *State v. Nash, supra*; *State v. Spotted Elk, supra*; *State v. Kolar*, 206 Neb. 619, 294 N.W.2d 350 (1980), *overruled on other grounds, State v. Obermier*, 241 Neb. 802, 490 N.W.2d 693 (1992).

CONCLUSION

McCracken having failed to comply with the requirements of § 25-1912(1), no jurisdiction is conferred upon this court. An appellate court can address the merits of an appeal only if the court has jurisdiction. *Manske v. Manske*, 246 Neb 314, 518 N.W.2d 144 (1994); *Nebraska State Bar Found. v. Lancaster*

Cty. Bd. of Equal., 237 Neb. 1, 465 N.W.2d 111 (1991). The appeal must be dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. ERWIN CHARLES SIMANTS, APPELLANT.

537 N.W.2d 346

Filed September 22, 1995. No. S-94-943.

1. **Judgments: Appeal and Error.** The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous.
2. **Mental Health: Final Orders: Proof: Appeal and Error.** An appellate court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof.
3. **Constitutional Law: Insanity.** At an annual review hearing, after an individual has been found not responsible by reason of insanity, that individual is guaranteed a full panoply of constitutional rights. The right to confront and cross-examine adverse witnesses falls within that panoply of constitutional rights.
4. **Insanity: Records: Expert Witnesses.** At an annual review hearing pursuant to Neb. Rev. Stat. § 29-3703 (Cum. Supp. 1994), the court may receive records for the purpose of providing the basis for expert witnesses' opinions.
5. **Trial: Rules of Evidence: Expert Witnesses.** Four preliminary questions must be answered in order to determine whether an expert's testimony is admissible: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702; (2) whether the expert's testimony is relevant; (3) whether the expert's testimony will assist the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded in light of Neb. Evid. R. 403.
6. **Insanity.** At an annual review hearing pursuant to Neb. Rev. Stat. § 29-3703 (Cum. Supp. 1994), courts are to consider public safety when determining what conditions of liberty and monitoring to place upon a person found to be mentally ill and dangerous.
7. **Criminal Law: Insanity.** The purpose of the acquitted persons statutes is to protect the public from mentally ill dangerous persons who have demonstrated their dangerous proclivities by committing criminal acts for which they are not punished because of insanity.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed.

Robert P. Lindemeier, Lincoln County Public Defender, for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Erwin Charles Simants appeals from an order entered by the district court for Lincoln County following the 1994 annual review of his commitment to the Lincoln Regional Center (LRC). At the hearing, appellant sought release from the LRC or, in the alternative, to have his status at the LRC upgraded to include less restrictive monitoring. The district court found there was clear and convincing proof appellant remained both mentally ill and dangerous to others by reason of his mental illness. The district court further found that appellant's status at the LRC should not be upgraded due to public safety concerns. Finding the district court's determinations were not clearly erroneous, we affirm.

FACTUAL BACKGROUND

On January 17, 1976, appellant was convicted on six counts of first degree murder for the October 18, 1975, deaths of a Sutherland, Nebraska, family and was sentenced to death. This court affirmed those convictions and sentences. *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977). Appellant's convictions were subsequently vacated, and the cause was remanded for retrial due to irregularities and misconduct in connection with the sequestration and deliberations of the jury during the original trial. *Simants v. State*, 202 Neb. 828, 277 N.W.2d 217 (1979). After his second trial, appellant was found not guilty by reason of insanity. He was civilly committed by the Lincoln County Mental Health Board and was admitted to the LRC on October 29, 1979.

On August 23, 1994, the district court for Lincoln County conducted an annual review hearing on appellant's status, pursuant to Neb. Rev. Stat. § 29-3703 (Cum. Supp. 1994), which provides in pertinent part:

> (1) The court which tried a person who is found not responsible by reason of insanity shall annually . . . review the records of such person and conduct an evidentiary hearing on the status of the person. . . .
>
> (2) If as a result of such hearing the court finds that such person is no longer dangerous to himself, herself, or others by reason of mental illness or defect and will not be so dangerous in the foreseeable future, the court shall order such person unconditionally released from court-ordered treatment. If the court does not so find, the court shall order that such person participate in an appropriate treatment program specifying conditions of liberty and monitoring consistent with the treatment needs of the person and the safety of the public. The treatment program may involve any public or private facility or program which offers treatment for mental illness and may include an inpatient, residential, day, or outpatient setting. The court shall place the person in the least restrictive available treatment program that is consistent with the treatment needs of the person and the safety of the public.

At the hearing, the State introduced the following evidence: (1) three exhibits of prior Lincoln County proceedings involving appellant; (2) the testimony of Nebraska State Patrol Superintendent Ronald Tussing, Lancaster County Attorney Gary Lacey, and Lincoln Police Chief Tom Casady; (3) the testimony of the LRC's medical records manager; (4) the deposition testimony of expert witness Dr. Jack Anderson; (5) a "1994 Annual Report to Lincoln County District Court on Erwin Charles Simants" prepared by Dr. Louis Martin; and (6) a report containing the LRC's records and statistics on recent escapes from the LRC.

Appellant introduced the following evidence: (1) the testimony of two expert witnesses, Dr. Beverly Mead and Dr. Martin; (2) the testimony of four employees of the LRC; and (3) a "Report of Psychiatric Clinical Interview with Erwin 'Herb' C. Simants" prepared by Dr. Mead.

In its order, the district court stated that it found clear and convincing evidence that appellant is and continues to be mentally ill and dangerous to others by reason of his mental

illness and will continue to be dangerous in the foreseeable future, as demonstrated by the overt acts of October 18, 1975. As a result, the district court ordered appellant to remain in the care and custody of the LRC. The court further found that appellant's request to have his status at the LRC upgraded should be denied due to public safety concerns.

ASSIGNMENTS OF ERROR

Appellant assigns four errors: (1) that the district court violated the appellant's right to confrontation as guaranteed by the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution when it allowed the State to introduce evidence of previous Lincoln County proceedings involving appellant; (2) that the district court erred in permitting three members of local law enforcement to testify regarding public safety concerns in connection with a proposed upgrade in appellant's status at the LRC, in violation of the rules of evidence and appellant's rights to due process and treatment; (3) that the State did not prove by clear and convincing evidence that appellant was mentally ill and dangerous; and (4) that the district court violated appellant's "right to treatment" by not ordering the LRC to administer a specific treatment plan.

STANDARD OF REVIEW

The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous. *RaDec Constr. v. School Dist. No. 17, ante* p. 338, 535 N.W.2d 408 (1995); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994). An appellate court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof. *State v. Simants*, 245 Neb. 925, 517 N.W.2d 361 (1994); *State v. Hayden*, 233 Neb. 211, 444 N.W.2d 317 (1989) (*Hayden I*).

ANALYSIS

State's Exhibits 1 to 3

Appellant first contends that the district court's admission of State's exhibits 1 to 3 into evidence violated his Sixth

Amendment right to confrontation and cross-examination. At an annual review hearing, after an individual has been found not responsible by reason of insanity, that individual is guaranteed a full panoply of constitutional rights. *State v. Hayden*, 237 Neb. 286, 466 N.W.2d 66 (1991) (*Hayden II*); *Tulloch v. State*, 237 Neb. 138, 465 N.W.2d 448 (1991). The right to confront and cross-examine adverse witnesses falls within that panoply of constitutional rights. *Hayden II, supra*.

The district court took judicial notice of State's exhibits 1 to 3 and admitted them into evidence over the relevance, hearsay, foundation, and right of confrontation objections of appellant's counsel. Exhibit 1 contains court transcripts from appellant's first trial and from his prior annual review hearings, as well as a list of exhibits that were offered into evidence in those proceedings. Exhibit 2 contains information about appellant's 1993 annual review hearing, including depositions, records from other hearings, autopsy reports, investigative reports, presentence investigation reports, and information about his outings from the LRC. Exhibit 3 contains the bill of exceptions from appellant's first trial and various investigative reports. These records indicate that the use of alcohol was a factor in the crimes and that one or more of the children who were murdered were also sexually assaulted.

Neb. Evid. R. 703 states that

> [t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

After interpreting evidence rule 703 in *Hayden II*, this court held that "[a]t an annual review hearing pursuant to § 29-3703 . . . the court may receive records for the purpose of providing the basis for expert witnesses' opinions." 237 Neb. at 293, 466 N.W.2d at 70. In *Hayden II*, we found it error for the district court to admit the State's exhibits into evidence because they were submitted to prove the truth of the matter asserted therein and not for the purpose of explaining any expert's direct

testimony. However, *Hayden II* and the present case are distinguishable. In *Hayden II*, the State relied exclusively on the exhibits as proof of the issue before the court, without testimony except on rebuttal. Because the State provided no witness to lay foundation and no witness whom the appellant could confront and cross-examine, the appellant was denied due process.

In the instant case, the State's exhibits 1 to 3 were presented in three large boxes. The documents contained in the boxes were not separately marked or identified. This material was intermingled in an unorderly manner which created unnecessary efforts on appellate review. However, these exhibits were relied upon by expert witnesses who testified at appellant's hearing. Dr. Anderson testified that he relied upon the record of the first trial (exhibits 1 and 3) in forming his expert opinion; Dr. Mead testified that he relied upon the record of the 1993 annual hearing (exhibit 2) in forming his expert opinion; and Dr. Martin testified that he drew conclusions "based on the whole history" in forming his expert opinion.

Because the State's exhibits were not offered for the truth of the matter asserted therein, but instead were relied upon to provide a basis for expert testimony pursuant to rule 703, the district court did not err by admitting the exhibits into evidence.

Testimony of Law Enforcement Officials

Appellant next argues that the district court erred in permitting three members of local law enforcement to testify about public safety concerns in connection with a proposed upgrade in appellant's status at the LRC. Appellant's contention is that none of these law enforcement officials were qualified to give their opinions, as lay witnesses or as expert witnesses, and that the admission of such testimony violated the Nebraska rules of evidence and appellant's right to due process and treatment.

The district court denied the request of appellant and the recommendations of the LRC to change appellant's status at the LRC from modified code 2 to code 3. A code 2 patient is permitted on the LRC's grounds under supervision where the staff/patient ratio is at least 2:10. A code 2 patient is not permitted to go on therapeutic outings off the LRC's grounds. Code 3 status allows a patient to go on therapeutic outings off

the LRC's grounds under supervision where the staff/patient ratio is at least 2:10. These outings include trips to the circus, basketball games, swimming at available facilities, and attending picnics or movies in the Lincoln community. Appellant's code 2 status has been judicially modified to permit appellant to go on therapeutic outings off the LRC's grounds under at least one-on-one supervision of a staff member. However, the LRC must notify local law enforcement agencies before taking appellant on these outings.

At the hearing, the State called as witnesses the heads of three law enforcement agencies covering the jurisdiction of Lancaster County, where the LRC is located. These witnesses were Tussing, the superintendent of the State Patrol; Lacey, the Lancaster County Attorney; and Casady, the chief of the Lincoln Police Department. Each of these law enforcement officials testified, over the relevance, foundation, and lack of personal knowledge objections of appellant's counsel, that in his opinion appellant's request to be upgraded from modified code 2 to code 3 should be denied due to public safety concerns.

The State also called as a witness the LRC's medical records manager. She testified to the number and categories of recent escapes from the LRC. Her testimony is not challenged by appellant. Appellant's two expert witnesses, and four employees of the LRC, testified in favor of upgrading appellant's status.

The three law enforcement officials testified that they do not have day-to-day contact with appellant and do not have access to his treatment records. Thus, these witnesses based their opinion testimony upon various hearsay sources, rather than personal perceptions as required by Neb. Evid. R. 701, and therefore were not testifying as lay witnesses.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. Neb. Evid. R. 702. As previously discussed, if the facts or data upon which an expert bases an opinion are of a type reasonably relied upon by experts in the particular field in forming such opinions, the facts or data need not be admissible in evidence. Rule 703.

No attempt was made to qualify these law enforcement officials as experts in the fields of psychology or psychiatry or to have these officials testify in terms of appellant's mental illness or dangerousness. Their testimony was confined to terms of public safety in response to appellant's request to have his status at the LRC upgraded. The duties of all three witnesses deal with coordinating and protecting public safety. Because the record reflects that all three witnesses are experienced, educated, and trained in the area of public safety, they clearly possess specialized knowledge and are qualified as expert witnesses on the subject.

Having determined these witnesses qualify as experts on public safety pursuant to evidence rule 702, we turn to three other issues which must be resolved before ultimately determining whether such expert testimony was admissible evidence: (1) whether the experts' testimony was relevant; (2) whether the experts' testimony assisted the trier of fact to understand the evidence or determine a controverted factual issue; and (3) whether the experts' testimony, even though relevant and admissible, should have been excluded in light of Neb. Evid. R. 403. See, *State v. Chambers*, 241 Neb. 66, 486 N.W.2d 481 (1992); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

Relevant evidence is evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401.

The express wording of § 29-3703 makes clear that courts are to consider public safety when determining what conditions of liberty and monitoring to place upon a person found to be mentally ill and dangerous. Thus, the opinion testimony of the State's experts concerning the impact an upgrade in appellant's status from modified code 2 to code 3 could have upon public safety was relevant evidence.

Furthermore, such testimony assisted the trier of fact in understanding the evidence and determining the outcome of this controverted status issue raised by appellant. Moreover, it cannot be said that the probative value of this relevant evidence is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, misleading of the fact finder, or needless presentation of cumulative evidence. See rule 403. This testimony was probative on the issue of public safety. There is no indication that the testimony was applied by the district court, as the trier of fact, outside the public safety context. Thus, the district court did not err by permitting these three law enforcement officials to testify concerning public safety in relation to a proposed upgrade in appellant's status at the LRC.

Mentally Ill and Dangerous

Appellant next contends that the district court erred in finding that there was clear and convincing evidence that he is still mentally ill and dangerous. The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous. *RaDec Constr. v. School Dist. No. 17, ante* p. 338, 535 N.W.2d 408 (1995); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994). More specifically, an appellate court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof. *State v. Simants*, 245 Neb. 925, 517 N.W.2d 361 (1994); *Hayden I.*

Three expert witnesses testified at appellant's 1994 annual review hearing. Dr. Anderson, a psychiatrist, testified by deposition on behalf of the State. Dr. Mead, a professor in the department of psychiatry for Creighton University and the University of Nebraska Medical Center, and Dr. Martin, chief of service of the Forensic Mental Health Service at the LRC, testified on behalf of appellant.

Dr. Anderson first evaluated appellant in 1975 and testified on his behalf at both trials. His trial testimony was that appellant was suffering from schizophrenia at the time of the murders and, as a result, should be found not guilty by reason of insanity. Dr. Anderson evaluated appellant again in 1990 and reviewed his record at the LRC in 1993, finding each time that appellant remained both mentally ill and dangerous. Most recently, on July 12, 1994, Dr. Anderson examined and interviewed appellant for 90 minutes, examined LRC reports

from the last year, and found appellant's diagnosis to be the same as it had been for the past 20 years: schizophrenia, undifferentiated, chronic, but in remission. Dr. Anderson stated his opinion that appellant is "still mentally ill and . . . potentially dangerous if taken out of the structured environment in which he now lives."

Dr. Mead interviewed appellant for about 2 hours on July 15, 1994, and reviewed various reports. Dr. Mead testified that appellant "suffers still from some residual [mental illness]" and that "he can still be considered mentally ill." As for dangerousness, on cross-examination Dr. Mead admitted that "in the sense that I would not want to see him out of confinement . . . I would consider him dangerous." He testified his answer was the same as it had been at his deposition—that appellant, "based upon his past acts, still remains a person that is mentally ill and dangerous." Dr. Martin is in charge of formulating a treatment plan for appellant, who is hospitalized in Dr. Martin's unit at the LRC. He testified that appellant does not show any "significant or serious mental illness." However, Dr. Martin prepared a report entitled "1994 Annual Report to Lincoln County District Court on Erwin Charles Simants," which the State entered into evidence. In that report, Dr. Martin states:

> Mr. Simants exhibits a mental illness in the following sense: He has a history of serious alcoholism. He, in my opinion, met the criteria for a diagnosis of pedophilia at the time of the murders. He has a history of severe depression during the same period of his life. None of these diagnoses are clinically symptomatic at the present time. They all, however, carry some likelihood of reemergence.

Dr. Martin testified that appellant "is not acutely or actively dangerous, but that in the overall context of the crime and his pattern of mental illness, that there is certainly a reasonable concern relative to a remote dangerousness." In his report, Dr. Martin states that appellant is "dangerous in the sense of having previously acted out during a period when his issues of mental illness were seriously active."

Based on the totality of this expert evidence, the district

court's finding of clear and convincing evidence that appellant is and continues to be mentally ill and dangerous to others by reason of his mental illness and will continue to be dangerous in the foreseeable future was not clearly erroneous.

TREATMENT PLAN

Finally, appellant contends that the district court violated his right to treatment under § 29-3703 and "the Fourth [sic] and Fourteenth Amendments to the United States Constitution," as well as article I, § 3, of the Nebraska Constitution, by not ordering the LRC to administer a specific treatment program.

After finding appellant to be both mentally ill and dangerous, the district court ordered appellant confined to the Forensic Mental Health Service unit of the LRC "for appropriate psychiatric treatment by the staff of the Regional Center." Appellant contends that because the district court accepted the opinion of Dr. Anderson and substantially discounted the opinions of appellant's witnesses, it should have ordered the LRC to administer Dr. Anderson's specific treatment recommendations. Dr. Anderson testified appellant should receive individual psychodynamic-oriented therapy.

Upon appellant's appeal of his 1993 annual review hearing, this court held that the purpose of the acquitted persons statutes is to protect the public from mentally ill dangerous persons who have demonstrated their dangerous proclivities by committing criminal acts for which they are not punished because of insanity. *State v. Simants*, 245 Neb. 925, 517 N.W.2d 361 (1994) (quoting *Tulloch v. State*, 237 Neb. 138, 465 N.W.2d 448 (1991)). This court has not held, and the legislative history and plain meaning of the statute do not indicate, that the purpose of § 29-3703 is for the courts to direct psychiatrists and psychologists on how to best treat the mental illness of a person committed.

The district court's order followed the directives of § 29-3703 by balancing the treatment needs of appellant with public safety concerns. Therefore, the district court did not err by not ordering the LRC to administer a specific treatment plan.

CONCLUSION

We affirm the district court's order because (1) there was

clear and convincing proof appellant remains both mentally ill and dangerous and (2) his status at the LRC should not be upgraded due to public safety concerns.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JASON L. MARKS, APPELLANT.

537 N.W.2d 339

Filed September 22, 1995. No. S-94-1247.

1. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Homicide: Intent: Words and Phrases.** Malice is that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse.
4. ____: ____: ____. Deliberate malice and premeditated malice are separate and distinct elements of the crime of murder in the first degree.
5. ____: ____: ____. Deliberate means not suddenly, not rashly; but deliberation requires that the defendant considered the probable consequences of his or her act before doing the act.
6. ____: ____: ____. Premeditated means to have formed a design to commit an act before it is done.
7. ____: ____: ____. One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification.
8. **Homicide: Intent: Time.** No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.
9. ____: ____: ____. The time required to establish premeditation may be of the

shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.

10. **Homicide: Intent: Juries.** A question of premeditation is for the jury to decide.
11. **Intent: Words and Phrases.** The intent involved in an actor's conduct is a mental process and may be inferred from the conduct itself; the actor's language, if any, in reference to the conduct; and the circumstances surrounding the conduct.
12. **Homicide: Intent: Convictions: Weapons.** The intent to kill may be inferred, sufficient to support a murder conviction, from the defendant's deliberate use of a deadly weapon in a manner likely to cause death.
13. **Sentences: Weapons.** Using a firearm to commit a felony is a separate and distinct offense from the felony being committed, and sentences imposed for using a firearm to commit a felony shall be consecutive to any other sentence imposed.
14. **Sentences: Appeal and Error.** An offender is to be given credit against the maximum term and any minimum term for time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to the delivery of the offender to the correctional facility.
15. **Homicide: Sentences.** Upon being sentenced to life imprisonment upon a conviction of first degree murder, a defendant is not entitled to credit for time in custodial detention pending trial and sentence. However, when the defendant receives a sentence consecutive to the life sentence that has a maximum and minimum term, the defendant is entitled to receive credit for the time served against the consecutive sentence.
16. **Sentences.** A judge in sentencing is required to separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled under Neb. Rev. Stat. § 83-1,106(1) (Reissue 1994).
17. **Sentences: Appeal and Error.** Neb. Rev. Stat. § 83-1,106(1) (Reissue 1994) requires that the defendant receive credit for time served pending the resolution of an appeal.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Affirmed in part, and in part vacated and remanded with directions.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Jason L. Marks appeals his conviction of first degree murder and use of a firearm to commit a felony.

SCOPE OF REVIEW

On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995).

In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *Id.*; *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995).

FACTS

On May 9, 1994, Marks was charged by information with first degree murder and use of a firearm to commit a felony. The information alleged that Marks purposely and with deliberate and premeditated malice killed Arthur Godbolt. After a jury trial, Marks was found guilty of both charges, and on November 30, 1994, he was sentenced to life in prison for first degree murder and to a consecutive term of 5 to 10 years in prison on the weapons charge. He was not given credit for time served.

The testimony at trial showed that the victim, who was 16 years old, died as the result of a gunshot wound to the head following a drive-by shooting during the early morning hours of April 9, 1994. Michael Godbolt, the victim's cousin, testified that he was at his home at 5632 North 29th Street in Omaha prior to the incident and that he was waiting for the victim to give him a ride to his grandmother's house. At about 2:30 a.m., the victim arrived, got out of his car, and talked to Michael Godbolt. The victim then talked to Dana Butler, who was standing near the rear of the victim's car. Michael Godbolt testified that he heard five or six gunshots and that he ducked

inside another car. When he raised his head, he saw a car speed past. He then turned and saw the victim on the ground. The victim had been shot in the right temple.

Wade Stewart testified that he left his mother's house with her car at about 11:30 p.m. on April 8, 1994, and that he went to a girl friend's house, where he met Shawn King, Shawn's brother John King, and Marks. Stewart, Shawn King, and Marks later left to go riding around. Stewart drove, King was in the passenger's seat, and Marks was in the backseat. Stewart asked, "What if we get in some dirt?" Marks replied, "I got the strap," and showed Stewart a .32-caliber gun. Stewart said this meant that if they got into any trouble, Marks had a gun.

Stewart testified that Marks asked if he knew where some "smokers" were who would want to buy crack cocaine. Stewart, King, and Marks drove to 29th and Ellison Streets and talked to a woman who was on the sidewalk. Stewart said that as he continued north on 29th Street, he stopped to let a pedestrian cross the street and then started driving away. At that point, King began firing a .25-caliber gun, and Marks fired two or three shots from the backseat. Marks then stated, "The dude fell." Marks also talked about how one of his guns had jammed and said he was "blasting from both straps." Stewart testified that Marks was carrying two guns: a .38-caliber and a .32-caliber.

King, who was charged with first degree murder, testified for the State in exchange for a reduction of the charge to attempted first degree murder. King said he did not know the victim, but said that he, his brother, and Marks had fired shots at the victim's car 3 or 4 weeks prior to this incident. King had used a .25-caliber semiautomatic, his brother had used a .32-caliber gun, and Marks had used a .38-caliber gun. King said that Marks had talked about "getting" the victim because a friend of the victim's had shot at Mario Shanklin's house. King claimed that 2 or 3 weeks before the incident, Marks said he wanted to get the victim in retaliation for the drive-by shooting at Shanklin's house.

King further testified that he went to a basketball game with his brother, Marks, and Shanklin prior to the incident and that the group went to a house in the Logan Fontenelle area after the

game. King and Marks then left the house with Stewart. Stewart said they could shoot out of the car. King testified that when they turned onto 29th Street, Marks stated, "There's [the victim's] car right there." King said that he saw Butler standing on the sidewalk by the car and that as they drove by and were almost even with the victim's car, he shot at Butler. King said he heard approximately five shots from the backseat of the car. When they got to the end of the block, Marks stated, "I seen him fall."

At trial, Marks testified that his friend Shanklin had moved to 28th and Laurel Streets about 3 months before the shooting. Marks and his friends had had problems with the victim and his friends. Marks testified that while riding around on the night of the shooting, Stewart stopped and got out of the car to talk to someone on Ellison Street and that after Stewart got back into the car, they turned north onto 29th Street, where Stewart asked a woman walking by if she was "looking." Marks said that he saw the victim's car and saw people standing by it. As they started driving toward the victim's car, King started firing, so Marks took the .32 and the .38 and opened fire. Marks said that after he saw the victim's car, he figured that his group would be shot at. He claimed that it was dark and that he did not see anyone in the area where he was aiming. He stated that after King started firing, he saw people by the car run back toward the sidewalk and the house, and he claimed that he was not thinking, but was just shooting at the car. As they drove away, Marks looked back and said, "Somebody fell." He thought he might have accidentally hit someone.

Jeanette Stewart, the woman spoken to by Wade Stewart, testified that Stewart's car drove by slowly, and then she heard gunshots, but did not see from where they came. She saw the victim and Butler in the street near the left rear of the car. Just before the shooting, she heard someone in Stewart's car say, "There he is."

ASSIGNMENTS OF ERROR

Marks claims that the evidence was insufficient as a matter of law to support the jury's verdict finding him guilty of first degree murder and that the district court erred in not giving him

credit for 232 days spent in custody.

ANALYSIS

Marks argues the evidence was insufficient to prove that the killing was premeditated. Neb. Rev. Stat. § 28-303 (Reissue 1989) provides: "A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice . . . ." In *State v. Lyle*, 245 Neb. 354, 358-59, 513 N.W.2d 293, 299 (1994), we defined the meaning of § 28-303(1) as follows:

> In order to be guilty of first degree murder, one must have killed purposely and with deliberate and premeditated malice. . . . Malice is that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. . . . Deliberate malice and premeditated malice are separate and distinct elements of the crime of murder in the first degree. . . . Deliberate means not suddenly, not rashly; but deliberation requires that the defendant considered the probable consequences of his or her act before doing the act. . . .
>
> Premeditated means to have formed a design to commit an act before it is done. One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. . . . No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. . . . The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. . . .

(Citations omitted.)

On a claim of insufficiency of the evidence, the appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the appellate court set aside a guilty verdict as unsupported by

evidence beyond a reasonable doubt. *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995). In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *Id.*; *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995).

Marks' basic argument is that there was no evidence that he planned to kill the victim. As the issue is framed by Marks' argument, the question is whether Marks' sudden shooting in the direction of two individuals at a distance of 20 to 30 feet with a .32-caliber gun and a .38-caliber gun is sufficient to establish that Marks killed the victim with deliberate and premeditated malice. Marks claims that because he testified that he merely started shooting without thinking and did not give any consideration to the consequences and because he denied that he planned to kill any particular individual, the evidence is insufficient to establish that the killing was premeditated. We disagree.

> The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. *State v. Drinkwalter*, [242 Neb. 40, 493 N.W.2d 319 (1992)]; *State v. Batiste*, [231 Neb. 481, 437 N.W.2d 125 (1989)]; *State v. Nokes*, 192 Neb. 844, 224 N.W.2d 776 (1975) . . . .

State v. Lyle, 245 Neb. 354, 359, 513 N.W.2d 293, 299 (1994). In *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989), this court held that a question of premeditation is for the jury to decide. It is entirely reasonable for the jury to have believed beyond a reasonable doubt that Marks acted with premeditation. Marks had fired shots at the victim's car 3 or 4 weeks prior to this incident. Two or three weeks prior to the incident, Marks had stated that he wanted to "get" the victim in retaliation for

a prior drive-by shooting. Marks carried two guns with him on the evening of the shooting. He went to 29th and Ellison Streets and was prepared to begin shooting when he saw the victim's car because he believed the victim might shoot at him. Marks began shooting when he recognized the victim's car. The victim was killed when a .38-caliber bullet entered his right temple, traveled through his brain, and exited the left side of the skull, lodging between the skull and the skin.

At trial, Marks testified that his group noticed the victim's car when they were 20 to 25 feet away and that he saw two people standing by the car. He was not sure who the people were, but while Stewart drove toward them, Marks began firing when King did. A couple of seconds elapsed between the time Marks first saw the victim's car and the time the shooting started. Marks stated: "As soon as I seen [King] firing, I seen people running. The car was right there, and I started firing." Marks stated that he was firing .32-caliber and .38-caliber guns and that he was aiming at the car. He claimed that after the firing started, he saw two people running away and that they were not in the area where he was firing.

Upon our review of the record, we find that the evidence is sufficient to establish the elements of first degree murder. "The intent involved in an actor's conduct is a mental process and may be inferred from the conduct itself; the actor's language, if any, in reference to the conduct; and the circumstances surrounding the conduct." *State v. Thompson*, 244 Neb. 375, 399, 507 N.W.2d 253, 270 (1993). Accord *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993).

Deliberate means not suddenly, not rashly; but deliberation requires that the defendant considered the probable consequences of his or her act before doing the act. *State v. Lyle, supra*. Marks had shot at the victim's car 3 or 4 weeks prior to this incident. He had stated that he had a "strap" in case he and his friends got into some "dirt." The evidence was sufficient to establish beyond a reasonable doubt that Marks' actions were deliberate.

One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. *Id.* The intent to kill may

be inferred, sufficient to support a murder conviction, from the defendant's deliberate use of a deadly weapon in a manner likely to cause death. See, *State v. Russell, supra*; *State v. Rokus*, 240 Neb. 613, 483 N.W.2d 149 (1992). The evidence was undisputed that Marks fired two deadly weapons toward the victim's car and that after the firing started, Marks saw two people running away. The intent to kill may be inferred from Marks' firing of these deadly weapons. There was sufficient evidence to support the jury's finding that Marks was guilty of murder in the first degree for the death of the victim. Marks' claim that the evidence is insufficient has no merit.

Marks argues that the trial court erred in failing to give him credit for time served. Marks was sentenced to life imprisonment on the first degree murder conviction. He was sentenced to 5 to 10 years' imprisonment on the use of a firearm to commit a felony conviction, which sentence was to be served consecutive to the life sentence. The court made a finding that Marks had been in custody for 232 days, but gave no credit for time served.

Using a firearm to commit a felony is a separate and distinct offense from the felony being committed, and sentences imposed for using a firearm to commit a felony shall be consecutive to any other sentence imposed. Neb. Rev. Stat. § 28-1205(3) (Reissue 1989). See *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995). Under Neb. Rev. Stat. § 83-1,106(1) (Reissue 1994), an offender is to be given credit against the maximum term and any minimum term for time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to the delivery of the offender to the correctional facility.

In *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994), we held that upon being sentenced to life imprisonment upon a conviction of first degree murder, a defendant is not entitled to credit for time in custodial detention pending trial and sentence. However, we determined that when the defendant receives a sentence consecutive to the life sentence that has a maximum and minimum term, the defendant is entitled to receive credit for the time served against the consecutive sentence. The State does not dispute Marks' contention, and we find that the district

court should have given Marks credit for the time that he spent in custody, such credit to be applied against his consecutive sentence for use of a firearm to commit a felony.

A judge in sentencing is required to separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled under § 83-1,106(1). *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995). Section 83-1,106(1) requires that the defendant also receive credit for time served pending the resolution of an appeal. We therefore vacate the sentence imposed for use of a firearm to commit a felony and remand the cause to the district court with directions to resentence Marks and give him credit for time served against the firearm conviction, including the time spent in resolution of this appeal.

CONCLUSION

The evidence was sufficient to support the jury's verdicts, and they are affirmed. Marks' sentence for use of a firearm to commit a felony is vacated, and the cause is remanded to the district court with directions to resentence Marks and give him credit for time served.

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

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. J. MARK BARNETT, RESPONDENT.

537 N.W.2d 633

Filed September 29, 1995. No. S-92-459.

1. **Disciplinary Proceedings.** The Nebraska Supreme Court has inherent authority to regulate the conduct of attorneys admitted to the practice of law in the State of Nebraska.
2. ____. The purpose of an attorney disciplinary proceeding is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.

3. ____. In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
4. ____. In a disciplinary proceeding against an attorney, the determination of what discipline is appropriate requires consideration of the nature of the offense, the need for deterrence of future misconduct by others, the maintenance of the reputation of the bar as a whole, protection of the public and clients, the expression of condemnation by society on moral grounds of the prohibited conduct, justice to the attorney, the attorney's fitness to continue in the practice of law, and the attitude of the offender generally.

Original action. Judgment of suspension.

Dennis G. Carlson, Counsel for Discipline, for relator.

J. Mark Barnett, pro se.

CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and BOSLAUGH, J., Retired, and RONIN, D.J., Retired.

PER CURIAM.

This is a disciplinary action in which respondent, J. Mark Barnett, was initially placed on probation for failing to perform timely legal services for a client, for failing to communicate with that client, and for failing to timely file a written response to a disciplinary complaint. *State ex rel. NSBA v. Barnett*, 243 Neb. 667, 501 N.W.2d 716 (1993). As a result of that proceeding, respondent was placed on probation for a period of 18 months on the following conditions: (1) Respondent shall not consume alcohol during the period of his probation, (2) respondent shall continue as an active participant in Alcoholics Anonymous, (3) respondent shall continue with medication and therapy as prescribed by his physician, (4) respondent shall meet with a partner of his law firm at least once a month for the purpose of reviewing the status of each of respondent's pending cases, and (5) respondent shall file a written report with the Counsel for Discipline of the Nebraska State Bar Association on the first of each month specifically indicating whether he has complied with these conditions of his probation.

On September 15, 1994, respondent violated the terms of his probation by consuming alcohol. Respondent testified that on that date, he attended an Alcoholics Anonymous meeting in the morning and met with his sponsor for lunch. He further

testified that "at some point during the day, I made a decision to drink." He continued to drink over a 2-day period and on September 16 was arrested for driving under the influence, second offense. A hearing was held before a referee on December 22, 1994. At that time, the driving under the influence charge was pending. At the hearing, respondent testified he intended to enter a plea of guilty to that charge. He subsequently pled guilty and was placed on probation. Respondent also admitted that he had violated the terms of his probation by consuming alcohol and by failing on four occasions to file monthly reports with the Counsel for Discipline. He testified that the reports were not filed because of his absences from work due to medical problems. The record reflects that on September 23, 1994, respondent admitted himself to a relapse prevention program at Methodist Richard Young Hospital in Omaha, Nebraska, and that he was discharged from the hospital on October 18, 1994. The respondent testified that he planned to leave his law firm in Norfolk, Nebraska, and open a solo practice in Omaha. He stated that the separation was amicable and that proximity to adequate medical treatment was a factor in his decision to relocate.

Fred Mesmer, an addiction counselor, testified on behalf of respondent. He stated that respondent was a relapse prone alcoholic and that relapse prone alcoholics have a more difficult task recovering. It was Mesmer's opinion, however, that respondent had a fair to good chance of continuing recovery.

After hearing the evidence, the referee recommended that respondent's probation be extended for a period of not less than 6 months under substantially the same conditions. Neither party has filed an exception to the referee's report. Since respondent has admitted the allegations of the motion to revoke his probation, the only issue for this court to decide is what disciplinary sanction is appropriate to impose under these circumstances.

ANALYSIS

The Nebraska Supreme Court has inherent authority to regulate the conduct of attorneys admitted to the practice of law in the State of Nebraska. *In re Integration of the Nebraska State*

Bar Ass'n, 133 Neb. 283, 275 N.W. 265 (1937). In furtherance of this responsibility, this court has adopted rules of discipline. These rules provide that misconduct by an attorney shall be grounds for the imposition of sanctions ranging from censure to disbarment. Neb. Ct. R. of Discipline 4 (rev. 1992).

The purpose of an attorney disciplinary proceeding is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice. *State ex rel. Nebraska State Bar Assn. v. Fitzgerald*, 165 Neb. 212, 85 N.W.2d 323 (1957); *State, ex rel. Wright, v. Sowards*, 134 Neb. 159, 278 N.W. 148 (1938). In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989). The determination of what discipline is appropriate requires consideration of the nature of the offense, the need for deterrence of future misconduct by others, the maintenance of the reputation of the bar as a whole, protection of the public and clients, the expression of condemnation by society on moral grounds of the prohibited conduct, justice to the attorney, and the attorney's fitness to continue in the practice of law. *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), *cert. denied* 488 U.S. 802, 109 S. Ct. 31, 102 L. Ed. 2d 10 (1988). The attitude of the offender is also generally an appropriate consideration. *State ex rel. NSBA v. Kirshen, supra.*

Respondent acknowledges that he is an alcoholic. He asserts there is no evidence that his legal practice suffered, nor were there any complaints filed with the Nebraska State Bar Association during the period of his probation. He argues that his consumption of alcohol was not the result of an intentional disregard for the court and that he is now actively participating in a recovery program. However, he concedes in his brief that an attorney who suffers from alcoholism and continues to drink will in all probability adversely affect his or her clients. He requests that this court continue his probation.

CONCLUSION

After de novo review, we find by clear and convincing

evidence that respondent violated the conditions of his probation. See *State ex rel. NSBA v. Schmeling*, 247 Neb. 735, 529 N.W.2d 799 (1995). This court is well aware that addiction to alcoholism is a prevalent problem in American society. Respondent's efforts to control his drinking are commendable, but, nevertheless, he did violate two conditions of his probation. For probation to be a useful sanction in disciplinary proceedings, there must be adherence to its provisions. Under the facts presented, to hold otherwise would demean the procedure. The record in this case does not justify an extension of respondent's probation.

It is our judgment and the order of this court that respondent be suspended from the practice of law in the State of Nebraska until further order of this court.

JUDGMENT OF SUSPENSION.

WHITE, C.J., and FAHRNBRUCH, J., not participating.

SHARLENE S. FLOYD, APPELLANT, V. MICHAEL WOROBEC, APPELLEE.

537 N.W.2d 512

Filed September 29, 1995. No. S-93-960.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
2. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed.
3. **Directed Verdict.** The party against whom a motion for directed verdict is lodged 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.
4. **Motor Vehicles: Highways: Right-of-Way.** A motorist is required to yield the right-of-way to a vehicle traveling on a street protected by stop signs if the vehicle on the protected street is close enough to the intersection to pose an

immediate hazard.

5. **Motor Vehicles: Highways: Public Health and Welfare.** A driver has a duty to look both to the right and to the left and to maintain a proper lookout for the driver's safety and that of others.
6. **Motor Vehicles: Highways: Right-of-Way.** One traveling on a favored street protected by stop signs of which one has knowledge may properly assume, until one has notice to the contrary, that motorists about to enter from a nonfavored street will come to a complete stop as near the right-of-way line as possible and yield the right-of-way to any vehicle approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves into or across the intersection.
7. ____: ____: ____. A driver approaching an intersection is not in a favored position and entitled to proceed merely because that driver has the right-of-way.
8. **Motor Vehicles: Negligence.** While a driver who fails to see another who is in a favored position is negligent as a matter of law, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is indisputably located in a favored position.
9. **Motor Vehicles: Highways: Words and Phrases.** A vehicle is located in a favored position when it is within that radius which denotes the limit of danger, a definition which focuses upon the vehicle's geographical proximity to the collision point and the vehicle's favored status under the applicable rules of the road.
10. **Motor Vehicles.** Not only must a motorist look at a time when looking would have been effective, but must see what is in plain sight.
11. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
12. **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 where there has been an abuse of discretion.
13. **Trial: Expert Witnesses.** The soundness of a trial court's ruling regarding an expert's qualifications depends upon the particular facts of the case.
14. **Trial: Expert Witnesses: Health Care Providers.** A duly licensed and practicing chiropractor is competent to testify as an expert witness within the scope of his or her knowledge according to his or her qualifications in the field of chiropractic; the weight of his or her testimony is a question for the jury.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded for a new trial.

Lee R. Terry, of Terry & Kratville, for appellant.

Michael F. Coyle and Michael J. Mooney, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. INTRODUCTION

In this negligence action arising out of the collision of two motor vehicles, the district court entered judgment pursuant to the verdict in favor of the defendant-appellee, Michael Worobec, against the plaintiff-appellant, Sharlene S. Floyd, thereby dismissing Floyd's petition. Floyd appealed to the Nebraska Court of Appeals, asserting, in summary, that the district court erred in (1) not directing a verdict in her favor on the issue of liability and (2) excluding certain testimony from her treating chiropractor and consequently instructing improperly on the issue of damages. In order to regulate the caseloads of the appellate courts, we on our own motion removed the matter to this court; we now reverse the judgment of the district court and remand the cause for a new trial.

II. FACTS

On the clear and dry afternoon of February 25, 1989, Floyd was driving an automobile in Omaha westbound on Martha Street, a two-lane blacktop street accommodating eastbound and westbound traffic and inclining upward from 13th Street toward 16th Street.

At its intersection with 15th Street, Martha Street is protected by signs commanding northbound and southbound traffic on 15th Street to stop. Floyd testified that as she approached that intersection, she scanned the area and, finding it to be clear, kept traveling at 20 to 25 miles per hour. She was able to see northbound and southbound traffic and the stop signs on both sides of 15th Street. There was no traffic on the north side of 15th Street, and she had an unobstructed view of a "big pickup truck" on the south side which appeared to be stopped. When she was in the intersection, she saw something in her peripheral vision and upon turning to look saw a truck. She sounded her horn and tried to accelerate, but was struck while in the westbound lane of travel on Martha Street. She could not recall how long it was between the time she saw the truck and sounded her horn and the time she was struck. At her pretrial deposition, Floyd testified that when she saw the truck which struck her, it was 25 feet from her, but at trial she changed her estimate to

its being "about a hundred feet away." Upon exiting from her automobile, she noticed that its left rear quarter panel had been damaged.

According to Worobec, he was driving his truck northbound on 15th Street and came to a complete stop at the stop sign at the intersection of 15th and Martha Streets. He could see traffic eastbound on Martha Street, but a "big truck" parked at the east corner of the intersection on Martha Street obstructed his view of westbound traffic. Worobec looked to his left but did not see any vehicles. As his vision to his right was blocked by the truck, he pulled out "[s]lowly, very slowly." As he did so, he kept a lookout for traffic. Worobec stated that he did not see Floyd's vehicle before impact and that the collision occurred in the middle of Martha Street. He told Officer Edward Garaczkowski of the Omaha Police Division, who investigated the collision, that he (Worobec) felt Floyd was speeding.

Garaczkowski testified that there was nothing in his report showing that Worobec's view was obstructed. However, he admitted that he did not mark "none" on his police report in response to the different things that one can check for a motorist not seeing danger. As there was no debris on the street or serious injury involved, Garaczkowski did not chart skid marks or the point of impact.

Floyd's treating chiropractor, Dr. Leslie J. Wilkie, who practiced in Missouri, testified that after finishing a premedical course at the University of Kansas, he attended and graduated from the National College of Chiropractic at Lombard, Illinois. In addition, he has pursued several postgraduate specialties, primarily

> different types of technique. . . . The specialties in regard to whiplash type injuries of the neck, [he has] had great interest in that. [He has] also pursued with a great deal of time applied kinesiology which is the utilization of muscle testing and nerve reflex to help ascertain the condition of a person . . . and in that respect [has] done probably close to 200, 250 hours of additional study in that line. . . . [He] also [has] great interest in testing of a patient in regard to computerized muscle testing, different types of evaluating a patient so that [he] can better establish where the patient

really is and how to help them.

Wilkie first saw Floyd in his office on June 28, 1989, at which time he obtained a history and conducted a standard physical examination. That was followed "with a chiropractic/orthopedic/neurological examination of the affected areas. Following that [he] did an x-ray . . . . From that point [he] . . . did kinesiological examinations . . . ." He continued to treat Floyd through January 8, 1993, and performed over 200 adjustments to her spine during that time.

On the basis that proper foundation was lacking, the district court precluded Wilkie from testifying that based on a reasonable degree of chiropractic probability, Floyd's injuries "are going to be of a permanent periodic nature." Neither was Wilkie permitted to testify based on "a reasonable degree of chiropractic care and treatment . . . how many future treatments on an average . . . Floyd should receive."

III. ANALYSIS

1. Directed Verdict

In her first assignment of error, Floyd asserts the district court should have sustained the motion for directed verdict she made at the close of all the evidence on the issue of Worobec's liability to her and should have instructed the jury to return a verdict in her favor on that issue.

(a) Scope of Review

A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. See, *Winslow v. Hammer*, 247 Neb. 418, 527 N.W.2d 631 (1995); *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994).

(b) Application of Law to Facts

In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is lodged 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. *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995).

Thus, for purposes of this appeal, we must accept as true that there was a "big truck" parked at the southeast corner of the intersection of Martha and 15th Streets which blocked Worobec's view of westbound traffic on Martha Street, that Worobec pulled out from the intersection very slowly, that Worobec kept a constant lookout for other vehicles, and that the collision occurred in the middle of the road rather than in Floyd's lane. Since Worobec failed to see Floyd's automobile until impact, his feeling that Floyd was speeding has no evidential value whatsoever. It must therefore be concluded that Floyd was driving at 20 to 25 miles per hour.

A motorist is required to yield the right-of-way to a vehicle traveling on a street protected by stop signs if the vehicle on the protected street is close enough to the intersection to pose an immediate hazard. *Kasper v. Carlson*, 232 Neb. 170, 440 N.W.2d 195 (1989). Moreover, a driver has a duty to look both to the right and to the left and to maintain a proper lookout for the driver's safety and that of others. *Id.* Consequently, one traveling on a favored street protected by stop signs of which one has knowledge may properly assume, until one has notice to the contrary, that motorists about to enter from a nonfavored street will come to a complete stop as near the right-of-way line as possible and yield the right-of-way to any vehicle approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves into or across the intersection. *Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103 (1986).

However, a driver approaching an intersection is not in a favored position and entitled to proceed merely because that driver has the right-of-way. See *Hodgson v. Gladem*, 187 Neb. 736, 193 N.W.2d 779 (1972). Thus, while a driver who fails to see another who is in a favored position is negligent as a matter of law, *Getzschman v. Yard Co.*, 229 Neb. 231, 426 N.W.2d 499 (1988), the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is "undisputably

located in a favored position," *Jones v. Goeden*, 232 Neb. 177, 180, 440 N.W.2d 199, 202 (1989); *Getzschman v. Yard Co.*, *supra*.

The issue, therefore, is whether Floyd was "undisputably located in a favored position." As stated in *Krul v. Harless*, 222 Neb. 313, 321, 383 N.W.2d 744, 749–50 (1986): "A vehicle is located in a '"favored position"' when it is '"within that radius which denotes the limit of danger,"' . . . a definition which focuses upon the vehicle's geographical proximity to the collision point and the vehicle's favored status under the applicable rules of the road."

While Floyd contradicted herself as to where Worobec's truck was when she first saw it, there is nothing in the evidence from which it can be inferred that Floyd violated any rule of the road so as to forfeit any favored position she otherwise enjoyed or that her automobile was other than within the radius of danger when Worobec proceeded into the intersection. The existence of the parked truck blocking Worobec's view of westbound traffic on Martha Street merely provided a condition, the existence of which Worobec was obligated to take into account. See *Vrba v. Kelly*, 198 Neb. 723, 255 N.W.2d 269 (1977) (stranded vehicle on road only a condition and not concurrent cause of collision). See, also, *Brown v. Nebraska P.P. Dist.*, 209 Neb. 61, 306 N.W.2d 167 (1981) (inanimate objects generally conditions and not causes). Not only must a motorist look at a time when looking would have been effective, but must see what is in plain sight. *Huntwork v. Voss*, 247 Neb. 184, 525 N.W.2d 632 (1995). Worobec's having failed to see Floyd's automobile under the circumstances presented here establishes that Worobec was negligent as a matter of law.

That being so, and there being no issue pled as to any contributory negligence on Floyd's part, it follows that the district court erred in not granting Floyd's motion for directed verdict.

2. Exclusion of Evidence

Although the foregoing determination resolves this appeal, we nonetheless consider the remaining assignment of error, as it presents issues which are likely to reoccur in the new trial we

must order, namely, whether the district court mistakenly prohibited Wilkie from testifying as to the permanency of her injuries and the need for future care.

(a) Scope of Review

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by said rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. See *Stang-Starr v. Byington, ante* p. 103, 532 N.W.2d 26 (1995).

(b) Application of Law to Facts

We have determined that a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only where there has been an abuse of discretion. *Kroeger v. Ford Motor Co.*, 247 Neb. 323, 527 N.W.2d 178 (1995); *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994). We have also held that the soundness of a trial court's ruling regarding an expert's qualifications depends upon the particular facts of the case. *Kroeger v. Ford Motor Co., supra.*

Floyd argues that the district court abused its discretion in refusing the proffered testimony of Wilkie because, based on his education and training alone, Wilkie was qualified as an expert to give testimony regarding the permanency of her injuries and the number and extent of future treatments required and that as a consequence, the district court's instructions on damages were deficient.

The answer to Floyd's claims is controlled by *Fries v. Goldsby*, 163 Neb. 424, 80 N.W.2d 171 (1956), and *Rodgers v. Sparks*, 228 Neb. 191, 421 N.W.2d 785 (1988). In *Fries v. Goldsby, supra*, a negligence action, a graduate of a chiropractic college duly licensed to practice as a chiropractor and holding membership in the National Chiropractic Roentgenologist Association took a history from the plaintiff, examined her, and x-rayed her. He then diagnosed the plaintiff's injuries, prescribed her care and treatment, and treated her. In ruling that the trial court erred in excluding the chiropractor's interpretations and explanations of the x rays he had taken, we adopted the reasoning of other courts that "a duly licensed and practicing chiropractor is competent to testify as an expert

witness within the scope of his knowledge according to his qualifications in the field of chiropractics, and the weight of his testimony is a question for the jury." *Id.* at 435, 80 N.W.2d at 178.

In *Rodgers v. Sparks, supra*, a workers' compensation action, the question was whether, given the *Fries* rule, opinions concerning "causation and permanency are within the scope of the field of chiropractic." *Rodgers v. Sparks*, 228 Neb. at 197, 421 N.W.2d at 789. After reviewing the relevant statutes and concluding that the practice of chiropractic is not the practice of medicine and surgery, we nonetheless concluded that a licensed and practicing chiropractor who had examined and x-rayed the claimant and had diagnosed his condition and treated it was, by virtue of education in spinal impairment ratings and treatment of the claimant, competent to testify that the claimant's injury was caused by the industrial accident in question, was exacerbated by a subsequent incident, and produced stated percentages of physical impairment and work capacity.

Thus, given Wilkie's other qualifications, had it been proved that he was licensed to practice chiropractic, it would have been an abuse of discretion for the district court to declare him incompetent to testify that, based upon a reasonable degree of chiropractic certainty, Floyd's injuries were of a "permanent periodic nature" and as to the future course of treatment. But the record does not establish that Wilkie was licensed to practice chiropractic. It therefore cannot be said that it was an abuse of discretion for the district court to have excluded the opinions of one engaged in a licensed profession but not shown to have been licensed.

Accordingly, it cannot be said the district court erred in excluding Wilkie's testimony.

IV. JUDGMENT

Because the district court erred in not sustaining Floyd's motion for directed verdict on the issue of liability, the judgment of the district court is, as first noted in part I above, reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

MARY JO KROPF, APPELLEE, V. FREDERICK J. KROPF, APPELLANT.

538 N.W.2d 496

Filed September 29, 1995. No. S-94-024.

1. **Garnishment: Appeal and Error.** Garnishment is a legal action; to the extent factual issues are involved, the findings of the fact finder will not be set aside on appeal unless clearly wrong; however, to the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
2. **Legislature: Divorce: Child Support: Words and Phrases.** The term "spousal support," as defined by the Legislature, means support paid to a spouse within the confines of an order that also provides for child support.
3. **Divorce.** Labels placed upon payments made under the terms of divorce judgments are not determinative of their nature.
4. **Alimony: Words and Phrases.** Alimony is an order of support for a person.
5. **Trial: 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 York County: BRYCE BARTU, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Steven M. Curry, of Sampson, Curry & Hummel, P.C., for appellant.

Charles W. Campbell, York County Attorney, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Frederick J. Kropf appeals from an order entered by the district court for York County granting appellee Mary Jo Kropf's summons in garnishment to collect $500 in spousal support from the appellant's Social Security benefits. The district court overruled the appellant's objections (1) that he does not owe the amount sought to be garnished and (2) that the county attorney did not have statutory authority to represent the appellee throughout these garnishment proceedings. Having found error in part of the district court's order, we affirm in part, and in part reverse and remand for further proceedings.

ASSIGNMENTS OF ERROR

The appellant assigns two errors: (1) The district court erred

in not limiting the amount garnished from his Social Security benefits to 15 percent as required by Neb. Rev. Stat. § 25-1558 (Reissue 1989), and (2) the district court erred in overruling the appellant's motion to disqualify the county attorney's office from representing the appellee throughout these garnishment proceedings.

BACKGROUND

The appellant and the appellee were divorced by decree of the district court for York County on May 22, 1990. The decree ordered the appellant to pay monthly "spousal support" to the appellee in the sum of $500. At the time of the divorce, the children born to the marriage were adults. The appellant remarried following the divorce and began supporting three minor stepchildren. In April 1993, the appellant lost his job. Two months later, he began receiving monthly Social Security benefits in the amount of $741.

In July 1993, the York County Attorney was appointed by the district court to represent the appellee in her efforts to recover the ordered support obligations from the appellant. At that time, the appellant was $3,857.72 in arrears. The county attorney filed a notice to withhold income with the Social Security Administration pursuant to the Income Withholding for Child Support Act (Act). Neb. Rev. Stat. §§ 43-1701 to 43-1743 (Reissue 1993). The notice requested that the lesser of $300 or 55 percent be withheld from the appellant's monthly Social Security benefits.

In response to the notice for withholding, the appellant filed a motion with the district court seeking to disqualify the county attorney's office from representing the appellee. He also objected to the notice as being without legal basis under the Act, and he filed a petition seeking to modify the ordered $500 per month support obligation because he was unemployed, dependent upon Social Security benefits, and supporting three minor stepchildren.

The county attorney then dismissed the motion for withholding of income under the Act, but in its place filed an affidavit and praecipe for summons in garnishment pursuant to Neb. Rev. Stat. § 25-1056 (Reissue 1989). The summons,

which sought to collect $500 monthly and an arrearage of $4,357.72, was issued by the district court to the Social Security Administration.

The appellant responded by filing a request for hearing on the garnishment proceeding alleging that the funds sought were exempt from garnishment or, in the alternative, that he did not owe the amount on the judgment. The appellant also filed another motion to disqualify the county attorney from acting on behalf of the appellee on the grounds that there was no legal basis for the county attorney to represent the appellee in these proceedings.

The district court denied the appellant's motion to disqualify the county attorney. However, the court granted the appellant's petition to modify his support obligations having found the changes in the appellant's circumstances to be material. The court ordered the appellant's spousal support obligations reduced to $123 per month starting October 1, 1993. Apparently, the court took into consideration the fact that the appellee was also receiving monthly Social Security benefits, drawn on the appellant's account, in the amount of $377.

On October 13, 1993, the district court overruled the appellant's objection to the amount sought to be garnished and entered an order to withhold $500 from the appellant's Social Security benefits. Apparently, though not specifically stated in the order, this $500 was intended by the court to be applied to the $4,357.72 which the appellant owed in arrears. The court also entered an order of continuing lien which would have allowed $500 to be garnished on a monthly basis without further action by the appellee. However, the court subsequently vacated the order, having discovered that the appellee had not properly applied for the continuing lien. The appellant timely filed a notice for new trial, which was overruled. This appeal follows.

STANDARD OF REVIEW

Garnishment is a legal action; to the extent factual issues are involved, the findings of the fact finder will not be set aside on appeal unless clearly wrong; however, to the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made

by the court below. *Davis Erection Co. v. Jorgensen, ante* p. 297, 534 N.W.2d 746 (1995).

ANALYSIS

AMOUNT LEGALLY GARNISHABLE FROM APPELLANT'S SOCIAL SECURITY BENEFITS

The appellant first contends that the district court erred in not limiting the amount garnished from his Social Security benefits to 15 percent as required by § 25-1558. Section 25-1558(1)(c) provides, in pertinent part:

> (1) Except as provided in subsection (2) of this section, the maximum part of the aggregate disposable earnings of an individual for any work week which is subject to garnishment shall not exceed . . . :
>
> . . . .
>
> (c) Fifteen percent of his disposable earnings for that week, if the individual is a head of a family.

Subsection (2)(a) limits the applicability of the 15-percent restriction in subsection (1)(c) stating, in pertinent part: "The restrictions of subsection (1) of this section shall not apply in the case of: (a) *Any order of any court for the support of any persons.*" (Emphasis supplied.)

The appellant cites Neb. Rev. Stat. §§ 42-347 and 43-1715 (Reissue 1988) as authority for his argument that the payments as ordered by the district court were not for the "support of any persons," and therefore, the maximum amount garnishable from his monthly Social Security benefits is 15 percent. Section 42-347 (Reissue 1993) states, in pertinent part:

> As used in sections 42-347 to 42-380, unless the context otherwise requires:
>
> . . . .
>
> (4) Spousal support, when used in the context of income withholding or any provisions of law which might lead to income withholding, shall mean alimony or maintenance support for a spouse or former spouse when ordered as a part of an order, decree, or judgment *which provides for child support and the child and spouse or former spouse are living in the same household.*

(Emphasis supplied.)

Section 43-1715 (Reissue 1993) of the Act contains language almost identical to § 42-347. That section of the Act states: "Spousal support shall mean alimony or maintenance support for a spouse or former spouse if the provision for support is a part of an order, decree, or judgment *which provides for child support and the child and spouse or former spouse are living in the same household.*" (Emphasis supplied.)

The appellant asserts that the express wording of §§ 42-347(4) and 43-1715 indicates that the Legislature did not intend the payments as ordered by the district court to fall under the category of "spousal support" because no child support was ordered in the divorce decree and no minor children were living with the appellee after the divorce. Because the district court defined the appellant's obligation as "spousal support," the appellant contends that the district court's order was not for the "support of any persons" as set forth in § 25-1558(2)(a). Thus, the appellant argues that that subsection's exception to the statute's 15-percent maximum on withholdings is inapplicable in this case. Therefore, the appellant, as head of a family, concludes that only 15 percent of his monthly Social Security benefits can be legally garnished.

The appellant is correct in his assertion that the term "spousal support," as defined by the Legislature, means support paid to a spouse within the confines of an order that also provides for child support. However, the appellant is incorrect in his conclusion that the district court's labeling of the appellant's support obligation as "spousal support" mandates limiting the garnishment of his Social Security benefits to 15 percent.

In *Black v. Black*, 223 Neb. 203, 388 N.W.2d 815 (1986), a husband had been ordered by the district court to pay alimony pursuant to Neb. Rev. Stat. § 42-362 (Reissue 1984). Section 42-362 provides that a court may order "support and maintenance" for a mentally ill spouse upon dissolution of the marriage and thereafter. The husband appealed to this court contending that the district court had erred in awarding alimony to his spouse under § 42-362 because the statute did not provide for such an award. This court rejected the husband's argument, noting that it was "clear from the trial court's language . . . that

notwithstanding its use of the word 'alimony,' it in fact awarded the wife 'support and maintenance' under the terms of § 42-362." *Black*, 223 Neb. at 207, 388 N.W.2d at 819.

In the present case, it is clear that the district court, notwithstanding its employment of the term "spousal support," in fact awarded the appellee alimony. This result is consistent with authority from other jurisdictions holding that labels placed upon payments made under the terms of divorce judgments are not determinative of their nature. *In re Marriage of Kessler*, 110 Ill. App. 3d 61, 441 N.E.2d 1221 (1982); *Knipfer v. Knipfer*, 259 Iowa 347, 144 N.W.2d 140 (1966) (holding that a trial court's use of the term "alimony" was not conclusive against a claim that the award was actually a property settlement); 27B C.J.S. *Divorce* § 309 (1986); 24 Am. Jur. 2d *Divorce and Separation* § 520 (1983). In addition, despite the statutory definition of spousal support, it is evident that the term "spousal support" and the term "alimony" are commonly used interchangeably. See *Else v. Else*, 219 Neb. 878, 367 N.W.2d 701 (1985). Thus, we find that the district court in fact awarded the appellee "alimony" despite the fact that it used the term "spousal support."

By definition, alimony is an order of support for a person. See Black's Law Dictionary 73 (6th ed. 1990). As a result, § 25-1558(2)(a), which eliminates the 15-percent maximum on withholdings for the support of any persons, is applicable to this case.

Thus, the only restrictions on the amount garnishable from the appellant's Social Security benefits are those set forth by federal law. The Consumer Credit Protection Act (CCPA) limits garnishments, for the support of any person, to 50 percent of the individual's disposable earnings in cases where the individual is supporting a spouse or dependent child, or 60 percent of such individual's disposable earnings where the individual is not supporting a spouse or dependent child. 15 U.S.C. § 1673(b)(2) (1994). These limitations increase by 5 percent respectively if the delinquent amount is more than 12 weeks in arrears. *Id.*

In the present case, the appellant was supporting a spouse and dependent children and was more than 12 weeks in arrears

on his support obligations to the appellee. Thus, under the CCPA, the appellant's Social Security benefits can be garnished up to a maximum amount of 55 percent. The appellant receives $741 per month in Social Security benefits. The district court ordered $500 garnished from these benefits. Because $500 exceeds the 55-percent maximum garnishable by federal law, the district court's order is reversed and remanded for further proceedings to recalculate the amount garnishable from the appellant's Social Security benefits.

In his brief, the appellant alleges that it is unconstitutional to allow a higher percentage of his monthly Social Security benefits to be garnished under the CCPA than is allowed under § 25-1558. However, the appellant did not raise this objection in 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. *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994); *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994); *Mid-America Pipeline Co. v. Boehm*, 244 Neb. 220, 506 N.W.2d 41 (1993). Therefore, the merits of the appellant's claim will not be considered, since the claim is not properly before this court.

County Attorney's Representation of Appellee

The appellant next alleges that the district court erred in overruling his motion to disqualify the county attorney's office from representing the appellee. The appellant argues that the district court was without legal authority to appoint the county attorney to appear on behalf of a private citizen. In her brief, the appellee cites two state statutes which she purports give the district court authority to appoint the county attorney to enforce the court's order. Neb. Rev. Stat. § 42-358 (Reissue 1993) states that if a county attorney consents, the county attorney may be appointed for the purpose of commencing contempt of court proceedings against those who fail to pay spousal support, and Neb. Rev. Stat. § 43-512.03(1)(c) (Reissue 1993) states that a county attorney or other authorized attorney shall, "[i]f income withholding is not feasible, enforce child, spousal, and medical support orders by other civil actions . . . ."

The appellant claims that because the support order does not

provide any child support, the amount owed to the appellee is not spousal support for purposes of income withholding. Thus, the appellant alleges that no statutory authority exists which gives the district court the power to appoint the county attorney to represent the appellee in these garnishment proceedings.

We agree with the appellant that §§ 42-358 and 43-512.03(c) do not grant the district court express authority to appoint the county attorney to pursue support obligation arrearage where the decree, order, or judgment does not provide child support.

However, the appellant makes no claim that he has been denied either a substantial right or a just result stemming from the appointment of the county attorney in this matter. We detect no prejudice resulting from the county attorney's acceptance of the district court's appointment to represent the appellee. Thus, any error the district court made by appointing the county attorney was harmless. Therefore, we find that the representation of the appellee by the county attorney is not reversible error.

CONCLUSION

Having found error in part of the district court's order, we affirm in part, and in part reverse and remand for further proceedings.

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

DAVID W. SEEVERS, APPELLANT, V. PAUL STEPHEN POTTER, APPELLEE.

537 N.W.2d 505

Filed September 29, 1995. No. S-94-077.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.

2. **Judgments: Appeal and Error.** As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
3. **Limitations of Actions: Malpractice: Attorneys at Law: Prisoners.** The statute of limitations on pursuing a legal malpractice claim against a criminal defense attorney begins to run upon the occurrence of the professional negligence alleged, see Neb. Rev. Stat. § 25-222 (Reissue 1989), and is not tolled while the petitioner is imprisoned.
4. **Statutes: Legislature: Intent: Appeal and Error.** In settling upon the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
5. **Statutes: Appeal and Error.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed.

Joel G. Lonowski, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellant.

Steven H. Heldt, of Smith, Heldt & McKeone, for appellee.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

David W. Seevers brought this criminal defense legal malpractice action seeking damages in the amount of $12,362.73 for the alleged professional negligence of the defendant, Paul Stephen Potter, stemming from Potter's representation of Seevers in various criminal matters. Upon a demurrer filed by Potter, the district court dismissed Seevers' amended petition on the ground that it was barred by the statute of limitations, Neb. Rev. Stat. § 25-222 (Reissue 1989). Seevers asks this court to determine that the statute of limitations for pursuing a legal malpractice claim against a criminal defense attorney is tolled until postconviction relief is granted. We affirm because Seevers' imprisonment did not toll the statute of limitations.

ASSIGNMENTS OF ERROR

Seevers contends that the district court erred in (1) concluding that Seevers' cause of action was barred by the statute of limitations and (2) finding that the statute of limitations was not tolled when Seevers sought postconviction relief.

FACTUAL BACKGROUND

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994). With that in mind, we take as true for the purposes of the demurrer the following facts set forth by Seevers in his amended petition.

In July 1989, Seevers was arrested and charged with possession of controlled substances, distribution of controlled substances, and violation of probation. Thereafter, Seevers retained Potter to represent him with regard to the criminal charges. During the course of Potter's legal representation of Seevers, Potter advised Seevers that he could not sustain a viable defense to the criminal charges and suggested that it would be in Seevers' best interests to negotiate a plea bargain. Pursuant to Potter's advice, Seevers pled no contest to all charges in exchange for the prosecutor's agreement to dismiss other criminal matters which were allegedly pending against Seevers.

According to Seevers, Potter advised that if Seevers accepted the plea agreement, Seevers would be sentenced to an aggregate total of 3 to 6 years' imprisonment in a minimum security facility. In fact, the district court sentenced Seevers to an aggregate term of 7 to 15 years in the Nebraska State Penitentiary. Immediately following sentencing, Seevers requested that Potter take the necessary steps in order to appeal the sentences imposed by the district court. Potter allegedly represented to Seevers that he would perfect such an appeal, but subsequently failed and refused to do so. Seevers began serving his sentences.

During his incarceration, Seevers retained different counsel in an attempt to obtain early parole. Seevers' request for early parole was denied. Subsequently, in August 1992, Seevers employed a third attorney and filed a motion in the district court for Lincoln County, requesting the court to vacate and set aside his original sentences on the grounds that Potter's actions violated Seevers' constitutional rights. On September 2, the district court sustained Seevers' motion and vacated his sentences. On September 9, Seevers was resentenced to 2 to 5 years for both controlled substance charges and not less than 1 year for the probation violation.

Seevers filed the original petition in the instant legal malpractice action on September 8, 1993, contending that Potter was negligent in failing to exercise the ordinary skill and knowledge of an attorney in the State of Nebraska and Lincoln County and that Potter failed and refused to (1) properly advise Seevers of the ramifications of entering into the original plea bargain agreement prior to his sentencing in February 1990 and (2) timely appeal Seevers' February 1990 sentences. Seevers requested $12,362.73 in damages, reflecting the attorney fees and costs he incurred in filing his various appeals and motions.

In response to Seevers' amended petition, Potter filed a demurrer arguing that Seevers' amended petition failed to set forth facts sufficient to state a cause of action. The district court found that Seevers' action was barred by § 25-222 and sustained Potter's demurrer. Seevers elected to stand on his amended petition, and the district court dismissed Seevers' action.

STANDARD OF REVIEW

In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Proctor v. Minnesota Mut. Fire & Cas., ante* p. 289, 534 N.W.2d 326 (1995); *Carlson v. Metz, ante* p. 139, 532 N.W.2d 631 (1995); *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995). As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under

review. *George Rose & Sons v. Nebraska Dept. of Revenue, ante* p. 92, 532 N.W.2d 18 (1995); *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995); *Winslow v. Hammer*, 247 Neb. 418, 527 N.W.2d 631 (1995).

ANALYSIS

As a preliminary matter, we note that neither the trial court nor this court was asked to address whether Seevers may maintain an action for legal malpractice under the facts set forth in his petition, since he obtained only a reduction in sentence rather than an acquittal. Rather, we are asked to determine only whether Seevers' imprisonment tolled the statute of limitations. An appellate court will not consider on appeal an issue that was not presented to or passed upon by the trial court. *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994). Thus, for the purposes of this opinion, we assume, without deciding, that Seevers has pled a viable cause of action.

Section 25-222 states:

> 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.

Seevers argues that in legal malpractice claims related to criminal defense, the statute of limitations is tolled until the criminal defendant successfully obtains postconviction relief.

Though it is not expressed in his brief on appeal, Seevers necessarily couches his argument in the language in § 25-222 which allows a client to bring a claim for legal malpractice within 1 year from the date of discovery when the client did not and could not reasonably have discovered the cause of action within the prescribed 2-year period. Seevers intrinsically argues that in cases involving legal malpractice claims involving criminal defense attorneys, it is not reasonably possible for the client to discover his or her cause of action for professional negligence until the client successfully petitions for postconviction relief.

Potter correctly notes that the language of § 25-222 and this court's previous opinions clearly indicate the statute of limitations on professional negligence claims begins to run upon the occurrence of the alleged act of negligence. See, *Seagren v. Peterson*, 225 Neb. 747, 407 N.W.2d 790 (1987); *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984). Potter also argues that the statutory language and the cited cases support the proposition that Seevers' imprisonment and motions for postconviction relief did not toll the statute of limitations because this court has "consistently held that non-discovery of all damages is not the equivalent of non-discovery of a cause of action as set forth in § 25-222." Brief for appellee at 6. In essence, Potter contends that a criminal defendant can *never* bring an action for negligence against his or her defense counsel more than 2 years after the occurrence of the alleged negligent conduct.

Case law from other jurisdictions provides support for both arguments. As support for his contention that his imprisonment tolled the statute of limitations on his professional negligence claim, Seevers cites *Shaw v. State, Dept. of Admin., PDA*, 816 P.2d 1358 (Alaska 1991). Shaw was convicted in 1973 on two counts each of burglary and robbery. On August 15, 1986, Shaw's convictions were set aside as being constitutionally defective, at least in part because of a conflict of interest between Shaw, his codefendant, and the attorney who represented both defendants. On January 13, 1988, Shaw filed a complaint alleging that his trial counsel negligently allowed a conflict of interest to lead to his 1973 convictions. The trial

counsel raised the defense of the statute of limitations.

The Alaska Supreme Court held that Shaw's professional negligence claim was not barred by the statute of limitations. The *Shaw* court formulated a rule wherein it held that a convicted criminal defendant had to obtain postconviction relief before pursuing an action for legal malpractice against his or her attorney. Since the criminal defendant could not know for certain whether he or she would successfully obtain postconviction relief until such relief was actually granted, the *Shaw* court held that the statute of limitations for filing a legal malpractice claim had to be tolled until such relief was granted. The *Shaw* court held that public policy required some form of postconviction relief as a prerequisite to filing a legal malpractice claim:

> "This is so because criminal prosecutions involve constitutional and procedural safeguards designed to maintain the integrity of the judicial system and to protect criminal defendants from overreaching governmental actions. These aspects of criminal proceedings make criminal malpractice cases unique, and policy considerations require different pleading and substantive rules."

816 P.2d at 1360 (quoting *Carmel v. Lunney*, 70 N.Y.2d 169, 511 N.E.2d 1126, 518 N.Y.S.2d 605 (1987)).

Furthermore, the *Shaw* court found that the requirement of postconviction relief promoted judicial economy because many of the issues litigated in the quest for postconviction relief, such as proximate cause and damages, would be duplicated and relevant in the legal malpractice action. The court noted that if the defendant was denied postconviction relief, collateral estoppel would serve to eliminate frivolous malpractice claims. Additional benefits of requiring postconviction relief were described as follows:

> Moreover, requiring post-conviction relief as a prerequisite to a legal malpractice action aids in determining whether the statute of limitations bars the action. By adopting the date that post-conviction relief is obtained as the trigger to the statute of limitations, we establish a bright line test which should significantly assist

> courts in the resolution of statute of limitations issues.
>
> Systemic concerns also support such an approach. Mallen and Smith note "the litigious nature of incarcerated persons who occupy the time of their incarceration by pursuing civil actions against their former attorneys." [2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 21.3 at 290 (3d ed. 1989)]. Also of concern is the attorney who, in the course of defending against a malpractice action, might produce privileged or other evidence in his or her defense that might hurt a criminal defendant with a legitimate basis for post-conviction relief. Finally, we note the desirability of allowing a criminal defendant with a valid post-conviction relief claim to pursue that remedy without the distraction of also filing a legal malpractice claim.

816 P.2d at 1361.

The court's reasoning in *Shaw* was based primarily on public policy and judicial economy concerns. The *Shaw* court established a "bright line" rule for determining when the statute of limitations begins running on a legal malpractice claim by a criminal defendant against his or her trial counsel. The simplicity of the rule appears attractive at first blush. Furthermore, the *Shaw* rule provides the additional benefit of preempting meritless civil malpractice claims by requiring the criminal defendant to successfully obtain postconviction relief as an element of the malpractice claim.

Despite its advantages, the Michigan Supreme Court rejected the *Shaw* rule in *Gebhardt v O'Rourke*, 444 Mich. 535, 510 N.W.2d 900 (1994). In *Gebhardt*, the criminal defendant was convicted on January 8, 1987, of aiding and abetting a rape. The defendant successfully petitioned the trial court for a new trial, and on July 11, 1988, the trial court entered a judgment of acquittal. The order of acquittal became final on April 19, 1989. On November 3, the criminal defendant initiated a legal malpractice lawsuit against her criminal trial counsel. The statute of limitations in Michigan required the plaintiff in a legal malpractice case to file suit within 2 years of the attorney's last day of service or within 6 months of when the plaintiff discovered or should have discovered the claim.

The criminal defendant in *Gebhardt* argued, inter alia, that the 2-year statute of limitations should have been tolled until she successfully obtained postconviction relief. The criminal defendant's argument is essentially the same as the rule announced by the *Shaw* court. The *Gebhardt* court rejected the *Shaw* rule, calling it a "legal fiction with serious analytical flaws." 444 Mich. at 548, 510 N.W.2d at 906. The *Gebhardt* court found the policy arguments set forth by the *Shaw* court to be unpersuasive when balanced against the policies underlying the statute of limitations and the court's obligation to uphold the Legislature's intent: "Issue preclusion and collateral estoppel should be utilized in the appropriate case. However, the availability of these devices should not lead to a subversion of the statute of limitations by allowing a criminal defendant to first obtain postconviction relief before starting the clock on the limitation period." 444 Mich. at 549-50, 510 N.W.2d at 906-07.

The *Gebhardt* court recognized that the policy arguments set forth in the *Shaw* decision addressed some substantial concerns with regard to the conflict between simultaneous criminal postconviction actions and civil malpractice actions involving the same issues. However, the *Gebhardt* court analyzed the situation in a manner that provided a strict reading of the statute of limitations while addressing the problems posed by multiple litigations:

> As pointed out by defendants, situations are numerous where a criminal matter is pending before a court, and a related civil suit arising out of that criminal matter is also pending. Commonly, the court presented with the civil suit will yield to the criminal matter, allowing it to proceed so that the rights of the criminal defendant will not be infringed. Thus, the civil and criminal cases proceed along separate tracks, without danger that the two will collide producing waste of judicial resources or unfairness to the criminal defendant.
>
> The "two track" approach adopted today recognizes that a criminal defendant who has initiated postconviction relief proceedings should have knowledge sufficient to have discovered his claim against his initial defense

> attorney for statute of limitation purposes. In order to put the defense attorney on notice that he will have to defend against a malpractice claim, and thereby honor the policies underlying the statute of limitations, the criminal defendant must file his malpractice complaint within six months of discovering the existence of the claim, or within two years of his attorney's last day of service in the matter in which the alleged negligence occurred.
>
> With his claim preserved, he can and should seek a stay in the civil suit until the criminal case is resolved. The trial court handling the civil suit would have discretion regarding whether the stay would continue until judgment in the criminal matter is final or, if after the initial judgment on postconviction relief, justice would permit going forward with the civil suit while the appeal process in the criminal matter continues until final determination.

444 Mich. at 550–51, 510 N.W.2d at 907.

We find the Michigan Supreme Court's analysis in *Gebhardt* more persuasive and adopt that reasoning as it pertains to the instant case. As this court has held previously, the Nebraska Legislature, in adopting § 25–222, opted for the occurrence rule, tempered or ameliorated by a provision for discovery. *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984). In other words, the statute of limitations begins running upon the occurrence of the professional negligence alleged, not when the plaintiff realizes the damage caused by the negligence. The fact that the plaintiff is imprisoned subsequent to his or her conviction does not affect the plaintiff's ability to reasonably recognize that he or she might have a viable claim for legal malpractice against his or her criminal trial counsel.

In settling upon the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *George Rose & Sons v. Nebraska Dept. of Revenue, ante* p. 92, 532 N.W.2d 18 (1995); *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995); *Anderson v. Nashua Corp.*, 246 Neb.

420, 519 N.W.2d 275 (1994). In the absence of anything indicating 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. *Proctor v. Minnesota Mut. Fire & Cas., ante* p. 289, 534 N.W.2d 326 (1995); *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995); *Russell v. State*, 247 Neb. 885, 531 N.W.2d 212 (1995).

The plain language of § 25-222 mandates that a claim for legal malpractice be brought within 2 years of the occurrence of the negligence, or within 1 year of the time that the professional negligence was or reasonably could have been discovered. Without attempting to pinpoint the exact date, we hold that Seevers could reasonably have discovered that he had a potential cause of action for legal malpractice against Potter prior to September 8, 1992—the date exactly 1 year prior to the date upon which Seevers filed his original petition in the instant action. Therefore, Seevers' cause of action is barred by the statute of limitations.

AFFIRMED.

FAHRNBRUCH, J., not participating.

TODD A. OLIVER, APPELLANT, V. FELISHA E. CLARK, APPELLEE.

537 N.W.2d 635

Filed October 6, 1995. No. S-93-1063.

1. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
2. ____: ____. After a movant for summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.
3. **Summary Judgment: Appeal and Error.** In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light

most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence.

4. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. ____. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
6. ____. As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed.
7. **Insurance: Compromise and Settlement: Releases.** A settlement agreement which purports to release any and all claims for accident-related damages may be set aside on grounds of mutual mistake where there are injuries of a serious character wholly unknown to the parties which were not taken into consideration when the release was executed.
8. ____: ____: ____. A mutual mistake of fact must relate to either a present or past fact or facts that are material to the contract of settlement, and not to an opinion as to future conditions as the result of present known facts. A mistake as to the future development of a known injury is a matter of opinion, and is not one of fact, and is not such a mistake as will avoid a release.
9. **Insurance: Compromise and Settlement: Releases: Intent.** Language in an insurer-prepared release which indicates that the settlement covers all injuries, "known and unknown," does not in and of itself conclusively demonstrate the parties' intent to settle claims for unknown injuries.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded for further proceedings.

Michael M. O'Brien, of Cannon, Goodman, O'Brien & Grant, P.C., for appellant.

Waldine H. Olson and Christopher D. Curzon, of Schmid, Mooney & Frederick, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

Todd A. Oliver, plaintiff-appellant, brought this action seeking recovery of damages for bodily injuries allegedly sustained on October 7, 1991, in an automobile collision with a vehicle driven by defendant-appellee, Felisha E. Clark. In defense of the action, Clark asserted that on October 25 Oliver received settlement funds and executed a document entitled

"Release of All Claims," which released her from all damage claims arising from that accident. On Clark's motion for summary judgment, the district court determined that the release and settlement bound Oliver, and the action was dismissed with prejudice. Oliver appealed to the Nebraska Court of Appeals, assigning as error that there is a question of fact whether such release is binding because of the parties' alleged mutual mistake relating to the nature and extent of the injuries Oliver had sustained in the accident. In order to regulate the caseloads of the appellate courts, we, on our own motion, removed the matter to this court. On the record in this case, we conclude that a genuine issue of fact exists as to whether the parties intended the release to cover the injury which Oliver presently asserts he sustained in the automobile accident. Accordingly, we reverse, and remand for further proceedings.

FACTUAL BACKGROUND

On October 7, 1991, a pickup truck driven by Clark collided with an automobile driven by Oliver in the Time Out Chicken parking lot on North 30th Street in Omaha, Nebraska. As a result of the collision, Oliver sustained property damage to his automobile and apparently minor injuries to his neck, which produced initial symptomatology of minor pain and swelling of the neck. On October 8, Oliver sought medical treatment from his private physician. X rays failed to indicate any fracture to Oliver's vertebrae, and he was treated and discharged.

On October 22, 1991, Oliver contacted Clark's insurer, indicating that he had received injuries to his back, neck, and arms. On that date, an agent for the insurer offered Oliver $200 to settle his bodily injury claim. Oliver rejected the offer and demanded $1,000 to settle the claim. On October 23, Oliver again contacted the insurer by telephone. During this conversation, Oliver reported that he had received x rays on October 22 and that nothing was wrong with him other than a twisted neck. After some brief negotiations, the agent for the insurer agreed to pay Oliver $500 plus all medical bills incurred to that date in settlement of Oliver's bodily injury claim. Oliver indicated that this settlement was satisfactory to him and stated that he wanted the entire matter settled by October 25.

On October 25, 1991, a document entitled "Release of All Claims" was executed by Oliver in the presence of an agent of the insurer, which document purported to release Clark "from any and all claims . . . arising from . . . an accident that occurred on or about the 7th day of October 1991 . . . [.] [T]his settlement shall apply to all unknown and unanticipated injuries and damages resulting from said accident . . . as well as to those now disclosed.".

In accordance with the release, Oliver was initially paid $500, and he received additional payments of $1,054 on November 20, 1991, and $34 on December 13 in payment of medical bills incurred prior to the signing of the release.

Following the signing of the release, Oliver's condition progressively deteriorated, and he continued to seek medical treatment regarding severe pain in the area of his neck. On December 5, 1991, Oliver visited Immanuel Medical Center where a CT scan was performed, and Oliver was diagnosed with a transverse fracture of the odontoid of the second cervical vertebra. Stabilization surgery was performed at AMI Saint Joseph Hospital (St. Joseph's) on December 19, which was followed by complications and has resulted in alleged permanent injury to Oliver.

DISTRICT COURT PROCEEDINGS

On February 12, 1993, Oliver filed a petition in the district court for Douglas County, alleging negligence on the part of Clark in regard to the automobile accident and seeking damages for permanent injuries and additional medical expenses incurred by Oliver after the signing of the release. Clark filed an answer denying the allegations in Oliver's petition and asserted that Oliver's execution of the document entitled "Release of All Claims" released her from all damage claims arising from the accident. Oliver's reply alleged that at the time of the signing of the release he was not mentally competent to enter into the settlement agreement. Clark subsequently filed a motion for summary judgment in the district court.

At the hearing on Clark's motion for summary judgment, Oliver sought to invalidate the release and settlement on grounds of mutual mistake. Oliver offered his own affidavit, which was received without objection, and attached to the

affidavit were records from the Douglas County Board of Mental Health and medical records from St. Joseph's and Immanuel. Oliver's affidavit and the attached medical records reveal that he has a long history of mental illness and, in fact, had been committed by the board of mental health to various institutions for mental health treatment on at least four occasions in the 4 years preceding the accident. In addition, the medical records attached to Oliver's affidavit set forth the initial diagnosis of no fractures on October 8, 1991, the diagnosis of the transverse fracture of the odontoid of the second cervical vertebra on December 5, and the resultant stabilization surgery that was performed on December 19. In opposition to Oliver's claim, Clark offered affidavits of Saralyn Serratore and Diana Thompson, claim representatives of Clark's insurer, which set forth the entire contents of the release of claims and the fact that the insurer paid all sums of money the insurer had agreed to pay pursuant to the terms of the settlement agreement. In addition, Serratore's affidavit revealed that Oliver informed her on November 20 that he was suffering from a psychotic condition known as paranoid schizophrenia.

The district court rejected the claim that a mutual mistake between Oliver and Clark's insurer had occurred and granted summary judgment in favor of Clark, dismissing Oliver's petition with prejudice.

SCOPE OF REVIEW

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. After a movant for summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995).

In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence. *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995).

Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Krohn v. Gardner, ante* p. 210, 533 N.W.2d 95 (1995).

ANALYSIS

The crucial question on a motion for summary judgment is whether there exists a "genuine issue as to any material fact." See Neb. Rev. Stat. § 25-1332 (Reissue 1989). The alleged factual dispute in this appeal concerns whether Oliver's late-diagnosed injury and asserted disability are reached by the release. 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. *Grover, Inc. v. Papio-Missouri Riv. Nat. Res. Dist.*, 247 Neb. 975, 531 N.W.2d 531 (1995); *Maloley v. Shearson Lehman Hutton, Inc.*, 246 Neb. 701, 523 N.W.2d 27 (1994). "[A]s a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed." *Wachtel v. Beer*, 229 Neb. 392, 399, 427 N.W.2d 56, 61 (1988). Accord *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992).

MUTUAL MISTAKE

Nebraska has long followed the majority rule that a settlement agreement which purports to release any and all claims for accident-related damages may be set aside on grounds of mutual mistake where there are injuries of a serious character wholly unknown to the parties which were not taken into consideration when the release was executed. See, *Frahm v. Carlson*, 214 Neb. 532, 334 N.W.2d 795 (1983); *Swartz v. Topping*, 191 Neb. 41, 213 N.W.2d 718 (1974); *Schmidt v. City of Lincoln*, 151 Neb. 317, 37 N.W.2d 500 (1949); *La Rosa v. Union P. R. Co.*, 142 Neb. 290, 5 N.W.2d 891 (1942); *Collins v. Hughes & Riddle*, 134 Neb. 380, 278 N.W. 888 (1938);

Simpson v. Omaha & C. B. Street R. Co., 107 Neb. 779, 186 N.W. 1001 (1922).

In the seminal *Simpson* case, this court set forth:

> Where one who has sustained personal injuries, and with his attention directed to the known injuries, which are trivial in their nature, contracts for the settlement of his damages with reference thereto, in ignorance of other and more serious injuries, both parties at the time believing that the known injuries are all the injuries sustained, then there is a mutual mistake, and the release, although couched in general terms, should be held not to be a bar to an action for the more serious and unknown injuries.

107 Neb. at 783, 186 N.W. at 1003.

This court further explained the rule, as follows:

> [T]he true rule is that the mistake must relate to either a present or past fact or facts that are material to the contract of settlement, and not to an opinion as to future conditions as the result of present known facts. A mistake as to the future development of a known injury is a matter of opinion, and is not one of fact, and is not such a mistake as will avoid a release; but, where the mistake is as to the extent of the injury due to unknown conditions or relates to injuries that were wholly unknown, then the release may be avoided, unless it further appears that the parties were contracting with respect to possible unknown injuries, and the releasor intended to relinquish all claims, whether known or unknown.

107 Neb. at 782, 186 N.W. at 1003.

In *Simpson*, the plaintiff fell while boarding a streetcar. The only known personal injury consisted of a superficial injury to the plaintiff's knee. The $50 release was for torn clothing and the superficial knee injury. After a few months, serious physical and emotional injuries developed. The release recited that the defendant was released " 'from any and all cause or causes of action, costs, charges, claim or demand, of whatever name or nature, in any manner arising or to grow out of an accident occurring . . . .' " *Id.* at 780, 186 N.W. at 1002. In *Simpson*, we held that the release was executed under a mutual mistake of the parties, and the plaintiff was not barred from recovery of

damages for the injuries that were unknown to both parties at the time the release was executed.

In a case factually similar to the instant cause, the U.S. Court of Appeals for the Eighth Circuit correctly applied Nebraska law in reversing a district court summary judgment and remanding the cause for further proceedings because the determination of the intention of the parties at the signing of a release was a fact question based on the lower court record. *McCamley v. Moss*, 587 F.2d 391 (8th Cir. 1978). In *McCamley*, the claimant was involved in an automobile accident and sustained some apparently minor back and neck injuries as a result of the accident. X rays failed to indicate any fractures, and the claimant's back and neck pains soon subsided. The insurance company ultimately tendered the claimant $700 for car repair, out-of-pocket expenses, medical treatment, and injuries (known and unknown, developed or undeveloped). Sixteen months after the accident, additional x rays were taken, and the x rays revealed a possible compression fracture of the C-6 vertebral disk. As a result of the original x rays showing no fractures and the relatively minor $700 payment in consideration for the release, the Eighth Circuit held that "Moss did not establish, within the language of *Simpson*, that 'the releasor [McCamley] intended to relinquish all claims, whether known or unknown.' " 587 F.2d at 395. The court went on to state that unless further evidence conclusively established that the claimant's present medical complaint reflects the future development of a known injury, "the issues [of intent and mutual mistake] should be submitted to a jury." *Id.*

Oliver, to avoid the release in this case, must demonstrate that his present condition is not the result of the development of an injury known at the execution of the release, but is an injury that was wholly unknown at the release's signing. A mistake as to the future development of a known injury is not such a mistake as will avoid a release. *Simpson v. Omaha & C. B. Street R. Co.*, 107 Neb. 779, 186 N.W. 1001 (1922). Put another way, an inaccurate or incomplete diagnosis is often the type of mistake that relates "to either a present or past fact or facts that are material to the contract of settlement" and may lead to a mutual mistake of fact by parties during settlement negotiations. See *id.* Whereas a mistaken or uncertain

prognosis of a known injury is most often a matter of opinion, it is not one of fact and is not such a mistake as will avoid a release.

To ultimately succeed in setting aside the release, Oliver must produce evidence to establish that the parties were not aware of any serious injuries caused by the accident and that the parties contracted for a settlement only with respect to the known minor injuries. In the December 18, 1991, St. Joseph's history and physical form dictated by Dr. Charles Taylon, it was revealed that Oliver saw his private physician the day after the accident and that "cervical spine films were obtained and no fractures were noted. The patient was seen in follow-up in Emergency Department at St. Joseph's. Upon reviewing the films it was not felt the patient had a fracture and he was discharged home." Any fracture-type injury to the cervical vertebra, for which Oliver now seeks recovery, was not disclosed by the x rays taken shortly after the accident. In addition, Serratore's affidavit confirmed that Oliver had contacted the insurer on October 23 and reported that he had received x rays on October 22 and that "nothing was wrong with him other than a twisted neck." Oliver and the insurer reached a settlement agreement on this very same date. This evidence, together with the fact that only $500, plus current medical bills, was paid in consideration for the release, creates an inference that the parties may have been contracting solely for a minor "twisted neck" injury, claimed by Oliver as of October 23, rather than the later-diagnosed fracture of the second cervical vertebra.

Intention of Parties

Language in an insurer-prepared release, such as the one in this case, which indicates that the settlement covers all injuries, "known and unknown," does not in and of itself conclusively demonstrate the parties' intent to settle claims for unknown injuries. *Id.* See, also, *McCamley v. Moss*, 587 F.2d 391 (8th Cir. 1978) (applying Nebraska law).

Clark did not establish, within the language of *Simpson*, that "the releasor [Oliver] intended to relinquish all claims, whether known or unknown." Although the release form and the insurance adjusters' affidavits support the conclusion that the

insurer may have contracted with respect to unknown injuries, that is not dispositive of Oliver's intent to relinquish "all unknown and unanticipated injuries and damages resulting from said accident . . . as well as to those now disclosed." The record in this case does not establish *as a matter of law*, under the *Simpson* standard, that both parties intended the release to cover possible unknown injuries arising from the accident.

The medical evidence concerning the status of Oliver's injury is not clear, since it merely consists of a history and physical form from St. Joseph's and a radiology report from Immanuel. There was no conclusive evidence introduced by either party regarding the causation of Oliver's cervical vertebra fracture as it was diagnosed on December 5, 1991. The record is unclear as to whether Oliver's present condition resulted from the development of a known injury to the neck or is due to injuries wholly unknown at the execution of the release. In light of the circumstances surrounding the signing of the release and the status of the medical evidence, we hold that a genuine issue of fact exists as to whether the parties intended the release to cover the injury Oliver presently claims he sustained in the accident.

JUDGMENT

Accordingly, we reverse the summary judgment entered against Oliver and remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

THE HORACE MANN COMPANIES, INTERVENOR-APPELLEE AND CROSS-APPELLEE, V. JANET PINAIRE, APPELLEE AND CROSS-APPELLANT, JAMES WILSON, APPELLEE, AND DIANE ZIPAY, APPELLANT.

538 N.W.2d 168

Filed October 6, 1995. No. S-94-142.

1. **Summary Judgment: Appeal and Error.** In an appellate review of a summary judgment, the court views the evidence in a light most favorable to the party

against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

2. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
4. **Insurance: Contracts: Motor Vehicles: Compromise and Settlement.** Under the terms of the Underinsured Motorist Insurance Coverage Act, an insurer can avoid its policy obligation only if the insured's settlement with the tort-feasor adversely affects the insurer's rights.
5. **Courts: Statutes: Legislature: Intent.** Courts are expected to 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. **Compromise and Settlement: Words and Phrases.** The term "settlement" as used in Neb. Rev. Stat. § 60-582 (Reissue 1993) means that the parties to a controversy must come to an agreement that is a final resolution of the controversy.
7. **Claims: Releases: Tort-feasors.** A covenant not to sue is not a present abandonment or relinquishment of a right or claim, but merely an agreement not to enforce an existing cause of action, and although it may operate as a release between the parties to the agreements, it will not release a claim against joint obligors or joint tort-feasors.
8. **Insurance: Contracts: Proof.** The insurer has the burden of proving a breach of a policy clause, and in the absence of showing of prejudice to the insurer, coverage cannot be denied.
9. **Summary Judgment: Proof.** After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.
10. **Judicial Notice: Pleadings: States.** To require a trial court to take judicial notice of the law of another state, the existence of that law must be pleaded.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Hugh I. Abrahamson for appellant.

Patrick L. Tripp, P.C., of Tripp, Schweer & Ferraro, for appellee Pinaire.

Eugene L. Hillman, of McCormack, Cooney, Hillman & Elder, for intervenor-appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

I. INTRODUCTION

Horace Mann Companies (Horace Mann) filed a petition in intervention in the Douglas County District Court requesting a determination of its liability with regard to an automobile insurance policy with an underinsured motorist endorsement. The district court granted summary judgment in favor of Horace Mann and denied Diane Zipay and Janet Pinaire benefits under the policy. Zipay appeals, and Pinaire cross-appeals. Under the authority granted to us by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1994) to regulate the caseloads of the appellate courts of this state, we removed the appeal to this court.

II. SCOPE OF REVIEW

In an appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995).

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995).

Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Krohn v. Gardner, ante* p. 210, 533 N.W.2d 95 (1995).

III. FACTS

On February 10, 1988, Pinaire, Zipay, James Wilson, and Vivian Roper, employees of Omaha Public Schools (OPS), were injured when the OPS automobile in which they were riding was struck from the rear by an automobile driven by Floyd

Sherburne. Sherburne was insured by State Farm Automobile Insurance Company (State Farm), which had a liability policy limit of $50,000 per accident. The OPS vehicle was insured by Aetna Casualty & Surety Company (Aetna), which policy included $100,000 of underinsured motorist coverage. Zipay, the driver of the OPS automobile, was insured by Horace Mann Company. Zipay's policy included "single limit underinsured benefits" in the sum of $300,000.

In December 1989, State Farm paid Pinaire $25,000, and Pinaire and Aetna signed a covenant not to sue Sherburne and State Farm. The agreement was made without the knowledge of Horace Mann. State Farm paid Zipay $9,268 on behalf of Sherburne, but Zipay did not sign a covenant or release. This payment was made without the knowledge or consent of Horace Mann. State Farm paid the balance of its $50,000 liability coverage to other parties in varying amounts.

In September 1991, Aetna intervened to determine the distribution of its underinsured benefits, which Aetna conceded were due and owing to Pinaire, Zipay, and Wilson. On December 6, 1991, Horace Mann intervened to determine what amounts of underinsured benefits, if any, Horace Mann was obligated to pay to the parties under its policy with Zipay. Pinaire's answer prayed for an order declaring that Horace Mann had an obligation to pay Pinaire the $300,000 policy limit. Roper disclaimed any further interest in the payment by Aetna. On March 9, 1992, Pinaire, Zipay, and Wilson, with the consent of Horace Mann, settled with Aetna for the maximum amount of underinsured benefits due under the OPS policy. After reducing its coverage of $100,000 by State Farm's payment of $50,000, Aetna paid Pinaire $34,000, Zipay $8,500, Wilson $2,500, and Roper $5,000.

Horace Mann moved for summary judgment, seeking a declaration of its underinsured liability under its policy with Zipay. The district court entered summary judgment denying Zipay and Pinaire benefits under Horace Mann's policy of underinsured coverage.

The order of summary judgment stated in part:

> [Horace] Mann claims that by reason of the defendant Pinaire and Zipay settling with the tortfeasor Sherburne

> and his carrier State Farm and by accepting payments under State Farm[']s policy and Pinaire giving a covenant not to sue in return for $25,000 and Zipay accepting $8,500 without giving a release or covenant not to sue that Mann's contingent right of subrogation against Sherburne is destroyed and the violation of the policy provisions bars the claims of the defendants under Mann's policy. (Note: State Farm paid out its full liability coverage under its policy). Defendants acknowledge the settlement with the tortfeasor and State Farm, his liability carrier, but claim that Mann's potential subrogation rights have not been adversely affected since Sherburne is for all practical purposes judgment proof and refer to Exhibit No. 3.
>
> However, a careful review of Exhibit No. 3 indicates, without discussion as to whether Sherburne's wife's income and expenses should be considered, that there is $265.84 excess income over expenses. One of the expenses listed is $270.00 per month for charitable contributions. This sum could well be used to pay on a judgment along with the $265.84 excess income or a total of $535.84 is available. There is no doubt in the Court's mind but that the settlements with Zipay and Pinaire have adversely affected Mann's potential subrogation rights and that Mann's policy has been violated so far as the consent to settlement provision is concerned. Hastings v. Fireman's Fund American Insurance Company, 193 Neb. 417, 227 N.W.2d 418 (1975).

The court found it was unnecessary to proceed to answer any additional issues inasmuch as it found that there had been a policy violation that substantially and adversely affected the rights of Horace Mann to pursue subrogation.

IV. ASSIGNMENTS OF ERROR

Pinaire claims the district court erred in sustaining the motions for summary judgment and in determining that her settlement with Sherburne's liability insurance carrier (State Farm) substantially and adversely affected Horace Mann's subrogation interests, thereby allowing Horace Mann to deny underinsured motorist coverage to Pinaire.

Zipay makes nine assignments of error which we summarize as assertions that the court erred (1) in entering summary judgment because there are significant and genuine issues of fact as to whether the settlement between Zipay, Sherburne, and State Farm adversely affected the rights of Horace Mann; (2) in finding no genuine issue of material fact regarding the financial condition of Sherburne and his ability to satisfy a judgment; and (3) in denying Zipay's motion for reconsideration and leave to file an amended answer and cross-petition.

V. ANALYSIS

The issue before us is whether the agreement between State Farm and Pinaire and the payment by State Farm to Zipay allow Horace Mann to deny underinsured motorist coverage to Pinaire and Zipay. Neb. Rev. Stat. § 60-582 (Reissue 1993), now codified at Neb. Rev. Stat. § 44-6413 (Cum. Supp. 1994), provides in pertinent part:

> (1) The underinsured motorist coverages provided in the . . . Act shall not apply to:
>
> (a) Bodily injury . . . of the insured with respect to which the insured . . . makes, without the written consent of the insurer, any settlement with or obtains any judgment against any person who may be legally liable for any injuries if such settlement adversely affects the rights of the insurer[.]

Similar provisions are contained in the language of the policy issued by Horace Mann. Horace Mann's underinsured motorist coverage endorsement provided: "This insurance does not apply: . . . to *bodily injury* to an *insured* with respect to which such *insured* . . . shall, without written consent of the company, make any settlement with any *person* or organization who may be legally liable therefor . . . ."

Under the terms of the Underinsured Motorist Insurance Coverage Act, an insurer can avoid its policy obligation only if the insured's settlement with the tort-feasor "adversely affects" the insurer's rights. Our analysis of § 60-582(1)(a) includes a determination of what is a "settlement" and whether the settlement adversely affected the rights of Horace Mann.

The term "settlement" is not defined within the act. As used

in § 60-582, the term "settlement" appears within the same sentence as "obtains any judgment against any person." Black's Law Dictionary 1372 (6th ed. 1990) describes a settlement, inter alia, as "[i]n legal parlance, implies meeting of minds of parties to transaction or controversy; an adjustment of differences or accounts; a coming to an agreement. . . . To fix or resolve conclusively; to make or arrange for final disposition. . . . Agreement to terminate or forestall all or part of a lawsuit."

Courts are expected to 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. *George Rose & Sons v. Nebraska Dept. of Revenue, ante* p. 92, 532 N.W.2d 18 (1995). We conclude that the term "settlement" as used in § 60-582 means that the parties to a controversy must come to an agreement that is a final resolution of the controversy.

1. ZIPAY

We first examine the agreement with Zipay, concentrating on the question of whether a settlement was entered into between Zipay and State Farm. Zipay received $9,268 from State Farm pursuant to Sherburne's policy, but Zipay did not sign a release or covenant not to sue. Zipay's brief states that this amount was forwarded to Aetna to reimburse it for its subrogation claims arising from workers' compensation benefits paid to Zipay. Aetna subsequently paid $8,500 to Zipay in exchange for a covenant not to sue, which agreement was consented to by Horace Mann.

There is no evidence in the record to indicate that the payment of $9,268 was considered as a final resolution of the matter between Zipay and Sherburne or State Farm. Restatement (Second) of Torts § 900 at 445 (1979) states: "(1) A cause of action for a tort may be discharged by . . . (b) satisfaction, or a release or contract not to sue . . . ." The comment on clause (b) provides: "A satisfaction is the payment made by the tortfeasor or by one acting in behalf of him of an amount that is accepted by the injured party as payment in full for his injury." *Id.*, § 900, comment *b*. at 446. There is no evidence that Zipay accepted the money from State Farm as

payment in full for her injuries or agreed that such payment would be a final resolution of the matter between Zipay and Sherburne. In *McCurry v. School Dist. of Valley*, 242 Neb. 504, 515, 496 N.W.2d 433, 440 (1993), we stated:

> Currently, the standard for determining the effect of an agreement purporting to operate as a "release" under Nebraska law is controlled by two factors: (1) whether the injured party has received full satisfaction and (2) whether the parties intended that the release be in full satisfaction of the injured party's claim.

The record does not support the position that the payment to Zipay operated as a release.

Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Krohn v. Gardner, ante* p. 210, 533 N.W.2d 95 (1995). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995).

Therefore, we conclude as to Zipay that neither § 60-582(1)(a) nor the exclusion in Horace Mann's policy applies because there was no settlement between Zipay and Sherburne or State Farm. The district court erred in granting summary judgment as to the issues involving Zipay.

2. Pinaire

(a) The Settlement

In consideration of $25,000, Pinaire agreed not to sue Sherburne or State Farm. In *McCurry*, we defined a covenant not to sue:

> " ' " '[A] covenant not to sue is not a present abandonment or relinquishment of a right or claim but merely an agreement not to enforce an existing cause of action, and, although it may operate as a release between the parties to the agreements, it will not release a claim

against joint obligors or joint tortfeasors.' . . ." ' "
242 Neb. at 516, 496 N.W.2d at 441. In the case of a single tort-feasor, the covenant not to sue and the release have the same practical effect. Pinaire is barred from suing Sherburne. The agreement between Pinaire, Sherburne, and State Farm is a settlement for purposes of § 60-582 and Horace Mann's policy.

(b) Adverse Effect Upon Horace Mann

We must next determine whether the settlement by Pinaire adversely affected Horace Mann. If Sherburne was "judgment proof," then Horace Mann was not adversely affected by the settlement.

Pinaire cites *Kapadia v. Preferred Risk Mut. Ins. Co.*, 418 N.W.2d 848 (Iowa 1988), in which the Iowa Supreme Court held that insurers could not rely on a consent to settlement clause to deny coverage unless actual financial prejudice to the insurer could be shown to have resulted from the insured's settlement with the tort-feasor.

In denying Horace Mann's coverage, the district court relied upon *Hastings v. Fireman's Fund American Ins. Co.*, 193 Neb. 417, 227 N.W.2d 418 (1975). See, also, *Worobec v. State Farm Mut. Auto. Ins. Co.*, 200 Neb. 210, 263 N.W.2d 95 (1978). In *Hastings* and *Worobec*, the insurers denied coverage to insureds based on violations of consent to settlement clauses in uninsured motorist policies. In *Hastings*, for example, the tort-feasor (Mills) was uninsured, and at the time of the accident, the plaintiff (Hastings) was insured under a policy issued by Fireman's Fund which provided coverage against uninsured motorists. The policy provided that Fireman's Fund was entitled to the proceeds of the judgment against Mills and that nothing should be done by the insured to prejudice the rights of recovery by Fireman's Fund. Hastings argued that breach of the policy should not be a defense because there was no showing of prejudice to Fireman's Fund. We did not directly address whether prejudice to the insurer was required, since we found there was no evidence which would sustain a finding that a judgment against Mills was worthless or that Fireman's Fund was not prejudiced by the covenant not to levy executed by

Hastings in favor of Mills. *Kapadia*, *Hastings*, and *Worobec* do not have any direct application because the issue is controlled by § 60-582, which requires that the settlement adversely affect the rights of the insurer before coverage can be denied.

In granting the summary judgment in the case at bar, the court reviewed the pleadings, the parties' stipulations, and the exhibits. Exhibit 3 was an affidavit which showed that Sherburne had real property of $26,375 and no debts.

Pinaire contends that whether Sherburne was judgment proof is a material question of fact which requires the weighing of evidence such as income and assets of Sherburne, including the extent to which such assets are exempt from the claims of creditors. Pinaire argues that Sherburne was a 78-year-old retired Iowa resident with no earned income whose only sources of income, Social Security and pension payments, were exempt from creditors' claims under Iowa law. Pinaire asserts that Sherburne's home was exempt from creditors' claims and that one-half interest in the home was owned by Sherburne's spouse. Pinaire claims that any subrogation rights Horace Mann possessed against Sherburne were of no value.

In *Iowa Mut. Ins. Co. v. Meckna*, 180 Neb. 516, 144 N.W.2d 73 (1966), we held that the insurer has the burden of proving a breach of a policy clause and that in the absence of showing of prejudice to the insurer, coverage cannot be denied. By moving for summary judgment, Horace Mann has the burden to show that no genuine issue of material fact exists. See *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995). Horace Mann argues that the evidence offered showed that Sherburne was not judgment proof because of his assets described in exhibit 3. We agree.

After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Krohn v. Gardner, ante* p. 210, 533 N.W.2d 95 (1995). Pinaire has not controverted the fact that Sherburne had real property valued at $26,375.

Pinaire's citation to sections of the Iowa Code regarding exemptions and creditors' rights does not create a material issue

of fact as to whether Horace Mann was adversely affected by the settlement. To require a trial court to take judicial notice of the law of another state, the existence of that law must be pleaded. *Calvert v. Roberts Dairy Co.*, 242 Neb. 664, 496 N.W.2d 491 (1993). The record on summary judgment shows that Pinaire did not plead Iowa law. Since we have not been presented with Iowa law, it is presumed to be the same as that of this state. See, *Vanice v. Oehm*, 247 Neb. 298, 526 N.W.2d 648 (1995); *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985).

Pursuant to Nebraska law, the homestead exemption does not exceed $10,000. Neb. Rev. Stat. § 40-101 (Reissue 1993). We find no case in Nebraska where we have construed whether the spouse may also assert a homestead exemption of $10,000. However, in *Matter of Foulk*, 134 B.R. 929 (Bankr. D. Neb. 1991), the husband and wife both asserted the Nebraska homestead exemption. The bankruptcy court found this exemption was defective on its face because the aggregate amount exceeded the statutory limit of $10,000. The bankruptcy court pointed out that under 11 U.S.C. § 522(b)(1) the debtors were entitled to assert the Nebraska exemptions. The bankruptcy court stated that the Nebraska homestead exemption was available only to a head of household and, therefore, limited to $10,000. If the head of the household did not have a homestead exemption, a $2,500 in lieu of homestead exemption can be claimed under Neb. Rev. Stat. § 25-1552 (Reissue 1989). The bankruptcy court stated that, at most, each exemption may be asserted once for an aggregate exemption of $12,500. See *Matter of Nachtigal*, 82 B.R. 533 (Bankr. D. Neb. 1988).

Neb. Rev. Stat. § 25-15,105 (Reissue 1989) states that federal exemptions provided in 11 U.S.C. § 522(d) are rejected by the State of Nebraska. Nebraska retains the personal exemptions provided under Nebraska statutes and the Nebraska Constitution, and such exemptions apply to any bankruptcy petition filed in Nebraska after April 17, 1980.

Therefore, it is uncontroverted that Sherburne's exemption, including his spouse's exemption, was $12,500. This would leave an excess of $13,500 of real property not exempt from execution. The covenant not to sue adversely affected Horace

Mann's rights to subrogation against Sherburne, who was not judgment proof to this extent. The Court of Appeals was correct in entering summary judgment in favor of Horace Mann against Pinaire.

VI. CONCLUSION

We affirm the judgment against Pinaire. We reverse the judgment against Zipay and remand that cause for further proceedings.

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

BRIDGETTE A. ANDERSON AND CANDY S. ANDERSON, BY AND THROUGH THEIR MOTHER, CINDY ANDERSON/COUVILLON, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLANT AND CROSS-APPELLEE.

538 N.W.2d 732

Filed October 20, 1995. No. S-94-547.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach its own independent conclusions.
3. **Appeal and Error.** A claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief.
4. **Negligence: Proof.** In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.
5. **Negligence.** The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
6. ____. Duty is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; in negligence cases, the duty is always the same,

to conform to the legal standard of reasonable conduct in the light of the apparent risk.

7. **Negligence: Words and Phrases.** Duty in negligence cases may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
8. **Negligence.** The risk reasonably to be perceived defines the duty to be obeyed.
9. **Negligence: Proximate Cause: Words and Phrases.** The proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred.
10. **Negligence: Proximate Cause: Proof.** A plaintiff must establish three basic requirements in establishing proximate cause, namely, that (1) without the negligent action, the injury would not have occurred, commonly known as the "but for" rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause.
11. **Negligence: Words and Phrases.** An efficient intervening cause is a new, independent force intervening between the defendant's negligent act and the plaintiff's injury by the negligence of a third person who had full control of the situation, whose negligence the defendant could not anticipate or contemplate, and whose negligence resulted directly in the plaintiff's injury.
12. **Negligence: Liability.** Once it is shown that a defendant had a duty to anticipate an intervening criminal act and guard against it, the criminal act cannot supersede the defendant's liability.
13. **Damages: Words and Phrases.** Hedonic damages are those damages awarded for loss of the enjoyment of life, as measured separately from the economic productive value that an injured person would have had.
14. **Damages.** Loss of the enjoyment of life is not a separate category of damages but is an element or component of pain and suffering and of disability.
15. **Trial: Rules of Evidence: Expert Witnesses: Damages.** Testimony concerning the value of loss of the enjoyment of life based on the "willingness to pay" approach is not admissible, as it neither is scientific nor provides assistance to the trier of fact, as contemplated by Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989).
16. **Trial: Rules of Evidence: Expert Witnesses.** In determining whether an expert's testimony is admissible, a court considers four preliminary and interrelated questions: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony assists the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations.
17. **Trial: Evidence: Appeal and Error.** Ordinarily, the erroneous admission of evidence in a bench trial of a law action is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings; however, a reversal is warranted if the

record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence.

Appeal from the District Court for Frontier County: JOHN P. MURPHY, Judge. Affirmed in part, and in part reversed and remanded for a new trial on the issue of damages.

Don Stenberg, Attorney General, and Royce N. Harper for appellant.

Steven D. Burns, of Burns & Associates, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

CAPORALE, J.

I. INTRODUCTION

This is a tort claims action brought under the provisions of Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1994) in which two minor girls, Bridgette A. Anderson and Candy S. Anderson, by and through their mother, the plaintiff-appellee, Cindy Anderson/Couvillon, allege that the defendant-appellant, Nebraska Department of Social Services, negligently placed the foster care of a minor boy in and with a friend of the mother and that as the proximate result, the boy sexually assaulted and damaged the girls. The district court entered partial summary judgment in favor of the girls on the issue of liability and upon trial awarded them damages as set forth in part IV(3) below. The department then appealed, and we, in order to regulate the caseloads of the two courts, on our own motion ordered the appeal transferred from the Nebraska Court of Appeals to this court.

As argued, the controlling errors assigned by the department may be summarized as claiming that the district court wrongly (1) found the department liable, as its conduct neither violated a duty it owed the girls nor proximately caused their injuries; (2) awarded hedonic damages as a separate and distinct category of damages; and (3) received and considered evidence concerning the computation of damages. The mother cross-appealed on behalf of the girls, assigning as error, in essence, the claimed inadequacy of the damages awarded.

For the reasons which follow, we affirm the partial summary judgment on the issue of liability, but reverse the award of damages and direct a new trial on that issue. Our rationale in so ruling makes consideration of the cross-appeal unnecessary.

II. SCOPES OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Horace Mann Cos. v. Pinaire, ante* p. 640, 538 N.W.2d 168 (1995); *Poppleton v. Village Realty Co., ante* p. 353, 535 N.W.2d 400 (1995). On questions of law, an appellate court has an obligation to reach its own independent conclusions. *Kropf v. Kropf, ante* p. 614, 538 N.W.2d 496 (1995); *McPherrin v. Conrad, ante* p. 561, 537 N.W.2d 498 (1995).

III. FACTS

The mother has three young daughters. Because her close friend, Terry Talle, and Talle's husband enjoyed children but had none of their own, the mother permitted her daughters to spend time at the Talle home, often without her supervision.

In the fall of 1988, Talle and her husband applied for a foster care license from the department. Talle attended all required training sessions, where she learned the department's rules and regulations. The training emphasized paperwork and financial matters but did not include discussion of proper discipline or control of older children, management of an older child's anger, or the relationship between one suffering physical and sexual abuse and becoming an abuser. The Talles' application ultimately was approved, and they accepted placement of two foster children for 2 months.

After those children left the Talle home, department caseworker Christy Johnson Strawder contacted Talle about the possibility of placing then 13-year-old Ronald Heinen with the Talles for foster care. The department knew, but did not disclose to Talle, that Heinen was an exceptionally troubled boy. There existed a well-documented history of self-mutilation;

uncontrollable rage; emotional, physical, and sexual abuse; lying; stealing; and suicidal and homicidal ideations. Indeed, a memorandum prepared by the department's Child Protective Services supervisor, Karen Griffith, noted that Heinen had been admitted to the Sandhills Psychiatric Unit of Great Plains Medical Center because he had said that he was going to commit suicide after killing his biological mother's boyfriend.

Despite the foregoing, Strawder proceeded to seek a new foster home for Heinen. When Talle expressed interest, Strawder informed her only as to Heinen's age, that he used hearing aids, that he was then hospitalized for a tonsillectomy, and that he had participated in a sexual fetish therapy group because of his fetish with women's underwear. Talle was assured, however, that Heinen was not at risk of becoming a sexual offender.

A few days after talking with Strawder, Talle and the mother visited Heinen in the hospital. No one informed either Talle or the mother that in addition to the tonsillectomy, Heinen was also admitted because of his uncontrollable anger and suicidal and homicidal ideations. Following the hospital visit, Strawder took Heinen to spend the night at the Talle home. According to the mother, she informed Strawder at that time that her children spent a great deal of time at the Talle home, often without the mother, and asked Strawder if there were any "risks" with continuing the practice. The mother claims Strawder replied that there were no risks and, in response to another direct inquiry by the mother, stated that the children could be left unsupervised with Heinen. Strawder, however, testified that she recalled no conversation with the mother prior to Heinen's being placed with the Talles.

On the basis of the sleepover and Strawder's encouragement, the Talles agreed to act as foster parents for Heinen and executed a department "Child Placement Agreement," in which the department agreed to "share with the foster care facility prior to placement and during placement, information known about the child's life situation as appropriate and necessary . . . ."

At no time did the department inform Talle about the opinion of Lynda Perry, a psychotherapist who was treating Heinen, that

foster care was not likely to be successful. Neither was Talle told that Heinen had a history of physical and verbal abuse that had caused his removal from prior foster care placements; that a former department caseworker believed the Talles did not possess the skill required to manage Heinen; that Heinen was thought to have suffered emotional, physical, and sexual abuse; that several caseworkers saw a correlation between being a victim of sexual abuse and becoming a perpetrator; that Heinen had homicidal and suicidal ideations; that caseworkers familiar with Heinen, his psychiatrist, and his psychologist believed Heinen's case to be the most difficult they had ever seen; and that if left unsupervised, Heinen posed a distinct threat to children.

Perry advised Strawder in January 1990 that Heinen was at "high risk sexually" and should not be left alone with children. Strawder did not pass this information on to either Talle or the mother. One month later, Perry urged Strawder to make the Talles aware of Heinen's sexual problems. Again, Strawder failed to communicate this to Talle or the mother.

Shortly thereafter, unbeknownst to Talle, Heinen began physically attacking Candy Anderson, who was then approximately 13 years old. He repeatedly attempted, with varying degrees of success, to kiss and fondle her; she, also with varying degrees of success, attempted to fight him off. In June 1990, while the children were in Denver with Talle and the mother, Heinen began sexually assaulting Bridgette Anderson, who was then 7 years old.

On October 2, 1990, Perry informed Talle that Heinen had confessed to sexually assaulting the two girls. Talle confronted Heinen, and he repeated his confession to her. Talle thereupon immediately reported this to the department and informed the department that she was barring Heinen from her home.

Since Heinen's removal from the Talle home, the two girls have exhibited symptoms of posttraumatic stress syndrome and have required intense therapy. The younger girl was diagnosed with severe trauma associated with sexual assault, has required intensive therapy, and has shown only minimal improvement. The older girl was also diagnosed with posttraumatic stress syndrome, and her psychologist observed that certain

preexisting conditions in her were significantly exacerbated by the assaults.

IV. ANALYSIS

With that factual background before us, we proceed to consider in turn each of the department's arguments and controlling assignments of error.

1. Liability

In asserting that the district court erred in determining the department is liable to the girls, the department urges that although it owed a duty to Talle, it owed no duty to inform the mother and the girls of Heinen's history, and further that its conduct was not the proximate cause of the girls' injuries.

(a) Duty

We note at the outset of our consideration of the duty question the conflict in the evidence arising from the mother's testimony concerning what Strawder told her when Heinen's placement with Talle was being discussed and Strawder's failure to recall any such conversations. However, any question of material fact such conflict may present becomes unimportant, for although the issue is within the reach of the department's assignment that the district court erred in "holding that there was no genuine issue of material fact on the issue of liability," this conflict in the evidence is not argued by the department.

Because a claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party, *Brewer v. Brewer*, 244 Neb. 731, 509 N.W.2d 10 (1993), an appellate court will not consider assignments of error which are not discussed in the brief, *Florist Supply of Omaha v. Prochaska*, 244 Neb. 776, 509 N.W.2d 209 (1993). Accordingly, we treat the mother's testimony concerning her conversations with Strawder as being uncontroverted.

That having been established, we recall that in order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994); *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994); *Moore v.*

State, 245 Neb. 735, 515 N.W.2d 423 (1994). The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *S.I. v. Cutler, supra*; *Merrick v. Thomas, supra*; *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

> " '[D]uty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. . . .
>
> "A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."

Schmidt v. Omaha Pub. Power Dist., 245 Neb. 776, 786, 515 N.W.2d 756, 763 (1994) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53 (5th ed. 1984)).

Foreseeability is also a factor in establishing a defendant's duty. *Merrick v. Thomas, supra*; *Schmidt v. Omaha Pub. Power Dist., supra*. As Justice Cardozo stated in *Palsgraf v. Long Island R. R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928), "The risk reasonably to be perceived defines the duty to be obeyed . . . ."

When the mother asked Strawder if her daughters could be left alone with Heinen without risk, the department had ample information that Heinen had a history of violent and abusive behavior. Thus, under the facts of this case, the risk of harm to the girls was foreseeable by the department, and it had a duty, upon direct questioning by the mother, to answer truthfully as to any knowledge it had or later acquired as to Heinen's violent propensities and any danger that the girls might encounter by being left alone with him. Given the department's knowledge and the precise nature of the mother's question, Strawder and the department had a duty to respond truthfully to safety-related inquiries regarding Heinen.

(b) Proximate Cause

The department also asserts that the district court erred in finding that the department proximately caused the girls'

injuries. The proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred. *Moore v. State, supra.* A plaintiff must establish three basic requirements in establishing proximate cause, namely, that (1) without the negligent action, the injury would not have occurred, commonly known as the "but for" rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause. *Merrick v. Thomas, supra.*

The first element of proximate causation is clearly established. The mother stated that had she known of Heinen's background and the risks which were presented by allowing the girls to be around him without adult supervision, she would never have allowed them to be left alone with him.

The second element is also clearly established. By the department's stating that there was no risk in leaving the girls alone with Heinen, it was a natural and probable result that the girls would be left alone with Heinen and would thereby be subjected to sexual abuse. A number of those involved in this case agreed that an adolescent victim of physical and sexual abuse has a risk of becoming a perpetrator, and Perry, Heinen's treating psychotherapist, noted that Heinen should not be left alone with children because of the danger he posed. The foreseeability that Heinen would act in a sexually abusive manner was the hazard that made the department's conduct negligent when it failed to respond truthfully to the mother's questions.

Finally, the third element is established as well. An efficient intervening cause is a new, independent force intervening between the defendant's negligent act and the plaintiff's injury by the negligence of a third person who had full control of the situation, whose negligence the defendant could not anticipate or contemplate, and whose negligence resulted directly in the plaintiff's injury. *Merrick v. Thomas, supra.*

The department offers two different claims of intervening causes that resulted in the girls' injuries. First, the department argues that Heinen's intervening criminal acts were an intervening cause. However, the evidence is that the department

had knowledge of Heinen's violent propensities and that he was at risk of becoming a sexual abuser. It therefore cannot be said that the department could not anticipate or contemplate Heinen's attacks on the girls. The department had a duty to disclose to the mother, upon her direct questioning, the elements of Heinen's history that would pose a hazard to her children. Once it is shown that a defendant had a duty to anticipate an intervening criminal act and guard against it, the criminal act cannot supersede the defendant's liability. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 44 (5th ed. 1984). E.g., *Erichsen v. No-Frills Supermarkets*, 246 Neb. 238, 518 N.W.2d 116 (1994) (store owner liable to patron for foreseeable criminal act on premises); *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994) (landlord liable to tenant for foreseeable assault by third party).

Second, the department argues that it was the mother's negligence in placing the younger girl in the same room as Heinen on the overnight trip to Denver that caused the girls' injuries. Not only does this argument not address the attacks on the older girl, it does not address the subsequent attacks on the younger one. Such an act might be negligent if the mother had been apprised of the risk that Heinen posed to her daughter; the department's problem, however, is that the mother was not so apprised and therefore could not take precautions to guard against Heinen's aggression. Again, based on Heinen's prior history, the department could and should have anticipated Heinen's criminal behavior, but the mother could not because the department did not inform her of Heinen's violent propensities. It therefore was not an efficient intervening cause for the mother to place her daughter in the same room as Heinen on the overnight trip.

(c) Resolution

As a consequence, the district court correctly ruled that there was no genuine issue of material fact concerning the department's liability.

2. Hedonic Damages

The department also contends that the district court erred in awarding hedonic damages, which we define in this context as

the damages arising from loss of the enjoyment of life, as measured separately from the economic productive value that an injured person would have had. See Black's Law Dictionary 391 (6th ed. 1990).

The issue of hedonic damages is not new in Nebraska. In *Swiler v. Baker's Super Market, Inc.*, 203 Neb. 183, 187-88, 277 N.W.2d 697, 700 (1979), we wrote:

> Loss of enjoyment of life may, in a particular case, flow from a disability and be simply a part thereof, and where the evidence supports it, may be argued to the jury. A separate instruction therein may be redundant. We do not recommend such an instruction be given, but find that under the facts of this particular case, where there is evidence from which the jury could find the injuries and resulting disability did cause loss of enjoyment of life, there was no error in giving the instruction, and we do not believe the jury was in any way misled.

Some courts and commentators have construed this passage as indicating that we have recognized hedonic damages as a separate and distinct category of damages, apart from pain and suffering. See, e.g., *Mariner v. Marsden*, 610 P.2d 6 (Wyo. 1980); Pamela J. Hermes, *Loss of Enjoyment of Life—Duplication of Damages Versus Full Compensation*, 63 N.D. L. Rev. 561 (1987). However, we did not go so far in *Swiler* as to hold that hedonic damages were to be recognized as a separate and distinct category of damages; we merely held that on the facts then before us, it was not error for the district court to have given the instruction on hedonic damages that it gave.

In this regard, *Swiler* is similar to the cases *Huff v. Tracy*, 57 Cal. App. 3d 939, 129 Cal. Rptr. 551 (1976), and *Leiker v. Gafford*, 245 Kan. 325, 778 P.2d 823 (1989), *overruled on other grounds, Martindale v. Tenny*, 250 Kan. 621, 829 P.2d 561 (1992). In both of those cases, the respective courts held that loss of the enjoyment of life was not a separate and distinct category of damages apart from pain and suffering, but that the instructions given which treated it as such did not amount to reversible error.

It is true that in *Swiler*, we declared that a majority of courts have approved hedonic damages as a separate category of

nonpecuniary damages that may be instructed upon. However, this statement appears to have been improvident.

> The cases which have considered the issue generally fall into three categories: (1) those which totally reject loss of enjoyment of life as a consideration in awarding damages; (2) those which hold it is not a separate category of damages but may be considered as an element or component of pain and suffering and/or disability; and (3) those which hold loss of enjoyment of life is a separate category of damages.

Leiker v. Gafford, 245 Kan. at 339, 778 P.2d at 834. A slight majority of courts that have considered the issue have adopted the second category. *Leiker, supra*. See, *Dugas v. Kansas City Southern Railway Lines*, 473 F.2d 821 (5th Cir. 1973) (construing FELA); *Sullivan v. U.S. Gypsum Co.*, 862 F. Supp. 317 (D. Kan. 1994) (wrongful death claim); *Ortega v. Plexco, A Div. of Chevron Chemical Corp.*, 793 F. Supp. 298 (D.N.M. 1991) (wrongful death claim); *Sterner v. Wesley College, Inc.*, 747 F. Supp. 263 (D. Del. 1990) (wrongful death claim); *Nichols v. Estabrook*, 741 F. Supp. 325 (D.N.H. 1989) (wrongful death claim); *Funston v. United States*, 513 F. Supp. 1000 (M.D. Pa. 1981) (construing Federal Tort Claims Act); *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 2137, 128 L. Ed. 2d 867 (1994); *Canfield v. Sandock*, 563 N.E.2d 1279 (Ind. 1990); *McDougald v. Garber*, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989); *Poyzer v. McGraw*, 360 N.W.2d 748 (Iowa 1985); *Judd v. Rowley's Cherry Hill Orchards, Inc.*, 611 P.2d 1216 (Utah 1980); *Willinger v. Mercy Catholic Med. Ctr., Etc.*, 482 Pa. 441, 393 A.2d 1188 (1978) (wrongful death claim); *Degen v. Bayman*, 90 S.D. 400, 241 N.W.2d 703 (1976); *Winter vs. Pa. R. R. Co.*, 45 Del. 108, 68 A.2d 513 (1949); *Lombardo v. Hoag*, 269 N.J. Super. 36, 634 A.2d 550 (1993), *cert. denied* 135 N.J. 469, 640 A.2d 850 (1994); *Foster v. Trafalgar House Oil & Gas*, 603 So. 2d 284 (La. App. 1992); *Stroud v. Stroud*, 299 S.C. 394, 385 S.E.2d 205 (S.C. App. 1989); *Leonard v. Parrish*, 420 N.W.2d 629 (Minn. App. 1988); *Wingfield v. Peoples Drug Store, Inc.*, 379 A.2d 685 (D.C. App. 1977); *Huff v. Tracy, supra*; *Underwood v. Atlanta & West Point R. Co.*, 105 Ga. App. 340, 124 S.E.2d 758

(1962), *reversed in part on other grounds* 218 Ga. 193, 126 S.E.2d 785.

We conclude that the better reasoned rule is the rule we adopted in *Swiler v. Baker's Super Market, Inc.*, 203 Neb. 183, 277 N.W.2d 697 (1979), i.e., that loss of the enjoyment of life is not a separate category of damages but is an element or component of pain and suffering and of disability. We therefore adhere to that rule.

As noted in *McDougald v. Garber*, 73 N.Y.2d at 257, 536 N.E.2d at 376–77, 538 N.Y.S.2d at 941:

> If we are to . . . approve a separate award for loss of enjoyment of life, it must be on the basis that such an approach will yield a more accurate evaluation of the compensation due to the plaintiff. We have no doubt that, in general, the total award for nonpecuniary damages would increase if we adopted the rule. That separate awards are advocated by plaintiffs and resisted by defendants is sufficient evidence that larger awards are at stake here. But a larger award does not by itself indicate that the goal of compensation has been better served.
>
> The advocates of separate awards contend that because pain and suffering and loss of enjoyment of life can be distinguished, they must be treated separately if the plaintiff is to be compensated fully for each distinct injury suffered. We disagree. Such an analytical approach may have its place when the subject is pecuniary damages, which can be calculated with some precision. But the estimation of nonpecuniary damages is not amenable to such analytical precision and may, in fact, suffer from its application. Translating human suffering into dollars and cents involves no mathematical formula; it rests, as we have said, on a legal fiction. The figure that emerges is unavoidably distorted by the translation. Application of this murky process to the component parts of nonpecuniary injuries (however analytically distinguishable they may be) cannot make it more accurate. If anything, the distortion will be amplified by repetition.
>
> . . . We are confident . . . that the trial advocate's art is a sufficient guarantee that none of the plaintiff's losses will be ignored by the jury.

Thus, while consideration of loss of the enjoyment of life may properly be considered as it relates to pain and suffering, and to disability, it is improper to treat it as a separate category of nonpecuniary damages. For that reason, the district court's damages award must be reversed.

3. Computation of Damages

Lastly, the department argues that the district court erred in admitting the testimony of Stan Smith, whom the girls' mother proffered as an alleged expert on establishing a formula for calculating the value of lost enjoyment of life.

Smith is an economist holding a bachelor of science degree who has worked toward a doctorate in economics and finance, served as a staff economist with various entities, worked for a financial and economics consulting firm, and now operates his own such firm.

Smith has calculated what he considers to be the average value per statistical life saved. Smith's testimony was based on a "willingness to pay" approach, an approach that encompasses an individual's willingness to pay for safety (e.g., airbags), the willingness to accept payment to endure risk of death in a job (e.g., coal miner), and the costs of government regulations. Utilizing the "willingness to pay" approach, Smith has calculated the average value per statistical life saved to be $2.3 million, in 1988 dollars. He then adjusts this figure based on the life expectancy of the individual in question and the fact that, except in a death case, not all of the enjoyment of life has been lost, but only some portion of it. Based on his calculations, Smith estimated that the older girl has suffered a loss of between $1,950,000 and $2,127,000, averaging $2,038,724, and that the younger girl has suffered a loss of between $2,442,000 and $2,817,000, averaging $2,629,996.

Although Smith claimed that the "willingness to pay" approach "is not only widely accepted but exclusively accepted as the proper basis for valuing human life" and that it is "exclusively employed in academia," this approach has been subject to severe criticism from both courts and legal commentators. See, *Mercado v. Ahmed*, 974 F.2d 863 (7th Cir. 1992); *Ayers v. Robinson*, 887 F. Supp. 1049 (N.D. Ill. 1995);

Hein v. Merck & Co., Inc., 868 F. Supp. 230 (M.D. Tenn. 1994); *Sullivan v. U.S. Gypsum Co.*, 862 F. Supp. 317 (D. Kan. 1994); *Livingston v. U.S.*, 817 F. Supp. 601 (E.D.N.C. 1993); *Sterner v. Wesley College, Inc.*, 747 F. Supp. 263 (D. Del. 1990); *Montalvo v. Lapez*, 77 Haw. 282, 884 P.2d 345 (1994); *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 2137, 128 L. Ed. 2d 867 (1994); *Foster v. Trafalgar House Oil & Gas*, 603 So. 2d 284 (La. App. 1992); *Fetzer v. Wood*, 211 Ill. App. 3d 70, 569 N.E.2d 1237 (1991); *Southlake Limousine v. Brock*, 578 N.E.2d 677 (Ind. App. 1991); Andrew J. McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 Notre Dame L. Rev. 57 (1990). The majority of jurisdictions considering testimony based on "willingness to pay" studies have concluded that such testimony is inadmissible. *Montalvo v. Lapez, supra*; *Wilt v. Buracker, supra*. The criticism focuses on the fact that the basis of the "willingness to pay" approach is faulty and that the testimony does not satisfy the rules of evidence.

As a practical point, it is impossible to place a dollar figure on how each individual values his or her own life. Government regulators may attempt to do so for purposes of adopting regulations, but any amount they arrive at is a fiction, designed to escape the obvious answer anyone would give when asked what one's own life was worth.

> Consider the paradigmatic plight of Jessica McClure, the little girl who became trapped in the Texas water well in 1987. Extraordinary rescue efforts were undertaken to rescue her, at great cost. It is doubtful, however, that anyone was overheard suggesting that Jessica be left to die because the attempts to rescue her were too costly. In that situation, society deemed Jessica's life to be priceless.

McClurg, 66 Notre Dame L. Rev. at 58.

The "willingness to pay" approach is based on the belief that the value of human life can be determined by "analyzing either production or consumption behavior with respect to risk reduction or avoidance." *Id.* at 102. Three different models are used to arrive at the value of life: (1) consumer purchases of safety devices, (2) wage risk premiums to workers, and (3)

cost-benefit analyses of governmental regulations. There are critical errors in all three models used to arrive at hedonic valuation.

The first model is based on consumption activities of individuals. "From the price differential between a safer product and one less safe, and the reduction of risk of dying supposedly consequent therefrom, an extrapolation is made to arrive at the hedonic value of life." *Hein v. Merck & Co., Inc.*, 868 F. Supp. at 234. However, such reasoning is flawed because it fails to take into consideration the numerous factors that go into a consumer purchase and whether a consumer actually and accurately perceives the risk in making a purchase of one product rather than another.

> For example, spending on items like air bags and smoke detectors is probably influenced as much by advertising and marketing decisions made by profit-seeking manufacturers and by government-mandated safety requirements as it is by any consideration by consumers of how much life is worth. Also, many people may be interested in a whole range of safety devices and believe they are worthwhile, but are unable to afford them. More fundamentally, spending on safety items reflects a consumer's willingness to pay to reduce *risk*, perhaps more a measure of how cautious a person is than how much he or she values life. Few of us, when confronted with the threat, "Your money or your life!" would, like Jack Benny, pause and respond, "I'm thinking, I'm thinking." Most of us would empty our wallets. Why that decision reflects less the value we place on life than whether we buy an airbag is not immediately obvious.

Mercado v. Ahmed, 974 F.2d 863, 871 (7th Cir. 1992). When viewed in this manner, as one commentator pointed out, the willingness to reduce risk, and not the value of one's life, is what drives consumer purchases, and this is the basic flaw in the first model:

> For example, how much would a person demand to play Russian Roulette with a six-chamber revolver loaded with one bullet? The risk is easily computed as a one-in-six chance of death. To know the amount people would

> demand to confront this risk would allow us to calculate with accuracy the value people attach to their lives. We can predict with confidence that the amounts would be tremendous, and that they probably would not vary widely between those who [buy cars with airbags] and those who do not.

Andrew J. McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 Notre Dame L. Rev. 57, 105-06 (1990).

The second model is based on the belief that workers will demand higher wages in return for higher risks of death. "An extrapolation is then made from the differential between salaries for low-risk jobs and high-risk jobs to come up with the hedonic value of life." *Hein v. Merck & Co., Inc.*, 868 F. Supp. 230, 233-34 (M.D. Tenn. 1994). This model suffers from the fact that it assumes workers have free choice in the jobs they take, that they voluntarily assume the risk the job entails, and that they accurately perceive the risk. These assumptions cannot stand up to close scrutiny.

> Diverse barriers—geographic, educational, language and racial, to name but a few—preclude free choice in employment decisions for many groups of people. For example, we cannot say that residents of Appalachian coal mining regions freely choose to be exposed to the risks of coal mining in return for a wage risk-premium. For many, coal mining is the only choice because of their lack of mobility.

McClurg, 66 Notre Dame L. Rev. at 104. Workers may also accept high-risk jobs for a variety of other reasons, including civic pride, the fact that one's mother or father engaged in the work, or that it was the only job available in a tight job market. The fact is that workers accept high-risk jobs based on a number of factors other than any wage-risk premium, calling into question any formula which uses such employment choices as a basis to value a human life. Cf. *Wilt v. Buracker*, 191 W. Va. 39, 48, 443 S.E.2d 196, 205 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 2137, 128 L. Ed. 2d 867 (1994) ("[a]nyone who is familiar with the wages of coal miners, policemen, and firefighters would scoff at the assertion that

these high risk jobs have any meaningful extra wage component for the risks undertaken by workers in those professions").

The third model is based on the cost-benefit analysis conducted by government agencies in deciding whether to adopt a regulation. Smith stated that government studies on the cost-benefit analysis of government "show [a] willingness to implement legislation at a cost of approximately two million dollars per life saved; very little legislation beyond three million." This model is also subject to the criticism that it does not take into account numerous other factors that go into such decisions. One court put it this way:

> [G]overnment calculations about how much to spend (or force others to spend) on health and safety regulations are motivated by a host of considerations other than the value of life: is it an election year? how large is the budget deficit? on which constituents will the burden of the regulations fall? what influence and pressure have lobbyists brought to bear? what is the view of interested constituents? And so on.

Mercado v. Ahmed, 974 F.2d 863, 871 (7th Cir. 1992). Another court pointed out that the amounts reached by government agencies in valuing a human life are often a result of political compromise:

> "The Occupational Safety and Health Administration's (OSHA's) use of risk reduction values in regulatory analysis led the agency into a major conflict with the Office of Management and Budget (OMB) in 1985. OSHA initially attempted to use a value of $3,000,000 per anonymous life saved. The OMB decided that this value was too high and suggested that OSHA use a value of $1,000,000. Eventually, OMB and OSHA reached a compromise of $2,000,000 per life saved." . . . "Although they do not always reveal their methodologies, federal agencies have set life values as low as $70,000 and as high as $132 million per life."

(Citations omitted.) *Ayers v. Robinson*, 887 F. Supp. 1049, 1061 n.4 (N.D. Ill. 1995).

All three models that are used by Smith in valuing a life are thus flawed in one way or another.

In addition to the problems with these three models, the testimony does not satisfy the standards for admissibility of expert testimony under the Nebraska Evidence Rules. In determining whether an expert's testimony is admissible pursuant thereto, a court, in accordance with *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), considers four preliminary and interrelated questions: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony assists the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations. See *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). See, also, *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994) (adheres to *Frye* test). Accord *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994).

Rule 702 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."

One of the criticisms of expert testimony on the value of life is that there is "no basic agreement among economists as to what elements ought to go into the life valuation. There is no unanimity on which studies ought to be considered. There is a lack of reliability." *Mercado v. Ahmed*, 756 F. Supp. 1097, 1103 (N.D. Ill. 1991), *aff'd* 974 F.2d 863 (7th Cir. 1992). The testimony is therefore not admissible as "scientific," as the term is used in rule 702. See *State v. Reynolds*, 235 Neb. at 681-82, 457 N.W.2d at 418:

> Under the test or standard enunciated in *Frye*, reliability for admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or is based on a technique or process which utilizes or applies

> a scientific principle, depends on *general acceptance of the principle, technique, or process in the relevant scientific community*.

(Emphasis supplied.)

Even assuming that there was agreement among economists or that Smith's process of valuation was scientific, there would still be a problem with such testimony because

> the consensus [would be] that of persons who are no more expert than are the jurors on the value of the lost pleasure of life. Even if reliable and valid, the evidence may fail to "assist the trier of fact to understand the evidence or determine a fact in issue" in a way more meaningful than would occur if the [trier of fact] asked a group of wise courtroom bystanders for their opinions.

Mercado v. Ahmed, 756 F. Supp. at 1103. "Given the flaws of the willingness-to-pay theory and the wide-ranging values it generates, the extent to which willingness-to-pay evidence meaningfully assists a jury in calculating damages for the intrinsic value of life is suspect at best." Andrew J. McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 Notre Dame L. Rev. 57, 106 (1990).

> The measurement of the joy of life is intangible. A jury may draw upon its own life experiences in attempting to put a monetary figure on the pleasure of living. It is "a uniquely human endeavor . . . requiring the trier of fact to draw upon the virtually unlimited factors unique to us as human beings." . . . Testimony of an economist would not aid the jury in making such measurements because an economist is no more expert at valuing the pleasure of life than the average juror. "[T]he loss of enjoyment of life resulting from a permanent injury is . . . not subject to an economic calculation."

(Citation omitted.) *Montalvo v. Lapez*, 77 Haw. 282, 303, 884 P.2d 345, 366 (1994).

Smith's testimony therefore fails the first and third prongs of the factors listed in *Reynolds*. That being so, we need not decide whether in any event such testimony should be excluded under rule 403 because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations, as

some courts have concluded. See, e.g., *Ayers v. Robinson, supra*; *Foster v. Trafalgar House Oil & Gas*, 603 So. 2d 284 (La. App. 1992).

Thus, the district court erred in admitting Smith's testimony. Ordinarily, the erroneous admission of evidence in a bench trial of a law action is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings. *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992); *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992); *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991); *Suess v. Lee Sapp Leasing*, 229 Neb. 755, 428 N.W.2d 899 (1988); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986). However, in such a case, a reversal is warranted if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence. *Miles v. Box Butte County, supra*; *State v. Lomack, supra*.

In awarding its damages, the district court here specifically recited that it found Smith to be an expert whose specialized knowledge was helpful. Moreover, in finding that the older girl sustained $26,860.28 in damages, it included $25,000 for loss of the enjoyment of life, and in finding that the younger girl sustained $348,341.83 in damages, included $300,000 for loss of the enjoyment of life. The record thus shows that although the district court did not fully accept Smith's testimony, it did rely on the erroneously admitted evidence. That circumstance provides an additional reason for rejecting the district court's damages award.

V. JUDGMENT

Accordingly, as noted in part I, the summary judgment finding the department liable to the girls is affirmed; however, the judgment awarding them damages must be, and hereby is, reversed and the cause remanded for a new trial on the damages issue alone.

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED FOR A NEW TRIAL
ON THE ISSUE OF DAMAGES.

WHITE, C.J., dissenting in part.

I would affirm the decision of the trial court.

Any error in admitting Stan Smith's testimony is harmless. Smith's methodology is by his own concession unorthodox. The Nebraska Department of Social Services (DSS) points out in its brief that not only is Smith one of the few alleged experts on hedonic damages, but in fact most of the reported decisions on this subject involve Smith and the much-debated value of his opinions. Smith's analysis applies a quasi-scientific spin to what may seem like a simple issue, which may not be the best method of gauging the value of enjoyment of life.

Nevertheless, the receipt of Smith's testimony in this case hardly cries out for a remand. At trial, Smith testified that Bridgette Anderson suffered a loss of enjoyment of life in an amount between $2,442,000 and $2,817,000; the trial judge awarded $300,000 in hedonic damages. Smith testified that Candy Anderson suffered losses valued between $1,950,000 and $2,127,000; the trial judge awarded $25,000. The trial judge stated in his written judgment that the court was not bound by Smith's calculations, noting that Smith's testimony was no more helpful than the testimony of a physician who stated that an injured person suffers pain more greatly than does the general public.

Although the trial judge did not specify how the final award was calculated or what its numbers represent, Smith's suggestions seem to have been irrelevant. Thus, any error in admitting Smith's testimony was harmless. A remand of this cause for the purpose of recalculating a damages award that reflected no influence by Smith is a waste of judicial resources.

Second, the majority uses Smith's testimony as a vehicle to condemn the concept of damages for the loss of enjoyment of life and to discourage the separation of hedonic damages from damages for pain and suffering. DSS has argued with some success that hedonic damages are too speculative to be measured in calculating a final award to an injured plaintiff. This argument misconstrues the policy prohibiting speculative damages, which is generally directed against uncertainty as to cause rather than uncertainty as to measure or extent. *Sherrod v. Berry*, 629 F. Supp. 159 (N.D. Ill. 1985). See *Calkins v. F.*

W. Woolworth Co., 27 F.2d 314 (8th Cir. 1928). Uncertainty which affects merely the measure or extent of the injury suffered is not the sort of "speculative" which bars recovery; rather, it is uncertainty or speculation whether the damages claimed flowed from the defendant's act that makes damages too uncertain to calculate. *Sherrod, supra.*

Nothing about hedonic damages is any more speculative or conjectural than the assessment of damages for pain and suffering. To some degree, the fact finder must speculate because it simply cannot experience the plaintiff's pain in order to make its award precise. When a plaintiff seeks damages for amputation of a leg, the law does not require a jury of amputees in order to prevent speculation as to the value of the plaintiff's pain, nor could the law require a fact finder in this case to have survived a childhood sexual assault. To make the plaintiff whole and to compensate her for each loss caused by the defendant, the law asks the fact finder to speculate, guided by the evidence, both as to palpable pain and as to the loss of enjoyment of life.

In Nebraska, a person injured by another's negligence can recover for each element of damages that the evidence shows is reasonably certain to be experienced in the future. *Jindra v. S.M.S. Trucking Co.*, 187 Neb. 502, 192 N.W.2d 139 (1971). I would expand *Swiler v. Baker's Super Market, Inc.*, 203 Neb. 183, 277 N.W.2d 697 (1979), to distinguish hedonic damages from damages for pain and suffering and to ease recovery of the former element when warranted by the evidence. Damages for pain and suffering compensate the victim for the physical and mental discomfort caused by the injury; hedonic damages compensate the victim for the limitations on a person's life created by the injury. *Thompson v. National R. R. Passenger Corp.*, 621 F.2d 814 (6th Cir. 1980). A blanket offering of "pain and suffering" does not accurately address those limitations.

In *Fantozzi v. Sandusky Cement*, 64 Ohio St. 3d 601, 617, 597 N.E.2d 474, 485–86 (1992), the Ohio Supreme Court adopted an understanding of hedonic damages with which I agree, stating that

> [t]he claim of damages for deprivation or impairment of life's usual activities has, in other jurisdictions, been applied to a wide variety of pleasurable activities shown to

> have been curtailed by the injuries received by the plaintiff. . . . These types of experiences are all positive sensations of pleasure, the loss of which could provide a basis for an award of damages to the plaintiff . . . . Such proof differs from the elements of mental suffering occasioned by the plaintiff's injury such as nervousness, grief, shock, anxiety, and so forth. Although the loss of the ability to engage in a usual pleasant activity of life is an emotional experience, it is a loss of a positive experience rather than the infliction of a negative experience.

Absent this distinction in our definition of compensatory damages, the law impedes the trier of fact in making a plaintiff whole in the only way it knows how, which is to give an equivalent in money for each loss suffered. See *Thompson, supra*.

In his judgment order, the trial judge noted that "[n]one of us know what demons dance in the injured mind, but we cannot use that lack of knowledge as the basis for denying compensation for that injury negligently imposed." To legally ignore the real magnitude of the loss caused by a defendant does not mean that the ignored part has gone away; to legally ignore the fact that living is more painful because of the defendant than it was prior to the injury is fundamentally unfair. So long as Nebraska law prohibits punitive damages, this court should at least see that compensatory damages live up to their name: full compensation for all losses shown by the evidence.

LANPHIER, J., joins in this dissent.

KARL D. KIRKLAND, APPELLEE, V. ALVIN ABRAMSON, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLANT.

538 N.W.2d 752

Filed October 27, 1995. No. S-94-026.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** When a petition instituting review pursuant to the Administrative Procedure Act is filed, a judgment rendered or a final order made by the district court may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for error appearing on the record.
2. **Res Judicata: Appeal and Error.** An appellate court may raise the issue of res judicata sua sponte.
3. **Res Judicata: Judgments.** The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
4. ____: ____. The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in an earlier proceeding if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
5. **Claims: Res Judicata: Appeal and Error.** A claim before a tribunal, be it an administrative agency or municipal board, once there has been a petition for judicial review and the petition has been dismissed, is res judicata and may not, as a general rule, be relitigated.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Judgment vacated, and cause remanded with directions.

Don Stenberg, Attorney General, and Amy Hollenbeck for appellant.

Gary L. Hogg for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Karl D. Kirkland's driver's license was revoked by the Department of Motor Vehicles (Department) after he was arrested for driving while intoxicated. Kirkland filed with the Department a motion for reinstatement, which was denied. On

petition for judicial review, the revocation was affirmed by the district court. Subsequently, Kirkland filed with the Department a second motion for reinstatement, which was also denied. On petition for judicial review, the district court vacated the Department's order and ordered the Department to reinstate Kirkland's driver's license without payment of any reinstatement fees. The Department appeals.

SCOPE OF REVIEW

When a petition instituting review pursuant to the Administrative Procedure Act is filed, a judgment rendered or a final order made by the district court may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for error appearing on the record. *Garcia v. Nebraska Dept. of Motor Vehicles, ante* p. 251, 533 N.W.2d 911 (1995).

An appellate court may raise the issue of res judicata sua sponte. *Hangman v. Bruening*, 247 Neb. 769, 530 N.W.2d 247 (1995); *Eggland v. Eggland*, 240 Neb. 393, 482 N.W.2d 245 (1992).

FACTS

On or about June 13, 1993, Kirkland was issued a citation for driving while intoxicated, pursuant to Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992) (recodified at Neb. Rev. Stat. § 60-6,196 (Reissue 1993)). The arresting officer impounded Kirkland's driver's license and issued Kirkland a 30-day temporary license.

On July 15, 1993, Kirkland pled no contest in Buffalo County Court to willful reckless driving, and he was found guilty as charged. On the same day, a formal hearing regarding Kirkland's license revocation was held before the Department, and on July 22, the Department revoked Kirkland's license.

Kirkland filed a motion for reinstatement with the Department on July 26, 1993, which alleged that since he had appeared before the Buffalo County Court and entered a plea of no contest to the charge of willful reckless driving, he was entitled to have his license reinstated. Neb. Rev. Stat. § 39-669.16(4)(b) and (c) (Cum. Supp. 1992) (recodified at Neb. Rev. Stat. § 60-6,206(4)(b) and (c) (Reissue 1993)) provided that if a driving while intoxicated charge was

dismissed or if a defendant was found not guilty of violating § 39-669.07 at trial, then the defendant's license should be reinstated without payment of any reinstatement fee. On the Nebraska State Patrol citation, the prosecutor had crossed out the driving while intoxicated charge and written in the charge of willful reckless driving. Kirkland attached to the motion for reinstatement a certified copy of the transcript regarding his conviction for willful reckless driving.

The Department denied the motion for reinstatement, and Kirkland petitioned the district court for Buffalo County for judicial review. Following a hearing on September 14, 1993, the district court dismissed Kirkland's petition, finding that the order of revocation was supported by adequate and competent evidence. However, the court noted a secondary issue was presented in that Kirkland alleged that at the time of the administrative hearing on July 15, he had also appeared in the Buffalo County Court and that the prosecutor had dismissed the driving while intoxicated charge by amending the complaint to willful reckless driving.

The district court found that pursuant to the rules and regulations of the Department, it was necessary that Kirkland provide the Department with a certified copy of the dismissal of the misdemeanor charge of driving while intoxicated. Instead, Kirkland had submitted a certified copy of the judgment of conviction for willful reckless driving, which did not specifically address the disposition of the driving while intoxicated charge. Therefore, the court found that the Department had properly rejected the application for reinstatement based on insufficiency of the evidence.

On September 23, 1993, Kirkland filed a second motion for reinstatement with the Department and a certified copy of the Nebraska State Patrol citation. The Department denied the motion for reinstatement. On October 22, Kirkland filed a second petition for judicial review to the district court for Buffalo County from the Department's denial of his second motion for reinstatement.

On December 8, 1993, the district court found that the prosecutor's amendment of the complaint by interlineation was a dismissal of the driving while intoxicated charge and that the

Department's decision to revoke Kirkland's driving privileges should be vacated. The Department was ordered to immediately reinstate Kirkland's driver's license and driving privileges without payment of any reinstatement fees.

ASSIGNMENT OF ERROR

The Department asserts that the district court erred in finding that Kirkland's driving while intoxicated charge was dismissed under § 39-669.16(4)(b).

ANALYSIS

We do not reach the issues decided in the district court's December 8, 1993, order. Kirkland's second petition to the district court was barred under the doctrine of res judicata. Res judicata was not raised as an affirmative defense by the Department, but an appellate court may raise the issue of res judicata sua sponte. See *Hangman v. Bruening*, 247 Neb. 769, 530 N.W.2d 247 (1995). We raise the doctrine on our own motion and find that the order of the district court must be reversed and that the order of revocation issued by the Department must be reinstated.

The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. *Kuskie v. Adams Bank & Trust of Madrid, ante* p. 18, 531 N.W.2d 921 (1995). The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in an earlier proceeding if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *Id.*; *Hangman v. Bruening, supra*.

A claim before a tribunal, be it an administrative agency or municipal board, once there has been a petition for judicial review and the petition has been dismissed, is res judicata and may not, as a general rule, be relitigated. See *L. J. Vontz Constr. Co. v. City of Alliance*, 243 Neb. 334, 500 N.W.2d 173 (1993). In the present case, the former judgment was entered by

the district court on September 22, 1993, and it was a final judgment on the merits involving the same parties.

In his second petition for judicial review to the district court, Kirkland asserted that the prosecutor had dismissed the offense of driving while intoxicated and amended the complaint to willful reckless driving and that Kirkland had entered a plea of no contest and was subsequently convicted of that charge. Section 39-669.16(4) does not appear to limit the number of times a party may present suitable evidence to the Department's director to have the license reinstated, but res judicata will prevent the party from seeking judicial review of the director's denial of such application if those matters could have been litigated in an earlier proceeding.

CONCLUSION

The doctrine of res judicata clearly applies in this case. Kirkland is not entitled to file a second motion for reinstatement based upon evidence which could have been submitted at the hearing on his first motion for reinstatement. We therefore vacate the judgment entered on December 8, 1993, by the district court for Buffalo County and remand the cause to that court with directions to reinstate the order of suspension entered by the Department.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

WESTERN SECURITY BANK, FORMERLY KNOWN AS AMES BANK, A NEBRASKA BANKING CORPORATION, APPELLANT, V. UNITED STATES FIDELITY & GUARANTY COMPANY ET AL., APPELLEES.

539 N.W.2d 15

Filed October 27, 1995. No. S-94-043.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences

that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Intent: Summary Judgment.** When the provisions of an alleged contract being sued upon are so cursory, indefinite, and conditional as to fail as a matter of law to establish an objective intent on the part of the parties to be bound thereby, no factual issues exist and summary judgment is appropriate.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

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

David L. Crawford and Christopher D. Curzon, of Schmid, Mooney & Frederick, P.C., and Norman R. Carpenter, of Faegre & Benson, for appellee United States Fidelity & Guaranty.

Robert J. Bothe and W. Greg O'Kief, of McGrath, North, Mullin & Kratz, P.C., for appellee Constructors Bonding Co.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Western Security Bank, formerly known as Ames Bank, appeals from an order entered by the district court for Douglas County, sustaining the motions for summary judgment by Constructors Bonding Company (Constructors) and United States Fidelity & Guaranty Company (USF&G). Because we find as a matter of law no enforceable contract exists, we conclude that the district court did not err by sustaining Constructors' and USF&G's motions for summary judgment. We therefore affirm.

BACKGROUND

In early 1988, Terry A. Lambert Plumbing, Inc. (Lambert), sought to obtain a loan from the bank. At that time, Lambert was experiencing financial difficulty. The bank drafted a proposed credit agreement in which it reserved a first priority

security interest in Lambert's accounts receivable. Prior to execution of the loan agreement, the bank sent a copy of the proposed agreement to Constructors, which had in the past served as an agent for USF&G in obtaining bonds for Lambert. The record does not indicate that any form of correspondence accompanied the proposed agreement when it was sent to Constructors.

Constructors replied to the bank by letter, stating that "[w]e have reviewed your pro forma credit agreement and based on that agreement we will be in a position to continue writing bonds for Lambert . . . ." The bank then executed the loan agreement, disbursing a total of $392,000 to Lambert.

Following execution of the loan, USF&G asked the bank to relinquish its first priority security interest in Lambert's accounts receivable. However, the bank refused to relinquish its interest. USF&G then refused to bond Lambert, which was subsequently unable to finance its occupational endeavors. As a result, it was alleged that Lambert went out of business, filed for bankruptcy, and was unable to pay the bank its loan debt.

The bank brought this action for breach of contract against Constructors and USF&G, seeking $124,000 in damages for failing to bond Lambert. The bank alleges it would not have made the loan had Constructors not agreed to continue bonding Lambert. The bank argues that sending Constructors a copy of its loan agreement with Lambert constituted an offer to Constructors to continue bonding Lambert. The bank further argues that Constructors' reply letter constituted an acceptance of the offer. Finally, the bank alleges that an agency relationship existed between Constructors and USF&G in which USF&G was bound by the representations and commitments made by Constructors. Constructors and USF&G filed motions for summary judgment asserting that no enforceable contract existed. In addition, USF&G asserted in its motion that Constructors was not acting as USF&G's agent in relation to the alleged agreement. The district court sustained the motions, having found no genuine issue of material fact.

ASSIGNMENT OF ERROR

The bank alleges that the district court erred in sustaining

Constructors' and USF&G's motions for summary judgment.

STANDARD OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Poppleton v. Village Realty Co., ante* p. 353, 535 N.W.2d 400 (1995); *Krohn v. Gardner, ante* p. 210, 533 N.W.2d 95 (1995); *Walpus v. Milwaukee Elec. Tool Corp., ante* p. 145, 532 N.W.2d 316 (1995). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

The bank contends that the district court erred by sustaining Constructors' and USF&G's motions for summary judgment because genuine issues of material fact existed. The bank argues that the proposed loan agreement it sent to Constructors, along with Constructors' reply letter, created an enforceable written contract.

When the provisions of an alleged contract being sued upon are "so cursory, indefinite, and conditional as to fail as a matter of law to establish an objective intent on the part of the parties to be bound thereby," no factual issues exist and summary judgment is appropriate. *Viking Broadcasting Corp. v. Snell Publishing Co.*, 243 Neb. 92, 97, 497 N.W.2d 383, 386 (1993).

In the instant case, the proposed agreement, sent by the bank to Constructors, did not request Constructors to issue bonds to Lambert. In fact, the proposed agreement mentions neither bonding Lambert by Constructors nor the terms and nature of any proposed offer. Thus, nothing in the record raises a genuine issue of material fact as to whether the bank manifested a willingness, in the form of a definite offer, to enter into a bargain with Constructors.

Furthermore, the reply letter, sent by Constructors to the bank, merely states that "[w]e have reviewed your pro forma

credit agreement and based on that agreement we will be in a position to continue writing bonds for Lambert . . . ." This letter merely expresses that Constructors had the ability to bond Lambert if it so chose. Clearly, the minds of the parties did not meet, and much was left open for future arrangement. Thus, nothing in the record raised a genuine issue of material fact as to whether Constructors manifested assent, in the form of an unconditional and absolute acceptance, to bond Lambert.

As a result, even when viewing the evidence in a light most favorable and giving the benefit of all reasonable inferences to the bank, we find that the alleged agreement is so cursory, indefinite, and conditional that it fails as a matter of law to establish an objective intent on the part of parties to be bound. See *Viking Broadcasting Corp. v. Snell Publishing Co., supra.*

CONCLUSION

We find as a matter of law that no enforceable contract exists, and thus, we conclude that the district court did not err by sustaining Constructors' and USF&G's motions for summary judgment.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JAMES F. CODY, APPELLANT.
539 N.W.2d 18

Filed October 27, 1995. No. S-94-109.

1. **Convictions: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact; 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. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach a conclusion independent of that of the inferior court.
3. **Criminal Law: Trial: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order denying a defendant's motion to suppress, the defendant must object at trial to admission of the evidence

which was the subject of the suppression motion in order to preserve an appellate question concerning admissibility of that evidence.

4. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution, a defendant must show that counsel's performance was deficient and that such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
5. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question.
6. **Trial: Appeal and Error.** When an issue has not been raised or ruled on at the trial level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
7. **Constitutional Law: Search and Seizure: Standing.** A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment to the U.S. Constitution.
8. **Constitutional Law: Search and Seizure.** A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable.
9. ____: ____. The special protection accorded by the Fourth Amendment to the U.S. Constitution to the people in their persons, houses, papers, and effects is not extended to open fields.
10. ____: ____. In order to have a protected Fourth Amendment interest as an overnight guest at searched premises, one must have been such a guest at the time of the search.
11. **Miranda Rights.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.
12. **Miranda Rights: Words and Phrases.** For purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), a custodial interrogation takes place when questioning is initiated by law enforcement officers after one has been taken into custody or is otherwise deprived of one's freedom of action in any significant way.
13. **Miranda Rights: Arrests: Words and Phrases.** One is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when there is a formal arrest or a restraint on one's freedom of movement of the degree associated with such an arrest.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and MUES, Judges, on appeal thereto from the District Court for Sheridan County, BRIAN SILVERMAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Toney J. Redman for appellant.

Don Stenberg, Attorney General, and James A. Elworth for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. INTRODUCTION

Pursuant to verdict, defendant-appellant, James F. Cody, was adjudged guilty of possessing with the intent to deliver a controlled substance, marijuana, in violation of Neb. Rev. Stat. §§ 28-405(c)(10) [Schedule I] and 28-416(1)(a) (Cum. Supp. 1992). He thereupon appealed to the Nebraska Court of Appeals, asserting the district court erred in failing to find that he had standing to challenge the search at which certain evidence was seized. Cody also asserted that he was denied the effective assistance of trial counsel. Determining as a matter of plain error that the evidence was insufficient to support the conviction, the Court of Appeals, without reaching Cody's claims, reversed the judgment of the district court and remanded the cause with the direction that it be dismissed. *State v. Cody*, 95 NCA No. 16, case No. A-94-109 (not designated for permanent publication). The plaintiff-appellee State, challenging the Court of Appeals' conclusion that the evidence was insufficient, successfully petitioned for further review by this court. We now reverse the judgment of the Court of Appeals and remand the cause with the direction that it affirm the judgment of the district court.

II. FACTS

Cody's mother, Frances Cody, owned a ranch in Sheridan County, Nebraska. Because she was away during the summer and fall of 1992 taking care of her injured daughter and returned to the ranch only infrequently during this time, Cody cared for the "two old dogs" and a cat she kept there as pets.

During an October 12, 1992, visit to the ranch, the mother went into a shed that served as a garage and a stable to get a pail. Upon entering, she discovered a pile of marijuana spread out on top of a blue plastic tarpaulin. When she found the pail

she had originally gone to retrieve, she discovered that it also contained marijuana.

This was not the first time the mother had found marijuana on her property. In both 1990 and 1991, she had called the Alliance Police Department to report some wild marijuana growing at the ranch. After finding the marijuana in the shed on this occasion, she reported it to the police department. Alliance police officer David Lehman responded to the mother's call and went to the ranch to investigate.

Lehman testified that the mother took him to the shed where a large amount of a substance thought to be marijuana was found inside a blue tarp which itself was placed into a white bucket. Lehman also found a wheelbarrow with traces of marijuana inside it, a large double-beam scale with a "lick tub" for cattle on top of it, a large machete, and two empty beer cans. There were several empty dog food and cat food bags in the tack area of the shed, along with a barrel filled with pet food. Lehman searched the stable area and behind a large piece of cardboard found two Lewin Norco lick tubs and a large black trash bag, all of which contained marijuana. Lehman confiscated these items.

Lehman further testified that the marijuana in the lick tubs and in the trash bag had been "manicured," a process by which the leaves and buds of the plants are removed from the stems and the material then dried and ground. He testified that the marijuana in the lick tubs had been there in excess of 2 weeks and that the other marijuana inside the shed had been there for only a few days. Lehman did not comment as to how long the marijuana had been in the trash bag.

A large patch of marijuana was discovered by Lehman growing about 75 to 100 yards north of the shed. The marijuana patch contained approximately 1,000 stripped marijuana plant stems that were still in the ground. Lehman estimated that each plant was capable of yielding about three-quarters of a pound of marijuana. There was a footpath which led around the marijuana patch and also a vehicle path that ran toward the shed.

While Lehman was conducting his investigation, Cody went to his mother's ranch to return a vacuum cleaner. However,

Lehman did not interview Cody until the next day, October 13, 1992, at which time Cody admitted that he was experiencing financial problems and acknowledged that he smoked several brands of cigarettes, including Marlboro Lights, generic brands, and Montclair 100's. Cody told Lehman that he had been taking care of the pets at the ranch while his mother was away and that he stayed at the ranch "maybe once or twice a week." Cody also told Lehman that he worked at the Lewin Norco Feed Mill in Alliance.

During the course of the investigation, Lehman confiscated several cigarette butts. He found one Marlboro Light cigarette butt in the shed near the tack area. A Montclair cigarette butt was recovered from the footpath area near the edge of the marijuana patch. An assortment of Marlboro Light, Montclair, and other brands of cigarette butts was recovered from the room at the ranch where Cody occasionally stayed.

Later chemical analysis of the substance found in the two lick tubs, the trash bag, and the blue tarp confirmed that it was marijuana. Several of the confiscated items were also examined for fingerprints. The latent prints found on the two beer cans and on the two lick tubs were insufficient for comparison purposes. Of the six latent prints on the confiscated trash bag, four matched Cody's fingerprints; the other two prints were insufficient for comparison purposes.

At the suppression hearing, two deeds to the mother's ranch were received in evidence. The first showed title to be in the mother, subject to a life estate in her father. The second showed that on October 20, 1992, a week after Lehman had searched the ranch, the mother transferred an undivided half interest in some of the property to Cody's brother and sister.

Lehman, called as a witness by Cody's trial counsel, testified that he was a police officer for the city of Alliance and that on October 12, 1992, he went to the ranch and seized the marijuana. Lehman further testified that he knew Cody lived in Alliance and that Cody stayed at the ranch once or twice a week.

Lehman indicated that several other police officers were at the Cody ranch with him on October 12, 1992, namely, a Detective McDaniel, who was also from the Alliance Police

Department; Officer Mark Overman from the Scottsbluff Police Department; and Det. Robert Greer from the Gering Police Department. None of the officers were state deputy sheriffs or members of the Nebraska State Patrol. Neither were any of them sheriffs or deputy sheriffs of Sheridan County. Lehman stated that his own jurisdiction was not really clear, but for the most part it was the city of Alliance and Box Butte County. There is no dispute that the Cody ranch is located approximately 18 miles east and 1 mile north of Alliance in Sheridan County.

After Lehman had testified, the State asserted that the district court did not have jurisdiction to hear the merits of Cody's motion because Cody lacked standing to challenge the search of the ranch. Cody's trial counsel disagreed, arguing that the mere fact that Cody stayed at the ranch one or two nights a week was enough to confer standing. Cody's trial counsel further urged that the officers did not have the authority to be in Sheridan County supervising police or law enforcement functions on October 12, 1992. The district court determined that Cody did not have standing to contest the search of the ranch and dismissed his motion to suppress.

At the trial on November 17, 1993, Cody presented evidence that he was not the only one with access to the ranch. Edward Dentler, a rancher who had been leasing part of the ranch property, testified that he put up hay on the property and kept cattle there from September of each year until calving time the following February. Dentler further testified that at times, he had used the shed to store feed, salt, minerals, and other materials, but that he had not been in the shed in October 1992.

According to Dentler, the marijuana on the Cody ranch began growing when a previous tenant had purchased hay from Burwell. The marijuana grew in the area where the hay had been scattered for the cattle to eat.

Dentler testified that he did not smoke cigarettes, but that his wife smoked Marlboros. Dentler further testified that his wife, who worked with Dentler every day tending to his cattle, was in the habit of putting out her cigarettes on the ground and leaving the butts there.

Mardella McFall, a neighbor to the ranch, was also called as

a witness by Cody's trial counsel. She testified that she saw strange automobiles going up the road to the Cody ranch. On cross-examination, McFall testified that "one was a dark colored car either black or navy blue" and the "other one was a tan older station wagon." However, she admitted that she was unsure when she had seen these vehicles; she could only say that it was during the summertime. McFall never saw the vehicles on the ranch itself.

III. ANALYSIS

Our analysis considers first, the State's claim that, contrary to the ruling of the Court of Appeals, the evidence is sufficient to support the conviction; second, Cody's claim that the district court erred in concluding he did not have standing to challenge the validity of the search; and third, Cody's claim that his trial counsel was ineffective.

1. Sufficiency of Evidence

(a) Scope of Review

In *State v. Pierce, ante* p. 536, 537 N.W.2d 323 (1995), decided after the Court of Appeals ruled in this case, we held that regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. See, also, *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995); *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994); *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981).

(b) Application of Law to Record

Pierce thus mandates that in reviewing a conviction, all evidence, whether direct or circumstantial, be viewed by an appellate court in the light most favorable to the State.

It is undisputed that during the summer and fall of 1992, the

mother was away from the ranch, and that during the time that she was away, Cody was the only one known to be on the ranch.

It was his job to take care of the pets on the ranch. In the shed where the pet food was stored, a large amount of marijuana was found lying on a blue tarp. Nearby was a machete, a wheelbarrow, and a double-beam scale. Lehman's testimony established that these items were suitable for harvesting and processing marijuana. The machete was suitable for chopping down marijuana plants, and the wheelbarrow, which in fact did contain some traces of marijuana, could be used to haul the marijuana from the patch to the shed. In addition, the double-beam scale could easily be put to use weighing amounts of marijuana. Also discovered inside the shed were two Lewin Norco lick tubs and a large black trash bag, all of which were full of manicured marijuana. Such a large amount of marijuana supports an inference that it was intended for further sale.

There were a number of pieces of evidence that tied Cody to the marijuana found in the shed. One of the lick tubs full of marijuana found in the shed was from the Lewin Norco Feed Mill. Cigarette butts found in the shed and on the footpath near the marijuana patch matched the cigarette brands Cody smoked. Perhaps most damning of all, four of Cody's fingerprints were found on the black trash bag full of marijuana. There was also evidence that Cody may have been motivated to harvest the marijuana because he was experiencing financial problems.

(c) Resolution

Viewed in the light most favorable to the State, the evidence is sufficient to sustain Cody's conviction, and the Court of Appeals erred in ruling otherwise.

2. Standing to Challenge Search

That conclusion leads us to a consideration of the assignments of error Cody made which the Court of Appeals did not reach. The first is Cody's claim that the district court incorrectly ruled that he did not have standing to challenge the search of the ranch.

(a) Scope of Review

That claim presents a question of law, in connection with

which a reviewing court has an obligation to reach a conclusion independent of that of the inferior court. *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995). See, also, *McPherrin v. Conrad, ante* p. 561, 537 N.W.2d 498 (1995).

(b) Application of Law to Record

It has long been the rule that in a criminal trial, after a pretrial hearing and order denying a defendant's motion to suppress, the defendant must object at trial to admission of the evidence which was the subject of the suppression motion in order to preserve an appellate question concerning admissibility of that evidence. *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992); *State v. Rodgers*, 237 Neb. 506, 466 N.W.2d 537 (1991); *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987); *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987).

(c) Resolution

Because a review of the record establishes that Cody's trial counsel failed to object at trial to the admission of the evidence that was the subject of the suppression hearing, the matter of the district court's denial of the suppression motion is an issue in this appeal only as it becomes part of the following analysis of Cody's claim that his trial counsel was ineffective.

3. Effectiveness of Trial Counsel

Cody claims that he was denied effective assistance of trial counsel because trial counsel failed at the suppression hearing to establish all the possible grounds for suppressing the evidence seized from the ranch and failed to object to the introduction of such evidence at trial, failed to move to suppress Cody's statements, and failed to move to suppress Cody's fingerprint identification.

(a) Scope of Review

To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution, a defendant must show that counsel's performance was deficient and that such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have

been different. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995); *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994).

(b) Application of Law to Record

We note that Cody's claim that trial counsel was ineffective is being made on direct appeal; however, such a claim need not necessarily be dismissed merely because it is made in such an appeal. The determining factor is whether the record is sufficient to adequately review the question. *State v. Dawn, supra*; *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991). When the issue has not been raised or ruled on at the trial level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. Dawn, supra*; *State v. Morley, supra*; *State v. Dixon*, 223 Neb. 316, 389 N.W.2d 307 (1986).

(i) Challenge of Search and Objection to Evidence

As noted earlier, Cody first argues that trial counsel was deficient by not presenting all available evidence to establish standing to challenge the search and seizure and by failing to object to the introduction of the seized evidence.

We observe at the outset that the use of a "standing" analysis is not particularly helpful in resolving search and seizure questions under the Fourth Amendment, notwithstanding our comprehensive treatment of such in *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993). According to *Baltimore*, " '[s]tanding' means that a person has a sufficient legally protectable interest which may be affected in a justiciable controversy, entitling that person to judicial resolution of the controversy." *Id.* at 568, 495 N.W.2d at 925. Standing also "relates to jurisdiction and prudential considerations regarding exercise of jurisdiction." *Id.* at 568, 495 N.W.2d at 926.

> As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf. . . . Thus,

> generally, a litigant must assert the litigant's own legal rights and interests, and cannot rest a claim on the legal rights or interests of third parties.

Id. at 568-69, 495 N.W.2d at 926.

However, the U.S. Supreme Court in *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978), questioned whether it serves any useful analytical purpose to consider the matter of standing distinct from the merits of a defendant's Fourth Amendment claim. According to *Rakas*, the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate but invariably intertwined concept of standing. Analyzed in these terms, "standing" is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment.

In urging that the search and seizure here infringed such rights, Cody argues that trial counsel focused almost entirely on whether the officers conducting the search were out of their jurisdiction and whether that jurisdictional question rendered the search and subsequent seizure illegal. The only evidence offered at the suppression hearing to support Cody's claim in that regard was statements elicited from Lehman that Cody had told him "he was going out to the ranch once in a while [sic] his mother was watching an injured sister" and that Cody stayed out at the ranch "maybe once or twice a week."

Cody asserts that counsel's performance was deficient for not producing at the suppression hearing the evidence adduced at trial that his mother visited the ranch infrequently during the approximately 6 months prior to the search; Cody had his own room in the house at the ranch; during the mother's absence, Cody took care of the pets and occasionally spent the night at the residence; on October 12, 1992, the mother found a large quantity of marijuana on the floor of her shed; the mother requested that Lehman and other officers come to the ranch where they found large amounts of marijuana in various places within the shed; and the mother showed the officers the room where Cody slept, from which the officers seized cigarette butts.

Initially, it must be noted that, contrary to Cody's assertion, the mother did not testify that Cody had his own room in the house at the ranch. She merely testified that there was a particular bedroom in the house in which he slept. She at no point indicated that it was "his" room.

With that slight modification, we accept that the trial evidence establishes what Cody says it does. Given those facts, the test is whether Cody had a legitimate expectation of privacy in the invaded place. See *Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990). A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable. *Id.*

Courts consider many factors in determining whether a defendant has a legitimate expectation of privacy. One of the most comprehensive lists of these factors was articulated in *U.S. v. Abreu*, 730 F. Supp. 1018, 1026 (D. Colo. 1990), in which the court stated:

> Property ownership is one factor to consider in determining whether a defendant has a reasonable expectation of privacy. [Citation omitted.] Other factors include the nature of the place searched, [citations omitted], whether the defendant had a possessory interest in the thing seized or the place searched, whether the defendant had a right to exclude others from that place, whether the defendant exhibited a subjective expectation that the place would remain free from governmental intrusion, whether the defendant took precautions to maintain privacy, and whether the defendant was legitimately on or in possession of the premises searched.

In applying these criteria, it is important to remember that the existence of a privacy right sufficient to entitle one to contest a search of one location does not necessarily imply such a right with respect to another location. Because of this, we have adopted a principle of severability which permits a court to address specific locations in which a defendant has standing to challenge and disregards those locations which a defendant does not. *State v. Stott*, 243 Neb. 967, 503 N.W. 822 (1993). In the present case, there were three areas searched by the officers: the marijuana patch, the shed, and a room in the house located on

the ranch where Cody would occasionally sleep. A separate analysis of Cody's capacity to claim the protection of the Fourth Amendment is required for each location.

The facts upon which Cody relies do not establish that he had a legitimate expectation of privacy in the marijuana patch. The marijuana patch is subject to the open fields doctrine that was first articulated in *Hester v. United States*, 265 U.S. 57, 59, 44 S. Ct. 445, 68 L. Ed. 898 (1924): "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." This decision was later reaffirmed in *Oliver v. United States*, 466 U.S. 170, 179, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984), where the Court said: "[O]pen fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance." We have concluded that the Nebraska Constitution provides no greater protection in this regard than does the U.S. Constitution. *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986).

Neither do the trial facts emphasized by Cody establish that he had a privacy right in the shed. Although he was legitimately on the premises taking care of his mother's pets, a greater number of the factors articulated in *U.S. v. Abreu, supra*, weigh against him. Cody had no property interest in the shed at the time of the search, nor is there any indication that he took any precautions to ensure that the contents of the shed would remain private. In fact, the evidence shows that no precautions were taken. The mother testified that the buildings on the ranch, including the shed, were left unlocked. Dentler, the rancher who rented part of the ranch, testified that during his lease, he had never found the shed locked. Moreover, Dentler testified that he had free access to the shed to store materials as a part of his lease. Thus, Cody could not have had a subjective expectation of privacy that society would recognize as reasonable.

Left remaining is the question as to whether the trial facts emphasized by Cody establish his right to contest the search of the room in which he stayed. At the suppression hearing, the evidence showed that although Cody had no title interest in the

ranch, he stayed overnight in a particular bedroom maybe once or twice a week while his mother was away and had responsibility for taking care of his mother's pets. Cody does not claim the trial evidence shows he was an overnight guest at the time of the search and seizure.

Relying on *Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990), we, in *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990), held that an individual's status as an overnight guest is alone enough to show that he or she has a legitimate expectation of privacy in the premises which is protected by the Fourth Amendment, and, thus, the person has standing. However, we later modified that broad view in *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991), *denial of habeas corpus aff'd, Cortis v. Kenney*, 995 F.2d 838 (8th Cir. 1993). We therein held that the defendant did not have such an expectation of privacy in a friend's home which society was prepared to recognize as reasonable even though he had stayed at the home overnight a couple of times, but was not an overnight guest at the time of the police intrusion. We there recognized that in order to have a protected Fourth Amendment interest as an overnight guest at searched premises, one must have been such a guest at the time of the search, noting that "[a]ny other conclusion would result in an overnight guest's having a permanently protected fourth amendment interest in a place in which he or she once stayed, no matter how remote in time." *State v. Cortis*, 237 Neb. at 104, 465 N.W.2d at 139.

Thus, even the trial evidence fails to establish that Cody had a reasonable expectation of privacy anywhere on the ranch.

(ii) Suppression of Statements

Cody next contends that Lehman's trial testimony that Cody was advised of his *Miranda* rights but did not waive them required that trial counsel move to suppress the statements he made.

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *State*

v. Brunzo, ante p. 176, 532 N.W.2d 296 (1995); *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993). For purposes of the *Miranda* rule, a custodial interrogation takes place when questioning is initiated by law enforcement officers after one has been taken into custody or is otherwise deprived of one's freedom of action in any significant way. *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977); *State v. Brunzo, supra*.

It must first be noted that the evidence as to whether Cody waived his *Miranda* rights is in conflict. During direct examination at trial, Lehman testified that such rights "were read to . . . Cody prior" to his being interviewed on October 13. When asked whether Cody agreed to "speak with" Lehman on that date, Lehman responded in the affirmative. During cross-examination, Lehman confirmed that Cody "was given" his *Miranda* rights, but when asked whether Cody "waived those rights and agreed to talk with" Lehman, Lehman answered in the negative. While on the record presented it was for the jury to resolve the conflict, see *Brandt v. Leon Plastics, Inc.*, 240 Neb. 517, 483 N.W.2d 523 (1992), and *Doggett v. Brunswick Corp.*, 217 Neb. 166, 347 N.W.2d 877 (1984) (in absence of bad faith motive, conflict in same expert's testimony was for trier of fact to resolve), the legal reality is that whether Cody waived those rights is immaterial.

That is so because the record establishes that Cody was not in custody at the time he made the statements. He voluntarily went to the Alliance Police Department to be interviewed. The officers did not in any way threaten or force Cody to speak with them, and the record does not establish that Cody was other than free to leave at any time. We have held:

> Police officers are not required to administer *Miranda* warnings to everyone whom they question, or simply because the questioning takes place in a police station, or because the questioned person is one whom the police suspect. [Citation omitted.] Rather, *Miranda* warnings are required only where there has been such a restriction on one's freedom as to render one "in custody." [Citation omitted.]
>
> One is in custody for *Miranda* purposes when there is

> a formal arrest or a restraint on one's freedom of movement of the degree associated with such an arrest.

State v. Brunzo, ante at 187, 532 N.W.2d at 305. Accord, *State v. Bronson, supra*; *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990), *cert. denied* 498 U.S. 1127, 111 S. Ct. 1091, 112 L. Ed. 2d 1195 (1991).

Consequently, there was no requirement that Cody be given the *Miranda* warnings.

However, Cody also claims the statements should have been suppressed because Lehman did not have the authority to question him. Cody argues that because Lehman did not have jurisdiction to search the ranch, any questions that Lehman asked were asked as a " 'private citizen' " under " 'color of law.' " Brief for appellant at 10. Cody maintains that such information gathered by a private citizen acting under color of law is subject to suppression. In support of this theory, Cody cites a variety of cases from various jurisdictions. E.g., *Phipps v. State*, 841 P.2d 591 (Okla. Crim. App. 1992); *Wilson v. State*, 403 So. 2d 982 (Fla. App. 1980); *People v. Martin*, 225 Cal. App. 2d 91, 36 Cal. Rptr. 924 (1964).

Even assuming arguendo that Cody's theory is sound, a matter we do not decide, this case does not fit the fact pattern found in the cited cases. In all of the foregoing cases, it was the law enforcement officer who, while outside the officer's jurisdiction, initiated the contact with a citizen. In this case, it was Cody's mother who initiated the contact with Lehman and the Alliance Police Department, and Cody made the statements while at the police department where Lehman did in fact have jurisdiction.

Therefore, the record provides no basis on which it can be said Cody's statements were to be suppressed.

(iii) Fingerprint Identification

As his final allegation of deficient performance, Cody claims that trial counsel was deficient in not attempting to suppress the fingerprint identification on the ground that Lehman did not have the authority to request such as Lehman did not have jurisdiction in the case and was acting as a private citizen under color of law.

The immediately preceding analysis of the jurisdictional issue with respect to Cody's statements disposes of this claim as well; there is no basis on which to suppress the fingerprint evidence.

(c) Resolution

Thus, it is apparent that even if trial counsel's performance was deficient in each of the particulars claimed by Cody, those deficiencies did not prejudice Cody.

That being so, there is no merit to Cody's claim of ineffective assistance of trial counsel.

IV. JUDGMENT

For the foregoing reasons, the judgment of the Court of Appeals is, as first noted in part I, reversed and the cause remanded with the direction that the Court of Appeals affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTION.

VOWERS AND SONS, INC., A NEBRASKA CORPORATION, APPELLANT, V. JERRY STRASHEIM, APPELLEE.

538 N.W.2d 756

Filed October 27, 1995. No. S-94-144.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom but does not accept as true the conclusions of the pleader.
2. **Contracts.** A party who signs and delivers a contract is bound by the obligations, though the contract is not executed by all the parties for whose signatures it has been prepared, where there is no showing on his part of an intention not to be bound thereby until signed by others, and no express agreement to that effect is shown.
3. **Assignments: Words and Phrases.** An assignment is a transfer vesting in the assignee all the assignor's rights in property which is the subject of the assignment.
4. **Contracts: Assignments.** An assignee stands in the shoes of the assignor and is bound by the terms of the contract to the same extent as the assignor.
5. **Assignments.** The assignee of a thing in action may maintain an action thereon in his own name and behalf, without the name of the assignor. Neb. Rev. Stat. § 25-302 (Reissue 1989).

6. **Breach of Contract: Pleadings: Proof.** In order to recover on an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with the conditions precedent which activate the defendant's duty.
7. **Demurrer: Pleadings: Records.** A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action.
8. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled.
9. **Contracts: Pleadings.** In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part. Neb. Rev. Stat. § 25-836 (Reissue 1989).

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Reversed and remanded for further proceedings.

Richard A. Douglas, of Nichols, Douglas, Kelly and Meade, P.C., for appellant.

Robert G. Simmons, Jr., of Simmons, Olsen, Ediger & Selzer, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Vowers and Sons, Inc., a Nebraska corporation, appeals from an order entered by the district court for Kimball County sustaining the demurrer of Jerry Strasheim, appellee, and dismissing appellant's second amended petition for breach of a real estate purchase agreement. We find that the second amended petition and attached exhibits plead a cause of action and that there was no defect in party plaintiff or party defendant. Thus, we conclude the district court erred in dismissing appellant's second amended petition and order that it be reinstated. We therefore reverse, and remand for further proceedings consistent with this opinion.

ASSIGNMENTS OF ERROR

Appellant assigns three errors: (1) The district court erred in finding a defect in party plaintiff, (2) the district court erred in finding a defect in party defendant, and (3) the district court erred in finding that the second amended petition does not state

facts constituting a cause of action.

STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom but does not accept as true the conclusions of the pleader. *Proctor v. Minnesota Mut. Fire & Cas.*, *ante* p. 289, 534 N.W.2d 326 (1995); *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994). In reviewing a ruling on a general demurrer, an appellate court cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Proctor v. Minnesota Mut. Fire & Cas.*, *supra*; *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994). An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken. *Gallion v. Woytassek*, 244 Neb. 15, 504 N.W.2d 76 (1993).

BACKGROUND

For purposes of reviewing the sustaining of a demurrer, we take the following facts set forth by appellant in its second amended petition and attached exhibits as true:

On May 19, 1992, a contract for the purchase of certain real estate in Kimball County, Nebraska, was entered into by Merle M. Vowers as seller and Jerry Strasheim as buyer for the agreed consideration of $320,000. Appellant was the owner of the real estate. The contract is on a form which is mostly printed and partly typed. At the bottom of the form, on a line marked "Buyer," are three typed names: August Iacono, Charles Delaplain, and Jerry Strasheim. Of these, only the latter, appellee, signed the contract. The terms of the contract stated, "The undersigned, as Buyer, whether one or more, agree to purchase the following property[.]"

Vowers is the president of appellant. Vowers' signature appears on a line in the contract marked "Seller." Appellant's name does not appear in the contract, and there is no indication that Vowers signed as a corporate officer.

Appellant's second amended petition filed on September 29, 1993, alleges inter alia that appellee intended to be bound by

the agreement; that appellee executed and delivered the purchase agreement, agreeing to accept conveyance of the property by corporate warranty deed, knowing at all times that appellant was the grantor of the corporate warranty deed; that on October 29, 1992, Vowers assigned to appellant any and all rights Vowers may have under the purchase agreement; and that at all times appellant was able and ready to convey the property and requested that appellee close the same.

Appellant claims appellee breached the real estate purchase contract by failing to close, and to perform his obligation under, the contract. As a result, appellant seeks judgment against appellee for general damages, $50,000 in loss of bargain damages, consequential damages as determined by the court, and the costs of this action.

Appellee demurred to appellant's second amended petition, alleging a defect in party plaintiff, a defect in party defendant, and a petition that did not state facts sufficient to constitute a cause of action. The district court sustained appellee's demurrer and dismissed appellant's action. The court found: (1) A defect in party defendant exists in that the purchase agreement is unsigned by parties thereto other than the named appellee and is, under the circumstances as disclosed by the pleadings, unenforceable against appellee; (2) a defect in party plaintiff exists in that the purchase agreement was not signed by any officer of appellant in the officer's corporate capacity; and (3) the petition does not state facts constituting a cause of action.

ANALYSIS

Whether Defect in Party Defendant Exists

Appellant first contends the district court erred in finding a defect in party defendant exists due to the fact that the purchase agreement was unsigned by parties, other than appellee, who were named as buyers in the purchase agreement.

In *Utilities Ins. Co. v. Stuart*, 134 Neb. 413, 278 N.W. 827 (1938), this court held that a party who signed and delivered a contract was bound by the obligations, though the contract was not executed by all the parties for whose signatures it had been prepared, where there was no showing on his part of an *intention* not to be bound thereby until signed by others, and no

express *agreement* to that effect was shown.

In that case, Utilities Insurance Company entered into a contract with Stuart and Kimball. Stuart signed the contract, but Kimball did not. Utilities sued Stuart for breach of contract. Stuart argued that he was not bound by the contract because the contract was not signed by Kimball. The court rejected Stuart's argument, finding that Stuart was liable on the contract. The court reasoned:

> While the defendant Kimball was named as party to the contract and it was prepared for his signature, there was no testimony or contention made that it was signed by Stuart on condition that it was not to become a binding obligation as to him or delivered until signed by Kimball. . . . Consequently, the defendant Stuart, having executed and delivered the contract, or permitted it to be delivered, is bound by the obligation therein assumed, although the contract was never signed by Kimball.

Id. at 418, 278 N.W. at 830.

Thus, the question as to whether or not appellee is bound by his signature must be determined by what the parties understood, intended, and agreed upon at the time the contract was executed. See *Utilities Ins. Co. v. Stuart, supra*. See, also, 17 C.J.S. *Contracts* § 62 (1963).

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom. *Proctor v. Minnesota Mut. Fire & Cas., ante* p. 289, 534 N.W.2d 326 (1995); *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994). The second amended petition alleges that appellee intended to be bound at the time he executed and delivered the purchase agreement. Therefore, given the facts as pled and the inferences which may reasonably be drawn from them, we find that it was error for the district court to rule that a defect in party defendant exists.

Whether Defect in Party Plaintiff Exists

Appellant next argues the district court erred in finding that a defect in party plaintiff exists due to the fact that the purchase agreement was not signed by any officer of appellant in a

corporate capacity.

Vowers signed the contract, but there is no indication he signed as a corporate officer, and appellant's name does not appear in the contract. At the time the contract was executed, Vowers did not individually own the property. However, there exists no requirement that at the time of execution a party be the legal owner of the property he contracts to sell. Thus, when Vowers signed his name to the agreement, he acquired the right to enforce, and became personally liable under, the terms of the agreement.

An assignment is a transfer vesting in the assignee all the assignor's rights in property which is the subject of the assignment. *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993); *Craig v. Farmers Mut. Ins. Co.*, 239 Neb. 271, 476 N.W.2d 529 (1991). An assignee stands in the shoes of the assignor and is bound by the terms of the contract to the same extent as the assignor. *Mid-America Appliance Corp. v. Federated Finance Co.*, 172 Neb. 270, 109 N.W.2d 381 (1961). The assignee of a thing in action may maintain an action thereon in his own name and behalf, without the name of the assignor. Neb. Rev. Stat. § 25-302 (Reissue 1989). See, also, *Archer v. Musick*, 147 Neb. 1018, 25 N.W.2d 908 (1947).

In the instant case, appellant attached an assignment executed on October 29, 1992, to its second amended petition filed on September 29, 1993, that stated Vowers assigned to it any and all rights he had under the purchase agreement. In its second amended petition, appellant alleged that the contract was executed and assigned to it for valuable consideration, that at all times appellant was able and ready to convey the property, and that appellee failed to perform his obligation under the terms of the contract. Thus, given the facts as pled and the attached exhibits and the inferences which may reasonably be drawn therefrom, we find that appellant was a proper party plaintiff and that it was error for the district court to rule that a defect in party plaintiff exists.

Whether Petition States Facts Which Constitute Cause of Action

Finally, appellant contends that the district court erred in

finding that the petition does not state facts constituting a cause of action. In order to recover on an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with the conditions precedent which activate the defendant's duty. *Production Credit Assn. v. Eldin Haussermann Farms*, 247 Neb. 538, 529 N.W.2d 26 (1995); *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994). A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action. *Horton v. Ford Life Ins. Co.*, 246 Neb. 171, 518 N.W.2d 88 (1994). In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled. *Proctor v. Minnesota Mut. Fire & Cas., ante* p. 289, 534 N.W.2d 326 (1995); *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994).

In its second amended petition, appellant alleged that a promise existed in that appellee agreed to purchase the real estate for $320,000; a breach of contract existed in that appellee failed and refused to close the purchase agreement and to perform his obligation under the terms of the agreement; and general damages, loss of bargain damages, and consequential damages resulted from appellee's actions.

As for conditions precedent, the purchase agreement provides generally that the sale is conditional upon appellant having marketable title in fee simple. Neb. Rev. Stat. § 25-836 (Reissue 1989) states, "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part . . . ."

While appellant does not plead specifically that it had marketable title in fee simple, appellant does allege it was able and ready to convey the property at all times. Liberally construed, appellant's second amended petition alleges compliance with the condition precedent on its part. As a result, the district court erred in finding appellant's second amended petition did not state facts constituting a cause of action.

CONCLUSION

Because we find that there were no defects in party plaintiff or party defendant and that the second amended petition states a cause of action, we conclude the district court erred in dismissing appellant's second amended petition, and thus, we order that it be reinstated.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CARL STANSBURY, APPELLANT, V. HEP, INC., APPELLEE.

539 N.W.2d 28

Filed October 27, 1995. No. S-94-813.

1. **Workers' Compensation: Appeal and Error.** A reviewing 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. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts.
3. **Statutes.** A substantive law creates duties, rights, and obligations; a procedural law prescribes the means and methods through and by which substantive laws are enforced and applied.
4. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
5. **Workers' Compensation: Expert Witnesses.** The Workers' Compensation Court is not required to take an expert's opinion as binding and may, as may any other trier of fact, either accept or reject such an opinion.
6. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact made by the Workers'

Compensation Court, the evidence must be considered in the light most favorable to the successful party.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and MILLER-LERMAN, Judge, and HOWARD, District Judge, Retired, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals reversed, and cause remanded with direction.

Gordon Peterson, of Orton, Brown, Thomas & Peterson, for appellant.

Robert D. Mullin, Jr., of McGrath, North, Mullin & Kratz, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. INTRODUCTION

The Nebraska Workers' Compensation Court entered judgment directing the defendant-appellee employer, HEP, Inc., to pay the plaintiff-appellant employee, Carl Stansbury, in addition to the compensation benefits it had already paid him or on his behalf, benefits for a 10-percent loss of earning capacity and for a 12-week period of vocational rehabilitation. Claiming that he was entitled to greater benefits, as more particularly set forth in part IV(2) below, Stansbury appealed to the Nebraska Court of Appeals, which in part affirmed and in part reversed the judgment of the compensation court. *Stansbury v. HEP, Inc.*, 3 Neb. App. 712, 530 N.W.2d 284 (1995). HEP then successfully petitioned this court for further review, asserting the Court of Appeals erred in determining the applicable law and its effect, as more particularly set forth in part IV(1) below. We now reverse the judgment of the Court of Appeals and remand with the direction that it affirm the judgment of the compensation court.

II. SCOPES OF REVIEW

A reviewing 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. *Shade v. Ayars & Ayars, Inc.*, 247 Neb. 94, 525 N.W.2d 32 (1994); Neb. Rev. Stat. § 48-185 (Reissue 1993). However, on questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts. See *McPherrin v. Conrad, ante* p. 561, 537 N.W.2d 498 (1995).

III. FACTS

Stansbury began working for HEP on March 25, 1991. The parties stipulated that he sustained a compensable injury to his lower back on May 9, 1991, and stipulated to his earnings. In addition, the parties entered into a partial settlement agreement which was approved by the compensation court. The partial settlement agreement left open for further determination the compensability of medical expenses incurred after August 27, 1992; the existence of temporary disability, whether total or partial, after August 27, 1992; the existence of permanent disability, whether total or partial; and Stansbury's entitlement to vocational rehabilitation. The nature and extent of Stansbury's injury also remain an issue between the parties.

Stansbury, who had a high school education and no other formal training at the time of trial, February 4, 1994, was 28 years old. His work history includes jobs that required heavy lifting, bending, and stooping.

He left HEP on May 19, 1991, and moved to Texas, where he found the job market more difficult than here. In the summer of 1991, he was hired part time by an amusement company. He quit that job in December 1991 because work was available for only a few hours a day. Stansbury thereafter received unemployment benefits while continuing to seek employment. However, he was unable to find reemployment until June 1992, when he was hired by a furniture company. He was laid off from that position in August 1992 and again received unemployment benefits while he searched for another job. He was next hired part time in October 1993 to install water softeners. This job

requires Stansbury to lift up to 75 pounds, and he has not missed any work because of his back problems.

After Stansbury moved to Texas, he started treatment with Dr. Jaime C. Lim, but HEP and its insurance carrier were not happy with him, so the parties agreed to switch to medical treatment by Dr. Craig A. Banta. Stansbury began treatment with Banta on October 28, 1992, and continued with him through March or April 1993. Banta expressed the opinion that Stansbury could not engage in heavy lifting or frequent bending, stooping, or lifting, and indicated that Stansbury had suffered a 5-percent permanent impairment of the whole body. Banta concluded in a questionnaire dated February 18, 1993, that Stansbury had reached maximum medical improvement.

Stansbury underwent a functional capacity assessment in March 1993 and has not seen Banta since. In fact, Stansbury did not see a doctor from March 1993 until the time of trial. The functional capacity assessment recited that Stansbury could lift an average material handling weight of 121 pounds and perform at a moderately heavy work level.

In June 1993, Dean N. Venter of Venter Consulting Service evaluated Stansbury's loss of earning capacity. Venter indicated that if Stansbury were limited to medium work, his loss of earning capacity would be approximately 15 to 20 percent. If he were limited to light-duty work, his loss of earning capacity would be 25 to 30 percent. According to Venter, however, if the functional capacity assessment was an accurate portrayal of Stansbury's present physical capabilities, his loss of earning capacity would be minimal. In December 1993, Venter prepared a vocational rehabilitation plan based on the assumption that Stansbury would be limited to light-duty work, which included 2 years of training at Southeast Community College in electronics.

IV. ANALYSIS

We first consider HEP's assignments of error and then proceed to a review of the errors Stansbury assigned to the compensation court.

1. HEP's Assignments of Error

HEP asserts the Court of Appeals erred in three respects,

namely, in its determination of the applicable statute, its treatment of the evidence, and its failure to find that Stansbury waived any error in the statute applied.

(a) Applicable Statute

More particularly, HEP contends in its first assignment of error that the Court of Appeals wrongly determined that Neb. Rev. Stat. § 48-162.01 (Reissue 1993) applies to this case.

Section 48-162.01 (Reissue 1988) was amended to operate from and after January 1, 1994, so as to provide, among other things, a means of determining a vocational rehabilitation plan and a means of determining loss of earning power. 1993 Neb. Laws, L.B. 757. Subsection (3) of the new version of the statute provides in relevant part:

> If entitlement to vocational rehabilitation services is claimed by the employee, the employee and the employer or his or her insurer shall attempt to agree on the choice of a vocational rehabilitation counselor from the directory of vocational rehabilitation counselors established pursuant to subsection (2) of this section. If they are unable to agree on a vocational rehabilitation counselor, the employee or employer or his or her insurer shall notify the compensation court, and the compensation court shall select a counselor from the directory of vocational rehabilitation counselors established pursuant to subsection (2) of this section. Only one such vocational rehabilitation counselor may provide vocational rehabilitation services at any one time, and any change in the choice of a vocational rehabilitation counselor shall be approved by the compensation court. The vocational rehabilitation counselor so chosen or selected shall evaluate the employee and, if necessary, develop a vocational rehabilitation plan. It shall be a rebuttable presumption that any vocational rehabilitation plan developed by such vocational rehabilitation counselor and approved by a vocational rehabilitation specialist of the compensation court is an appropriate form of vocational rehabilitation. . . . Any loss-of-earning-power evaluation performed by a vocational rehabilitation counselor shall be performed by a

> counselor from the directory established pursuant to subsection (2) of this section and chosen or selected according to the procedures described in this subsection. It shall be a rebuttable presumption that any opinion expressed as the result of such a loss-of-earning-power evaluation is correct.

The old version read in relevant part:

> If such services are not voluntarily offered and accepted, the Nebraska Workers' Compensation Court or any judge thereof on its or his or her own motion, or upon application of the employee or employer, and after affording the parties an opportunity to be heard by the compensation court or judge thereof, may refer the employee to a qualified physician or facility for evaluation and report of the practicability of, need for, and kind of service, treatment, or training necessary and appropriate to render him or her fit for a remunerative occupation, the costs of such evaluation and report involving physical or medical rehabilitation to be borne by the employer or his or her insurer, except that the costs of such evaluation and report involving vocational rehabilitation shall be paid from the Vocational Rehabilitation Fund. When both physical or medical rehabilitation and vocational rehabilitation are involved, the costs may be apportioned by the compensation court between the employer and the Vocational Rehabilitation Fund. Upon receipt of such report, and after affording the parties an opportunity to be heard, the compensation court or judge thereof may order that the physical or medical services and treatment recommended in the report, or such other physical or medical rehabilitation treatment or service he, she, or they may deem necessary, be provided at the expense of the employer or his or her insurer.

§ 48-162.01(3) (Reissue 1988).

Notwithstanding that the trial was not held until February 4, 1994, more than a month after the new statute became effective, the compensation court applied the old statute. Contrary to the conclusion of the Court of Appeals, HEP claims the compensation court was correct in doing so for two separate

reasons. HEP first argues that as the amendments to the statute were substantive in nature, the new statute could not apply to Stansbury's preamendment injury.

In *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988), we adopted the observation made in then Chief Justice Krivosha's concurrence in *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984), that a substantive law is one which creates a right or remedy and that a procedural law provides the method by which a substantive right is exercised. Stated otherwise, a substantive law creates duties, rights, and obligations; a procedural law prescribes the means and methods through and by which substantive laws are enforced and applied. See, *Rios v. Board of Pub. Utilities*, 256 Kan. 184, 883 P.2d 1177 (1994); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994); *S. Kellogg & Sons v. Lobban*, 204 Tenn. 79, 315 S.W.2d 514 (1958); *Johnson v. Terry*, 48 N.M. 253, 149 P.2d 795 (1944); *Hopkins v. Kurn*, 351 Mo. 41, 171 S.W.2d 625 (1943).

The new statute did not provide a new right; it merely altered the method by which a claimant could receive the already existing right of vocational rehabilitation or compensation for loss of earning power. The fact that the new statute provides for priorities in developing and evaluating a rehabilitation plan does not alter this legal reality. The priorities do not create the right to vocational rehabilitation; they are merely part of the new method for exercising this right.

The second reason HEP urges that the new statute does not apply to this case is that the compensation court promulgated rules evidencing an intention that "transitional" cases be governed by the old statutory framework. HEP cites to Workers' Comp. Ct. R. of Proc. 42E (1995), which provides: "If an employer received notice of injury before January 1, 1994, the employee may continue to receive vocational rehabilitation services from the vocational rehabilitation counselor selected prior to that date." Irrespective of whether this rule evidences an intent on the part of the compensation court to treat transitional cases differently, the legal reality is that while the compensation court is entitled to adopt and promulgate rules necessary for carrying out the intent of the Nebraska Workers'

Compensation Act, see Neb. Rev. Stat. § 48-163 (Reissue 1993), the rules cannot modify, alter, or enlarge provisions of a statute entrusted to its administration, see, *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994); *State ex rel. Spire v. Stodola*, 228 Neb. 107, 421 N.W.2d 436 (1988); *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985). In short, the compensation court does not have the power to determine when statutes will apply and when their application will be stayed.

Where an amendment to a statute makes a procedural change, it is binding upon a tribunal on the effective date of the amendment and is applicable to pending cases that have not been tried. *Behrens v. American Stores Packing Co.*, 236 Neb. 279, 460 N.W.2d 671 (1990); *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988); *Oviatt v. Archbishop Bergan Mercy Hospital*, 191 Neb. 224, 214 N.W.2d 490 (1974). See *Allen v. IBP, Inc.*, 219 Neb. 424, 363 N.W.2d 520 (1985). As the amendments to the statute in question were procedural in nature, the new statute was applicable to this case, and Stansbury was thus entitled to vocational rehabilitation. As such, the new statutory procedure for selecting a vocational rehabilitation counselor should have been followed.

Accordingly, there is no merit to HEP's first assignment of error.

(b) Treatment of Evidence

In its second assignment of error, HEP alleges that the Court of Appeals erred in finding that Venter's opinions were entitled to a rebuttable presumption of correctness.

But the fact is that the Court of Appeals made no such ruling. Moreover, the statute clearly states that the only opinion regarding vocational rehabilitation or loss of earning power entitled to a rebuttable presumption is that of a vocational rehabilitation counselor chosen or selected by the procedures set forth in the statute. § 48-162.01(3) (Reissue 1993). Venter was not chosen or selected by those procedures, so his opinion is not entitled to a rebuttable presumption.

Therefore, neither is there any merit to HEP's second assignment of error.

(c) Waiver of Error

Finally, in its third assignment of error, HEP urges that the Court of Appeals erred in failing to find that Stansbury waived his right to claim error in the misapplication of the statute.

HEP bases this argument on two different grounds. First, HEP argues that it was error for the Court of Appeals to utilize the doctrine of plain error. Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *Dike v. Dike*, 245 Neb. 231, 512 N.W.2d 363 (1994); *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993). HEP states that in order for the Court of Appeals to reach its result, "it was required both to find that the subject statute was 'procedural' for purposes of determining whether it should be applied and 'substantive' in that it effected [sic] a litigant's substantial right for purposes of applying the doctrine of plain error." Brief in support of petition for further review at 8. According to HEP, these findings are inherently inconsistent.

However, this assertion is incorrect. As determined in part IV(1)(a), the statute in question is procedural. Thus, there is nothing inconsistent in these two precepts.

Second, HEP asserts that Stansbury was not prejudiced by the application of the old statute. Under the new statutory scheme, Stansbury would not have had the ability to select a rehabilitation counselor of his choosing without the agreement of HEP. In addition, the only rehabilitation expert whose opinions were admitted into evidence and considered by the compensation court was Stansbury's own rehabilitation expert. Finally, any rehabilitation plan proposed under the new statute would be subject to the priority scheme set forth therein:

> The following priorities shall be used in developing and evaluating a rehabilitation plan. No higher priority may be utilized unless all lower priorities have been determined by the rehabilitation counselor to be unlikely to result in a job placement for the injured employee that is consistent with

the priorities listed in this section. If a lower priority is clearly inappropriate for the employee, the next higher priority shall be utilized. The priorities are, listed in order from lower to higher priority:

(a) Return to the previous job with the same employer;

(b) Modification of the previous job with the same employer;

(c) A new job with the same employer;

(d) A job with a new employer; or

(e) A period of formal retraining which is designed to lead to employment in another career field.

§ 48-162.01(3) (Reissue 1993).

The plan proposed for Stansbury is for a period of formal retraining and is in the highest priority category. Under the new statute, any plan of formal retraining could be utilized only if all lower priorities were shown to be clearly inappropriate for the employee, and the vocational rehabilitation counselor would be required to show that all lower priorities were unlikely to result in a job placement for Stansbury. Thus, it cannot be said that Stansbury was prejudiced by having the compensation court consider the only plan entered into evidence, proposed by a vocational rehabilitation counselor selected solely by himself, constituting the highest priority category under the new statute.

As for the loss of earning power evaluation, under the new statutory scheme only the evaluation performed by the vocational rehabilitation counselor selected or chosen pursuant to the new statute is entitled to a rebuttable presumption. Whether a vocational rehabilitation counselor so selected would have determined that Stansbury's loss of earning potential was greater than the 10 percent determined by the compensation court is mere speculation. Hypothetically speaking, if Venter's opinion on loss of earning power was given a rebuttable presumption effect, the result need not necessarily be different from that reached by the compensation court. Venter opined that if the functional capacity assessment was an accurate portrayal of Stansbury's physical condition, his loss of earning capacity would be minimal. The trier of fact was free to accept the functional capacity assessment over the opinion of Banta as to Stansbury's physical condition. See *Vredeveld v. Gelco Express*,

222 Neb. 363, 383 N.W.2d 780 (1986). Therefore, even with a rebuttable presumption in favor of Venter's opinion, the trial court could nonetheless have concluded that Stansbury's loss of earning power was minimal.

Stansbury introduced into evidence opinions ranging from minimal to 30 percent. Because on this record it cannot be said that Stansbury was prejudiced by a finding of 10 percent by the compensation court or by the application of the old statute, there is merit in HEP's third assignment of error. Accordingly, the Court of Appeals erred by holding that application of the old statute constituted plain error.

2. Stansbury's Assignments of Error

Stansbury asserts that the compensation court erred in finding that he was entitled to only a 12-week period of vocational rehabilitation for job placement, finding that he had suffered only a 10-percent loss of earning capacity, and awarding him no benefits after August 27, 1992.

(a) Rehabilitation Plan

Stansbury first urges that the compensation court erred when it rejected his proposed plan of vocational rehabilitation and instead allowed only a 12-week program of job placement. He seems to argue that because he was entitled to vocational rehabilitation and HEP did not offer any contrary evidence, his plan therefore should have been accepted by the compensation court.

Although HEP did not introduce a plan contrary to the one proposed by Stansbury, this does not mean that the evidence was uncontradicted.

> "A conflict or contradiction regarding an expert's opinion need not result from opinions expressed by different experts. A conflict or contradiction of opinions may arise in the course of testimony given by the same expert witness. A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact."

Vredeveld v. Gelco Express, 222 Neb. at 369, 383 N.W.2d at 783. Venter's plan was based on Stansbury being restricted to light-duty work. However, as noted in part III, Venter stated

that if the functional capacity assessment that Stansbury underwent was an accurate portrayal of his present physical capabilities, his loss of earning capacity would be minimal.

The functional capacity assessment concluded that Stansbury could perform at a moderately heavy work level. The compensation court could easily have found that these two opinions of Venter were contradictory. Therefore, the compensation court was not required to accept Venter's rehabilitation plan. See, *Brandt v. Leon Plastics, Inc.*, 240 Neb. 517, 520, 483 N.W.2d 523, 525 (1992) ("where the testimony of the same expert is conflicting, resolution of the conflict rests with the trier of fact. . . . Moreover, the compensation court is not required to take an expert's opinion as binding and may, as may any other trier of fact, either accept or reject such an opinion"); *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991) (compensation court not bound by testimony of expert, nor is reviewing court to determine the weight and credibility of such evidence).

Stansbury also claims that the compensation court's award is not supported by sufficient evidence. In testing the sufficiency of the evidence to support findings of fact made by the compensation court, the evidence must be considered in the light most favorable to the successful party. See, *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994); *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994). So considered, there is ample evidence to support the award of limited vocational rehabilitation benefits. The award was consistent with the functional capacity assessment, which concluded that Stansbury could perform at a moderately heavy work level, and the opinion of Venter, who indicated that if the assessment was accurate, Stansbury's loss of earning potential would be minimal.

Thus, there is no merit to Stansbury's first assignment of error.

(b) Earning Capacity

Stansbury's second assignment of error is that the compensation court erred in finding that he had suffered only a 10-percent loss of earning capacity.

Contrary to Stansbury's claim that the evidence is insufficient to support the compensation court's finding in this regard, there is ample evidence which does so. The functional capacity assessment indicated that Stansbury had a good fitness level and was capable of working with an average material handling weight of 121 pounds, or at a moderately heavy work level. Although Banta indicated that Stansbury should not perform manual labor with frequent lifting, bending, or stooping and is employable at a light-duty job, the compensation court, as the trier of fact, was entitled to resolve any conflicts in the evidence in HEP's favor and to accept the functional capacity assessment over Banta's opinion. See *Vredeveld v. Gelco Express*, 222 Neb. 363, 383 N.W.2d 780 (1986).

Accordingly, neither is there any merit to Stansbury's second assignment of error.

(c) Temporary Total Disability

In his third assignment of error, Stansbury contends that the compensation court erred in awarding him no temporary total disability benefits after August 27, 1992. Stansbury argues that he is entitled to temporary total disability benefits from August 28, 1992, through February 18, 1993, the date he reached maximum medical improvement.

However, a claimant is not entitled to temporary total disability benefits merely because the claimant underwent rehabilitation up to the time of maximum medical improvement. Under Neb. Rev. Stat. § 48-121(5) (Reissue 1993), an injured employee is entitled to compensation for such reasonable period of time as is spent undergoing rehabilitation and he or she is therefore unable to work. *Bindrum v. Foote & Davies*, 235 Neb. 903, 457 N.W.2d 828 (1990). There was ample evidence that Stansbury's unemployment during this time was not because of his injury, but, rather, because of the poor economy in the area of Texas in which he was living. Stansbury himself testified that during this period, he was constantly looking for any work he could find, including general labor, maintenance, or janitorial work. The compensation court could therefore properly have found that Stansbury was not entitled to any further temporary total disability payments after August 27, 1992.

Consequently, this assignment of error is as meritless as were the first two.

V. JUDGMENT

For the foregoing reasons, the judgment of the Court of Appeals is, as first noted in part I, reversed and the cause remanded with the direction that the Court of Appeals affirm the judgment of the compensation court.

REVERSED AND REMANDED WITH DIRECTION.

PAUL H. EVENSON, APPELLEE, V. TAMMI L. EVENSON, APPELLANT.

538 N.W.2d 746

Filed October 27, 1995. No. S-94-991.

1. **Modification of Decree: Child Custody.** In a modification hearing to determine who should have custody of the children, the paramount consideration is the best interests of the children.
2. **Trial: Divorce: Child Custody: Evidence: Appeal and Error.** It is discretionary with the trial court whether to admit evidence of facts, existing at the time of the decree and which affect the custody and best interests of children, that were not called to the attention of the trial court at the time of the decree, and this discretion will not be disturbed on appeal unless there is clearly an abuse of discretion.
3. **Trial: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Divorce: Visitation: Appeal and Error.** In a dissolution of marriage action, determinations concerning visitation with a minor are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion.

Appeal from the District Court for Adams County: STEPHEN ILLINGWORTH, Judge. Affirmed.

Brenda L. McCrady for appellant.

Chris A. Johnson, of Conway, Connolly and Pauley, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and GERRARD, JJ.

WHITE, C.J.

This is an appeal from actions for modification of a decree of dissolution of marriage. Tammi L. Evenson, now known as Tammi L. Stewart, and Paul H. Evenson separately requested that the joint custody agreement under the original decree be terminated. Both sought sole custody of their child, Shamus Evenson. The district court for Adams County granted Paul Evenson sole custody. The court granted Stewart 6 weeks' visitation during Shamus' summer vacation, and 1 week's visitation during his Christmas vacation. Stewart appeals.

Stewart assigns two errors. She contends that the district court (1) erred in receiving into evidence predivorce hospitalization records and a predivorce petition from the Mental Health Board of the 10th Judicial District concerning Stewart's mental health and (2) erred in awarding Stewart only 6 weeks' visitation each summer and 1 week's visitation each Christmas vacation.

On July 15, 1991, a decree of dissolution of marriage was entered by the district court for Adams County. The decree, incorporating a prior property settlement and joint custody agreement of the parties, provided for Evenson and Stewart to retain joint legal custody of Shamus. Pursuant to the decree, Stewart was to have physical custody the first 6 months of every year, and Evenson was to have physical custody the latter 6 months of every year.

After the parties' dissolution, Stewart moved to New Mexico, and Evenson moved to South Dakota. Both parties are remarried.

On March 16, 1994, Stewart filed an application for modification of decree, seeking sole custody of Shamus and child support. Evenson responded to Stewart's application and also filed his own application for modification of decree, seeking sole custody and child support.

On June 20, Evenson filed a motion to produce, requesting

that the court enter an order requiring two hospitals to release medical records of Stewart regarding her mental and physical condition. The hospitalizations occurred prior to the dissolution of the parties' marriage. The court granted the motion. The hospital records indicated that Stewart had suicidal impulses, self-mutilating impulses, personality disorders, and a history of alcohol abuse.

At the hearing, Evenson sought to introduce these records and examine Stewart regarding her hospitalizations. The district court judge, over objection, allowed the evidence to be admitted, but reserved ruling as to whether he was going to consider it in his final decision. Also admitted at trial was a petition filed with the Mental Health Board of the 10th Judicial District alleging Stewart to be a mentally ill dangerous person.

On August 23, following the full hearing, the judge entered an order stating that there had been a material change of circumstances and that it was in the best interests of the child to grant sole custody to Evenson. Stewart was ordered to pay child support and was allowed 6 weeks' visitation during the summer and 1 week's visitation during Christmas vacation. Stewart appealed.

First, Stewart contends that the district court erred in admitting the evidence regarding her predivorce hospitalizations. She claims that because the parties knew of the evidence at the time of the dissolution and did not present it to the court, the evidence is now inadmissible.

"In a modification hearing to determine who should have custody of the children, the paramount consideration is the best interests of the children." *Boll v. Boll*, 219 Neb. 486, 488, 363 N.W.2d 542, 544 (1985). In regard to the admission of evidence at such a hearing, this court has stated:

> It is discretionary with the trial court whether to admit evidence of facts, existing at the time of the decree and which affect the custody and best interests of children, that were not called to the attention of the trial court at the time of the decree, and this discretion will not be disturbed on appeal unless there is clearly an abuse of discretion.

Kuhn v. Kuhn, 204 Neb. 363, 369, 282 N.W.2d 43, 46 (1979). " 'A judicial abuse of discretion exists when reasons or rulings

of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.' " *State v. Trackwell*, 244 Neb. 925, 931-32, 509 N.W.2d 638, 643 (1994). Accord *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993).

In her medical records, Stewart was diagnosed as having suicidal tendencies and potential mental disorders, among other problems. Exposure to these characteristics can certainly affect a child, and that evidence is worthy of consideration in determining the best interests of the child with regard to custody. The court did not abuse its discretion.

Second, Stewart contends that the district court erred by not awarding her visitation for the full duration of Shamus' summer vacation from school. This court has consistently held that "in a dissolution of marriage action, determinations concerning visitation with a minor are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion." *Rosse v. Rosse*, 244 Neb. 967, 969, 510 N.W.2d 73, 76 (1994). Accord *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991). Even though the trial court's determination is reviewed de novo, weight is given to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the other. *Hickenbottom, supra*.

The district court heard testimony from both of Shamus' parents, Stewart's husband, Evenson's then fiance, and both maternal and paternal grandparents. The court concluded that 6 weeks' summer visitation and 1 week's Christmas visitation were appropriate. When reviewing the record, we find that the judge did not abuse his discretion in granting only 6 weeks' visitation in the summer.

The judgment of the district court is affirmed.

AFFIRMED.

CONNOLLY, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. EDWARD A. RUSSELL, APPELLANT.

539 N.W.2d 8

Filed October 27, 1995. No. S-94-1071.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous.
2. ____: ____: ____. The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.
3. **Postconviction: Proof.** A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
4. **Sentences: Weapons.** Neb. Rev. Stat. § 28-1205(3) (Reissue 1989) mandates that a sentencing court require that a sentence for the use of a firearm in the commission of a felony be served consecutively to any other sentence imposed.
5. **Appeal and Error.** An appellate court always reserves the right to note plain error of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process.
6. **Sentences: Weapons: Appeal and Error.** The trial court's failure to impose a defendant's sentence for use of a firearm consecutively to his life imprisonment sentence is in violation of Neb. Rev. Stat. § 28-1205(3) (Reissue 1989) and is plain error.
7. **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.
8. **Criminal Law: Trial.** A trial court sitting without a jury is not required to articulate findings of fact or conclusions of law in criminal cases.
9. **Criminal Law: Trial: Judges: Presumptions.** It is presumed in a jury-waived criminal trial that the judge was familiar with and applied the proper rules of law unless it clearly appears otherwise.
10. **Trial: Attorneys at Law: Evidence.** It is improper for counsel to comment during closing argument on matters unsupported by the evidence.
11. **Speedy Trial: Indictments and Informations.** Every person indicted or informed against for any offense shall be brought to trial within 6 months.
12. **Trial: Time: Motions to Suppress.** A defendant's motion to suppress evidence shall be excluded in computing the time for trial.
13. **Postconviction: Effectiveness of Counsel: Proof.** When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area.
14. **Effectiveness of Counsel: Proof.** The defendant must make a showing of how

the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.

15. **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.
16. **Criminal Law: Jury Trials: Waiver.** The right to trial by jury is personal and may be waived by a criminal defendant.
17. **Jury Trials: Waiver.** In order to waive the right to trial by jury, a defendant must be advised of the right to jury trial, must personally waive that right, and must do so either in writing or in open court for the record.
18. **Trial: Appeal and Error.** An issue not presented to or passed upon by the trial court is not an appropriate issue for consideration upon appeal.
19. **Constitutional Law: Postconviction: Proof.** An evidentiary hearing on a postconviction motion 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.
20. **Postconviction.** An evidentiary hearing may properly be denied on a motion for postconviction relief when the records and files of the case affirmatively establish that the defendant is not entitled to relief.
21. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.
22. **Trial: Words and Phrases.** Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed in part, and in part reversed and remanded with direction.

James Walter Crampton for appellant.

Edward A. Russell, pro se.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

In his postconviction relief motion, Edward A. Russell asked the district court for Douglas County to vacate his bench trial first degree murder conviction and his life sentence. Russell appeals from the district court's denial of his postconviction relief motion.

Upon review of the record, we find that Russell's claims for

postconviction relief lack merit. However, Russell's case must be remanded to the district court because that court failed to properly sentence Russell on a charge of using a firearm to commit a felony.

STANDARD OF REVIEW

A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous. *State v. Ryan, ante* p. 405, 534 N.W.2d 766 (1995). The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial. *State v. Barfoot, ante* p. 335, 534 N.W.2d 572 (1995). A defendant in a postconviction proceeding must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Lowe, ante* p. 215, 533 N.W.2d 99 (1995).

FACTS

On July 26, 1991, Russell, having previously been attacked and beaten, returned with a gun to the site of his beating and fired one bullet in the direction of three individuals. The bullet struck one of the individuals, who died of a hemorrhage from the gunshot wound. The State charged Russell with first degree murder and also with the use of a firearm to commit a felony. A public defender was appointed to represent Russell.

On January 13, 1992, Russell filed a motion to suppress statements allegedly made by him to police. On February 25, the court sustained in part Russell's suppression motion.

At the hearing on the motion to suppress, Russell stated that he was prepared to waive a jury trial. The court advised Russell of his right to a jury trial and the consequences of waiving a jury trial. Russell told the court that he was not promised leniency, threatened, or pressured to waive a jury trial. Russell then, in open court with his counsel present, waived his right to a jury trial.

Thereafter, a bench trial began. Russell was convicted of both counts contained in the information filed against him. The trial court sentenced Russell to life imprisonment on the murder conviction and to a 15-month term of imprisonment on the use

of a firearm conviction with credit for 283 days served. The trial court was silent as to whether the sentences were to be served consecutively or concurrently.

Russell, represented by different counsel, directly appealed his conviction to this court, assigning only that there was insufficient evidence for the trial court to find Russell guilty of first degree murder. We held that there was sufficient evidence in the record to support the trial court's finding that Russell was guilty of murder in the first degree. *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993).

On September 20, 1994, Russell filed, pro se, a verified motion for postconviction relief. Russell essentially claimed that (1) there was insufficient evidence to convict him of first degree murder, (2) the trial court did not present a basis for finding him guilty, (3) his right to a speedy trial was violated, and (4) the prosecutor's closing statement contained uncorroborated conclusions. Russell also alleged that his trial counsel provided ineffective assistance because counsel advised and coerced Russell to waive a jury trial, employed an unsupported theory of defense, failed to inform Russell of his right to a speedy trial, allowed Russell to sit idle in jail for 5 months before rushing him to trial, and failed to object to unsupported testimony. Russell alleged that his counsel on direct appeal provided ineffective assistance because counsel did not put forth a meaningful challenge to the State's evidence and adopted the same defense strategy as trial counsel. Russell also requested appointment of counsel and an evidentiary hearing in his pro se postconviction proceedings.

On November 1, 1994, the district court, after reviewing Russell's motion and the record, entered judgment denying Russell postconviction relief. Russell then filed this appeal.

ASSIGNMENTS OF ERROR

In a supplemental brief prepared by newly appointed counsel, Russell assigned that the trial court erred in (1) failing to find that Russell was denied effective assistance of appellate counsel, (2) refusing to grant an evidentiary hearing, and (3) failing to appoint counsel to represent Russell on his motion for postconviction relief.

In Russell's pro se brief, filed prior to the appointment of counsel, Russell assigned that the trial court erred in (1) convicting Russell of first degree murder without sufficient evidence; (2) failing to present a basis for finding Russell guilty of first degree murder; (3) failing to find ineffective assistance of trial counsel based upon counsel's failure to advise Russell of his right to a speedy trial and to raise the issue before the court, employing unsupported defense strategy, persuading Russell to waive his right to a jury trial in return for a lesser sentence, and waiting 5 months to rush Russell to trial; (4) failing to find ineffective assistance of counsel on direct appeal based upon appellate counsel not raising the issue of trial counsel's ineffective assistance; (5) failing to find that the prosecutor's closing statement contained uncorroborated conclusions; and (6) failing to find that Russell's right to a speedy trial was violated.

ANALYSIS

Initially, we note that the trial court sentenced Russell to a 15-month term in the Nebraska Penal and Correctional Complex with 283 days' credit for time served for using a firearm to commit a felony. The trial court also sentenced Russell to life imprisonment for first degree murder. The trial court, however, did not state whether the sentence for use of a firearm was to be served consecutively to the sentence for first degree murder.

Neb. Rev. Stat. § 28-1205(3) (Reissue 1989) mandates that a sentencing court require that a sentence for the use of a firearm in the commission of a felony be served consecutively to any other sentence imposed. The use of the word "shall" in § 28-1205(3) mandates consecutive sentencing. *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995). An appellate court always reserves the right to note plain error of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Wilson*, 247 Neb. 948, 530 N.W.2d 925 (1995). Using a firearm to commit a felony in violation of § 28-1205(3) "shall be treated as a separate and distinct offense from the felony being committed, and sentences

imposed under the provisions of [§ 28-1205] shall be consecutive to any other sentence imposed." The trial court's failure to impose Russell's sentence for use of a firearm consecutively to his life imprisonment sentence is in violation of § 28-1205(3) and is plain error. See *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

Sufficiency of the Evidence

Russell's argument that there was insufficient evidence to support his conviction of first degree murder lacks merit because the sole assignment of error on direct appeal was the sufficiency of the evidence. The issue has already been addressed by this court and will not be addressed again. 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. Keithley*, 247 Neb. 638, 529 N.W.2d 541 (1995).

Trial Court Findings

Russell's claim that it was error for the trial court to convict and sentence him without articulating a basis for the conviction also lacks merit. A trial court sitting without a jury is not required to articulate findings of fact or conclusions of law in criminal cases. *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994). It is presumed in a jury-waived criminal trial that the judge was familiar with and applied the proper rules of law unless it clearly appears otherwise. *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992).

Prosecutorial Misconduct

Russell argues that the prosecutor in her closing arguments made prejudicial uncorroborated statements. It is a well-established legal principle that it is improper for counsel to comment during closing argument on matters unsupported by the evidence. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994). Russell does not explain, however, precisely what comments made by the prosecutor were improper. The record does not reflect any unsupported closing arguments from the prosecutor. Once again, Russell failed to meet his burden of proving a prejudicial error.

Speedy Trial

Russell's contention that his right to a speedy trial was violated also lacks merit. Every person indicted or informed against for any offense shall be brought to trial within 6 months. Neb. Rev. Stat. § 29-1207(1) (Reissue 1989). A defendant's motion to suppress evidence shall be excluded in computing the time for trial. § 29-1207(4). The state charged Russell by information on August 9, 1991, and a bench trial was held on February 25, 1992. Russell filed a motion to suppress evidence on January 13, 1992, and the motion was sustained in part on February 25. Excluding the time between Russell's filing his suppression motion and the date the court ruled on the motion, Russell's trial was held within the statutory 6-month period.

Ineffective Assistance of Trial Counsel

Russell claims that his trial counsel provided ineffective assistance by not advising him of his right to a speedy trial, not raising the speedy trial issue before the court, waiting 5 months before rushing Russell to trial, conspiring to deprive Russell of his right to a speedy trial by filing a motion to suppress, employing an unsupported defense strategy, and persuading Russell to waive his right to a jury in return for a lesser sentence.

When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions. *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995).

We do not agree with Russell's contention that trial counsel failed to protect Russell's right to a speedy trial. As stated earlier, Russell's right to a speedy trial was not infringed. The defense counsel's decision to toll the 6-month time period in order to move to suppress evidence was a competent decision in light of the court having sustained the motion in part as to

unrecorded statements Russell made to police. Furthermore, given the evidence in the case at bar, defense counsel's emphasis on a bullet-ricochet theory was a reasonable strategy of attacking the issue of intent. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. Ryan, ante*, p. 405, 534 N.W.2d 766 (1995).

The record reflects that there is no basis to Russell's claim that his trial counsel pressured Russell to waive a jury. The right to trial by jury is personal and may be waived by a criminal defendant. *State v. Zemunski*, 230 Neb. 613, 433 N.W.2d 170 (1988). In order to waive the right to trial by jury, a defendant must be advised of the right to jury trial, must personally waive that right, and must do so either in writing or in open court for the record. *State v. High*, 225 Neb. 690, 407 N.W.2d 776 (1987). The record reflects that Russell personally, freely, voluntarily, knowingly, and intelligently waived his right to a jury trial without any promises of leniency or pressure from his counsel. In his postconviction petition, Russell did not meet his burden of setting forth facts entitling him to postconviction relief in regard to his allegation that trial counsel performed below the level of ordinary skill of counsel in the area of criminal law.

Ineffective Assistance of Appellate Counsel

In his supplemental brief, Russell assigns that his counsel on direct appeal provided ineffective assistance by not assigning available errors. Specifically, Russell claims that appellate counsel should have argued that the trial court erred in (1) permitting the State to reopen its case on Russell's motion to suppress, (2) failing to find Russell was arrested without probable cause, (3) admitting Russell's postarrest recorded statement because it was the fruit of an illegal arrest, and (4) finding Russell guilty of first degree murder instead of manslaughter.

Russell did not address his motion to suppress, the legality of his arrest, or the admission of his recorded statement to police in his postconviction motion to the district court. Absent plain error, an issue not presented to or passed upon by the trial court

is not an appropriate issue for consideration upon appeal. *State v. Ryan, supra*. Except as previously stated, we find no plain error. Therefore, we do not address the assignments of error which were not presented to the district court as grounds for postconviction relief.

Russell's contention that appellate counsel was ineffective because counsel did not argue that the evidence supports manslaughter rather than first degree murder lacks merit, for, in fact, Russell's counsel on direct appeal assigned that there was insufficient evidence to find Russell guilty of first degree murder. That matter was addressed by this court, and we affirmed Russell's conviction of first degree murder.

Russell also assigned as error that appellate counsel was ineffective for failing to assign the ineffective assistance of trial counsel. Russell's claim clearly lacks merit because, as addressed earlier, Russell did not establish ineffective assistance on the part of trial counsel.

Evidentiary Hearing

Russell claims that the postconviction relief court erred in not granting him an evidentiary hearing. An evidentiary hearing on a postconviction motion 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. An evidentiary hearing may properly be denied on a motion for postconviction relief when the records and files of the case affirmatively establish that the defendant is not entitled to relief. *State v. Livingston*, 244 Neb. 757, 509 N.W.2d 205 (1993). As reflected in the analyses of Russell's assigned errors, Russell's postconviction motion did not affirmatively establish any basis for relief. Therefore, an evidentiary hearing was not a predicate for the district court to deny Russell's motion for postconviction relief.

Appointment of Counsel

Finally, Russell argues that the court erred in not appointing counsel for his postconviction motion. Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant. *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144

(1994). Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition. *State v. Eona, ante* p. 318, 534 N.W.2d 323 (1995). Because Russell's claims are without merit, there was no justiciable issue of law or fact. As a result, the trial court did not abuse its discretion in declining to appoint counsel for Russell.

CONCLUSION

The issues presented by Russell in his motion for postconviction relief lack merit. We affirm the district court's judgment in denying Russell's motion for postconviction relief.

Due to plain error, we remand this cause to the district court with direction to vacate Russell's sentence on his conviction of use of a firearm to commit a felony and direct that the district court sentence him on the firearm charge in accordance with § 28-1205(3) and *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995).

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

STATE OF NEBRASKA, APPELLEE, V. BARTON L. SUNDLING, APPELLANT.

538 N.W.2d 749

Filed October 27, 1995. No. S-94-1100.

1. **Statutes: Appeal and Error.** The meaning of a statute is a question of law. In connection with a question of law, a reviewing court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Criminal Law: Statutes.** A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence.
3. **Statutes: Time.** The simultaneous repeal and reenactment of substantially the same statutory provisions is ordinarily construed to be an affirmation or continuation of the original provisions rather than a true repeal.

4. ____: ____. When a statute has been repealed and substantially reenacted with additions or changes, the additions or changes are treated as amendments effective from the time the new statute goes into effect and not as a repeal in the strict or constitutional sense of the term.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of Court of Appeals affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Susan R. Tast for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

Barton L. Sundling, in petitioning this court for further review of his conviction of driving while intoxicated (DUI), third offense, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993), claims that his two prior DUI convictions prosecuted under Neb. Rev. Stat. § 39-669.07 (Cum. Supps. 1990 & 1992) cannot be used to enhance the penalty for a DUI conviction under § 60-6,196.

We hold that § 60-6,196 is a continuance and affirmation of the previous statute § 39-669.07. Convictions under § 39-669.07 can be used for the purpose of sentence enhancements under § 60-6,196.

Therefore, we affirm the Nebraska Court of Appeals' judgment affirming Sundling's third-offense DUI conviction prosecuted under § 60-6,196.

ASSIGNMENTS OF ERROR

Sundling claims that the Court of Appeals erred in (1) finding that § 39-669.07 was not repealed in the strict or constitutional sense of the term and that § 60-6,196 is a mere affirmance of § 39-669.07 and (2) finding that convictions under § 39-669.07

are suitable to use in enhancement proceedings under § 60-6,196.

STANDARD OF REVIEW

The meaning of a statute is a question of law. In connection with a question of law, a reviewing court has an obligation to reach a conclusion independent of that of the inferior court. *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995); *State v. Wragge*, 246 Neb. 864, 524 N.W.2d 54 (1994).

A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994).

FACTS

On March 5, 1994, Sundling was arrested in Lincoln for DUI. Sundling had a blood alcohol content of .195. As a result of his March 5 arrest and two previous convictions, Sundling was charged with third-offense DUI under § 60-6,196.

Sundling's two previous DUI offenses entered in evidence by the State were under § 39-669.07 for incidents arising on December 10, 1992, and March 7, 1993. Sentencing for both prior convictions was held on July 23, 1993. Sundling pled no contest to both charges and for each charge was fined $250, had his driving privileges revoked for 6 months, and was sentenced to 7 days in jail.

The Lancaster County Court found Sundling guilty of third-offense DUI and sentenced him to 120 days in jail, fined him $500 plus costs, and suspended his privilege to operate a motor vehicle for 15 years after his release from jail.

Sundling appealed to the district court for Lancaster County, assigning that his two previous convictions were not admissible for purposes of enhancement under § 60-6,196. The district court affirmed the judgment of the county court.

Sundling then appealed to the Court of Appeals, assigning that the county court erred in using convictions under § 39-669.07 to enhance the penalty for Sundling's conviction under § 60-6,196. The Court of Appeals affirmed Sundling's conviction and sentence and held that because there was no significant substantive change in content, convictions under § 39-669.07 are suitable for use in enhancement proceedings

under § 60-6,196(2)(c). *State v. Sundling*, 3 Neb. App. 722, 531 N.W.2d 7 (1995).

Sundling successfully petitioned this court for further review.

ANALYSIS

Both assigned errors address one basic issue: whether DUI convictions under § 39-669.07 are proper for sentence enhancement under § 60-6,196.

The Legislature directed the Revisor of Statutes to reassign § 39-669.07 as amended a new section number under chapter 60. 1993 Neb. Laws, L.B. 370. Pursuant to the legislative mandate, the Revisor of Statutes assigned former § 39-669.07 to § 60-6,196, effective January 1, 1994.

Sundling does not dispute that § 60-6,196 is substantively the same as § 39-669.07. The statute, under § 39-669.07 as well as the currently assigned § 60-6,196, provides that a person is guilty of a third-offense DUI if such person "has had two or more convictions under *this section*." (Emphasis supplied.)

Sundling's argument that § 60-6,196 does not allow for use of prior convictions under § 39-669.07 relies upon our holding in *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980).

In *State v. Suhr*, the defendant was charged under Neb. Rev. Stat. § 28-611(2) (Reissue 1979) with issuing a bad check, second offense. At trial, all the facts of the case were stipulated by the parties, and the defendant was found guilty as charged. On appeal, the defendant assigned that the trial court erred when it held that his 1976 misdemeanor conviction "of writing a no-account check, pursuant to Neb. Rev. Stat. § 28-1212 (Reissue 1975) (repealed 1977)," qualified as a conviction for the purpose of enhancing his sentence under § 28-611(2). 207 Neb. at 557, 300 N.W.2d at 27. We remanded the cause for resentencing and held that the Legislature, in enacting § 28-611, deleted the words " 'or if any person shall have been previously convicted,' " originally found in § 28-1212. (Emphasis omitted.) 207 Neb. at 560, 300 N.W.2d at 28. We further held that § 28-611 affirmatively declares that, for an offense to be a second or subsequent offense, there must be a prior conviction under § 28-611(1)(c) or (1)(d). Significant to our analysis is that § 28-611 is substantially different than its predecessor,

§ 28-1212. Section 28-611 essentially redefined the offense of issuing a bad check.

In the present case, the Legislature did not make a substantive departure from § 39-669.07 when ordering the Revisor of Statutes to renumber the statute. Furthermore, § 60-6,196 did not amend § 39-669.07's standard for a prior conviction. That standard was and remains two or more convictions under this section.

We have long held that the simultaneous repeal and reenactment of substantially the same statutory provisions is ordinarily construed to be an affirmation or continuation of the original provisions rather than a true repeal. When a statute has been repealed and substantially reenacted with additions or changes, the additions or changes are treated as amendments effective from the time the new statute goes into effect and not as a repeal in the strict or constitutional sense of the term. See, *Dairyland Power Co-op v. State Bd. of Equal.*, 238 Neb. 696, 472 N.W.2d 363 (1991); *Sullivan v. City of Omaha*, 146 Neb. 297, 19 N.W.2d 510 (1945); *Bauer v. State*, 99 Neb. 747, 157 N.W. 968 (1916); *State v. Wish*, 15 Neb. 448, 19 N.W. 686 (1884).

Being substantially the same as § 39-669.07, § 60,6-196 represents an amendment of the statute, renumbered by the Revisor of Statutes. As such, appropriate convictions under § 39-669.07 can be used for sentence enhancement under § 60,6-196(2)(c).

Therefore, the Court of Appeals did not err in affirming Sundling's conviction and sentence.

CONCLUSION

Section 60,6-196 is merely an affirmation and continuance of § 39-669.07. Therefore, Sundling's earlier convictions under § 39-669.07 are applicable to sentence enhancements under § 60-6,196.

Sundling was appropriately convicted of third-offense DUI under § 60-6,196, and his conviction and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRANK LADIG, APPELLANT.

539 N.W.2d 38

Filed October 27, 1995. No. S-94-1195.

1. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion.
2. **Sentences.** An abuse of discretion takes place when the sentencing court's reasons or rulings are untenable and unfairly deprive the defendant of a substantial right and a just result.
3. ____. In imposing sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Sentence vacated, and cause remanded for resentencing.

R. Bradley Dawson and George E. Clough, of Clough, Dawson & Piccolo, for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

In this appeal, Frank Ladig claims that the district court for Lincoln County abused its discretion in sentencing him to life imprisonment for aiding and abetting the second degree murder of Richard Sterkel.

Ladig entered a no contest plea to a charge of second degree murder on September 16, 1993, was found guilty, and was sentenced to life imprisonment on November 20. He appealed that sentence to this court. Because the information upon which he was charged omitted "malice" as an element of the crime of second degree murder, this court, on July 29, 1994, set aside Ladig's conviction and remanded the cause to the district court for further proceedings. *State v. Ladig*, 246 Neb. 542, 519 N.W.2d 561 (1994).

Subsequently, an amended information, properly charging

Ladig with second degree murder, was filed in the district court for Lincoln County. On November 14, 1994, Ladig again entered a plea of no contest and was again found guilty of aiding and abetting the second degree murder of Sterkel. He again was sentenced to life imprisonment and again timely appealed his life sentence, claiming that it is excessive.

We find that the credit for time served while awaiting final disposition of his case is invalid and remand the cause to the district court for the resentencing of Ladig.

STANDARD OF REVIEW

A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Ellen*, 243 Neb. 522, 500 N.W.2d 818 (1993); *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993).

FACTS

Ladig arrived in North Platte in July 1992. There, he met some men who had set up a transient camp under a Platte River bridge. Among the group were his future codefendants Antonio Estrada and Darrin McHenry.

Ladig joined the men as they spent their day drinking alcoholic beverages, swimming, playing cards, and taking turns begging for money to buy more food and alcohol. Sterkel came upon the group and accepted McHenry's invitation to join them at their camp. Later that afternoon, when Sterkel returned from a swim, he found that his wallet was missing. Ladig had the wallet and returned it to Sterkel. Ladig noticed that the wallet contained about $52.

The next morning Ladig, McHenry, Estrada, Sterkel, and another man, Nordell Moore, sat drinking alcoholic beverages. McHenry suddenly stood up and said, "Let's do it." McHenry looked at Estrada and asked if he was "ready." In response, Estrada stood up and McHenry hit Sterkel in the face. Estrada asked Ladig if he was with them. Ladig stood up and said, "Yeah." Ladig and Estrada then joined McHenry in beating Sterkel with their fists. Moore watched. McHenry demanded Sterkel's wallet. When Sterkel replied that it was hidden in the woods, McHenry demanded that he show them where it was. The presentence investigation report reflects that Sterkel was

too drunk to offer any resistance as he stumbled toward the woods. As Sterkel stumbled, McHenry, Ladig, and Estrada held him up and continued to punch him.

Once in the woods, the three men dumped Sterkel on the ground, and McHenry began kicking Sterkel in the face. McHenry again demanded to know where Sterkel had hidden the wallet. Sterkel replied that he had no money. The three men then began to search for Sterkel's wallet. In this search, Sterkel was stripped of his clothing. Sterkel then began to make a gurgling noise in his throat and seemed to have difficulty breathing. Ladig stopped hitting Sterkel and left the scene with Estrada.

Sterkel's battered body was discovered on July 30, 1992. The immediate cause of death was manual strangulation with blunt trauma to the chest and head.

Ladig was arrested on October 27, 1992, while driving a stolen truck in San Diego, California. Ladig had previously been convicted of burglary, grand theft (twice), retail theft (twice), trespass, petit theft, retail fraud (four counts), criminal damage to property, and opening and damaging coin-operated machines. At the time of sentencing, Ladig also had two counts each of burglary and theft pending in California.

Ladig was convicted of aiding and abetting second degree murder, sentenced to life imprisonment, and given 794 days' credit for time served.

ASSIGNMENT OF ERROR

Ladig alleges that the trial court abused its discretion in imposing an excessive sentence.

ANALYSIS

A sentence within the statutory limits will not be disturbed upon appeal absent an abuse of discretion by the sentencing court. See, *State v. Navrkal*, 242 Neb. 861, 496 N.W.2d 532 (1993); *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991). An abuse of discretion takes place when the sentencing court's reasons or rulings are untenable and unfairly deprive the defendant of a substantial right and a just result. See, *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993); *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993); *State v. Reynolds*, 242

Neb. 874, 496 N.W.2d 872 (1993).

In imposing sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his 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. See *State v. Smith*, 242 Neb. 202, 494 N.W.2d 126 (1993).

Ladig was 19 years old when he aided and abetted Sterkel's murder. The motive behind the murder was robbing Sterkel of approximately $52. Ladig's share of the take would have been minuscule. The attempted robbery of Sterkel ending in murder was the last in a long line of theft-related crimes Ladig has committed.

Ladig did express remorse at Sterkel's death. However, the brutal and vicious way in which Sterkel was repeatedly kicked, beaten, and finally strangled to death is a fact that cannot be ignored. The penalty authorized by Neb. Rev. Stat. § 28-304 (Reissue 1989) is not less than 10 years to a maximum of life imprisonment.

In light of the callousness with which Sterkel was killed and the theft-related nature of the crime, it cannot be said that the trial court abused its discretion in sentencing Ladig to life imprisonment. We note, however, that the trial court ordered that Ladig be given 749 days' credit for the time spent in jail. A defendant sentenced to life imprisonment is not entitled to credit for time in custodial detention pending trial and sentence. See, *State v. Rust*, 247 Neb. 503, 528 N.W.2d 320 (1995); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994); *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994); *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983). Therefore, the credit given to Ladig for time served is invalid.

Ladig's sentence is vacated and the cause remanded to the district court for Lincoln County with direction to resentence Ladig in accordance with the law.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

SARAH P. ROEMER, APPELLANT, V. JAMES MALY, M.D., APPELLEE.

539 N.W.2d 40

Filed November 3, 1995. No. S-93-926.

1. **Judgments: Equity: Time.** A litigant seeking vacation or modification of a judgment after term may take one of two routes. The litigant may proceed either under Neb. Rev. Stat. § 25-2001 (Reissue 1989) or under the district court's independent equity jurisdiction.
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. **Judgments: Time.** A district court has no authority to set aside a judgment after the term when any mistake, inadvertence, or neglect was the party's own. The purpose of Neb. Rev. Stat. § 25-2001(3) (Reissue 1989) is to address mishaps beyond a party's control.
4. **Judgments: Words and Phrases.** The operative definition of "irregularity" limits the term to the doing or not doing that, in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done.
5. ____: ____. A judgment marred by irregularity is one rendered contrary to the course of law and practice of the court.
6. **Judgments: Equity.** Neb. Rev. Stat. § 25-2001 (Reissue 1989) is concurrent with an independent equity jurisdiction and with a court's inherent powers of equity.
7. **Courts: Dismissal and Nonsuit.** Trial courts possess equally inherent power, equally independent of any statute or rule of court, to dismiss a case for failure to prosecute with due diligence. Courts can and should invoke this sanction to prevent undue delays in the disposition of pending cases and to stave off congestion from their trial dockets.
8. **Equity.** Any litigant who seeks equity must herself do equity.
9. **Dismissal and Nonsuit: Limitations of Actions: Appeal and Error.** The fact of an expired statute of limitations does not in and of itself demonstrate an abuse of discretion in dismissing a case.
10. **Attorneys at Law: Notice.** Notice to the counsel of record constitutes notice to the party represented by such counsel.
11. **Actions.** Regardless of whether represented by counsel, the plaintiff—not the court, not opposing counsel—bears responsibility to prosecute the case with reasonable diligence.
12. ____. A litigant has a duty to follow the progress of the case, rather than to merely assume that counsel is doing everything necessary and proper.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

E. Terry Sibbernsen and Mandy L. Strigenz, of E. Terry Sibbernsen, P.C., for appellant.

Mark J. Blazek and Mark A. Christensen, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, and GERRARD, JJ.

WHITE, C.J.

This appeal arises from the refusal of the Lancaster County District Court to reinstate Sarah P. Roemer's medical malpractice action against her physician, James Maly, M.D. Roemer sued Maly on September 13, 1990, for injuries ostensibly caused by Maly when he performed surgery on Roemer; the details underlying Roemer's action are not material to her appeal.

Roemer's petition and praecipe were signed by Steven Renteria, attorney and employee of the then partnership of Welsh & Sibbernsen. All subsequent documents filed for Roemer were signed by E. Terry Sibbernsen of Welsh & Sibbernsen. The last document filed for Roemer, a motion to compel, was filed on April 5, 1991; the last of the four depositions taken by Roemer was taken on June 12, 1991. That deposition marked the last evidence of Roemer's interest in her lawsuit while her case remained on the docket.

In the meantime, Maly filed a motion to compel discovery on May 30, 1991, and appeared at the hearing on the motion on June 28. Neither Roemer nor her attorneys appeared at this hearing. The district court granted both Maly's motion and his request for sanctions. Still Roemer did not comply with the discovery order. Neither Maly, Maly's counsel, nor the district court heard from Roemer or her attorneys again in 1991.

In October 1991, the partnership of Welsh & Sibbernsen dissolved, and Sibbernsen moved his practice to a different Omaha location. Renteria did not accompany Sibbernsen to the new office, but stayed behind with Sibbernsen's former partner at the old location until March 1992, when he moved to a different office. Neither Sibbernsen nor Renteria notified the court of any change of address for Roemer's counsel. For that matter, neither Sibbernsen nor Renteria advised the court at any time of the dissolution or of which attorney would thereafter handle Roemer's case. By virtue of signing the initial pleading

in Roemer's case, Renteria constituted Roemer's sole attorney of record, and neither Renteria nor Sibbernsen ever advised the court to the contrary.

In May 1992, the clerk of the Lancaster County District Court noted a lack of activity in Roemer's case over the many preceding months. Standard court practice instructs the clerk to mail notice to attorneys of record in languishing cases of an order to show cause why their cases should not be dismissed for want of prosecution; in this case, Renteria was the attorney of record listed on the docket sheet. The clerk mailed a show cause notice to Renteria at the address listed on the docket sheet (which was the only address ever listed in any court documents for either Renteria or Sibbernsen) on May 12, 1992, ordering him to show cause by June 11. Notice of the show cause hearing was also published in The Daily Reporter on May 29. Neither Roemer, Renteria, nor Sibbernsen appeared at the show cause hearing, and the court dismissed Roemer's case for want of prosecution on June 12. A notice of that judgment was mailed to Renteria on that date.

Not until October 22, 1992—the next term of the court—did the clerk hear from anyone connected with Roemer's case. On that date, Sibbernsen called the clerk and was informed that the district court had dismissed Roemer's case 5 months earlier. Sibbernsen moved to reinstate the case and filed affidavits in support of that motion from himself, Renteria, and James Welsh, his former partner at Welsh & Sibbernsen. All affiants insisted that they had never received either the show cause notice or the notice of judgment dismissing Roemer's case. Unpersuaded, the court refused to reinstate the case.

It is from that ruling that Roemer and her assorted counsel appeal to this court. Roemer argues that the district court abused its discretion in not reinstating Roemer's case pursuant to Neb. Rev. Stat. § 25-2001 (Reissue 1989). She further contends that the district court erred in not reinstating her case by invoking its inherent powers of equity.

A litigant seeking vacation or modification of a judgment after term may take one of two routes: The litigant may proceed either under § 25-2001 or under the district court's independent equity jurisdiction. *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d

262 (1994). This 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. *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993).

Under the auspice of § 25-2001(3), a district court may vacate or modify its own judgment after the term in which that judgment was rendered if the moving party can show "mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order." Roemer claims that her misfortune stems from the clerk's "mistake" in sending the show cause notice to the former address of Welsh & Sibbernsen, an address at which neither Sibbernsen nor Renteria practiced in May 1992. Roemer concedes that the clerk was not at fault, but argues that any mistake, irrespective of fault, should trigger § 25-2001(3).

This argument ignores our precedent on the issue of "mistake" versus "fault." In *Aetna Cas. & Surety Co. v. Dickinson*, 216 Neb. 660, 345 N.W.2d 8 (1984), an unsuccessful attempt to vacate a default judgment, we held that a district court has no authority to set aside a judgment after the term when any mistake, inadvertence, or neglect was the party's own. The purpose of § 25-2001(3) is to address mishaps beyond a party's control. *Aetna Cas. & Surety Co., supra*. The mistakes that occurred in the present case are not addressed, and therefore are not redeemed, by this section.

Roemer next attempts to trigger § 25-2001(3) by asserting that an irregularity occurred in obtaining the judgment or order. Her argument seems to be predicated on the notion that because a notice is sent for the purpose that it be received, that purpose is frustrated—and an "irregularity" occurs—when the notice is not received and cause is not shown.

The operative definition of "irregularity" in our precedent, however, limits the term to " '[t]he doing or not doing that, in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done. . . .' " (Emphasis omitted.) *Haen v. Haen*, 210 Neb. 380, 382, 314 N.W.2d 276, 277 (1982). A judgment marred by irregularity is one rendered contrary to the course of law and practice of the court. *Haen, supra*. An example of irregularity under these circumstances would be dismissal for want of prosecution

entered without any opportunity to show cause, not failure of counsel to take notice of opportunity given in accordance with court rules. The record reveals no deviation by the clerk from the standard practice of the district court of sending notice to counsel of record and publishing notice in The Daily Reporter.

As with Roemer's accusation of "mistake," the only irregularity that occurred in this case has nothing to do with § 25-2001(3). See *Bowen v. Rohnacher*, 15 Md. App. 280, 290 A.2d 560 (1972) (holding that nonreceipt of notice of hearing is not irregularity when notice is sent in precise accord with requirements of court rules). In rejecting Roemer's redefinitions of the terms in § 25-2001(3), the district court did not abuse its discretion. This assignment of error fails.

In her second assignment of error, Roemer contends that the district court should have invoked its inherent powers of equity to reinstate her case. Roemer correctly notes that § 25-2001 is not her exclusive remedy for vacating a judgment after the term has expired, because that statute is concurrent with an independent equity jurisdiction and with a court's inherent powers of equity. See *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983).

For that matter, however, trial courts possess equally inherent power, equally independent of any statute or rule of court, to dismiss a case for failure to prosecute with due diligence. *Schaeffer v. Hunter*, 200 Neb. 221, 263 N.W.2d 102 (1978). Courts can and should invoke this sanction to prevent undue delays in the disposition of pending cases and to stave off congestion from their trial dockets. *Id.* In this case, neither was actual argument presented nor reason clear from the pleadings and documents on file to convince the district court that this case was doing anything more than stagnating on its docket.

Any litigant who seeks equity must herself do equity. *Campbell v. Ohio National Life Ins. Co.*, 161 Neb. 653, 74 N.W.2d 546 (1956). Yet, in the name of equity, this court is presented with a plea for deliverance by an appellant who failed to give notice of substituted counsel; who failed to notify the court of counsel's address changes; who failed to check the local legal newspaper for scheduled hearings in her case; who

failed to comply with an order compelling discovery; who failed to inquire into the status of her case until fully 5 months after its dismissal; who, even at the hearing on her motion to reinstate, failed to present evidence indicating any merit to her claim such that the district court might be persuaded of equities at stake; and who now asks this court to reinstate an action against Maly who denies liability and has awaited finality—albeit without resolution—for 5 years, as of the date of this decision. Although the circumstances do not rise to the level of coming to court with unclean hands (i.e., intentional misconduct), Roemer's hands are not so clean that her request should trump the power of the court to control its docket. Equity follows the diligent, not the negligent. *Abels v. Bennett*, 158 Neb. 699, 64 N.W.2d 481 (1954).

We are aware that the statute of limitations in Roemer's cause of action has long since run. The fact of an expired statute, however, does not in and of itself demonstrate an abuse of discretion in dismissing a case. *Schaeffer, supra*. Other factors present, which are traditionally considered in a decision to reinstate a case, counsel in favor of affirming the district court. No reason for delay was given (and, in fact, Roemer denies any excessive delay), and no previous dismissals were entered in this case only because Roemer did not take the opportunity to keep her case on the docket (and eligible for future dismissals) when dismissal first became a possibility. See *id*.

Roemer argues that "[i]t is unrealistic to expect this Appellant or any other party to a lawsuit to be aware of statutory deadlines and dismissal provisions." Brief for appellant at 12. This contention is simply untrue. Roemer was represented by capable counsel. This court has repeatedly held that notice to the counsel of record constitutes notice to the party represented by such counsel. *Emry, supra*. Regardless of whether represented by counsel, the plaintiff—not the court, not opposing counsel—bears responsibility to prosecute the case with reasonable diligence. See *Schaeffer, supra*. A litigant has a duty to follow the progress of the case, rather than to merely assume that counsel is doing everything necessary and proper. *City National Bank v. Langley*, 161 Ill. App. 3d 266, 514 N.E.2d 508 (1987). See, also, *Minkin v. Levander*, 186 Cal.

App. 3d 64, 230 Cal. Rptr. 592 (1986) (holding that specific duty to keep track of calendar and pertinent dates crucial to maintenance of lawsuit is central to plaintiff's general duty to expedite resolution of plaintiff's case).

The pattern of delay refutes the claim that equity demands reinstatement of the lawsuit. Finding no abuse of discretion by the district court, we affirm the decision to dismiss and deny reinstatement.

AFFIRMED.

WRIGHT and CONNOLLY, JJ., not participating.

GAS 'N SHOP, INC., A NEBRASKA CORPORATION, APPELLEE, V. CITY OF KEARNEY, A MUNICIPAL CORPORATION, APPELLANT.

539 N.W.2d 423

Filed November 3, 1995. No. S-93-1030.

1. **Ordinances: Zoning: Injunction: Equity.** An action to declare a zoning ordinance void and to enjoin its enforcement is equitable in nature.
2. **Equity: Appeal and Error.** In an appeal from an equitable action, the reviewing court reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Municipal Corporations: Ordinances: Zoning: Proof.** To successfully challenge the validity of a zoning ordinance, the party challenging must prove that the conditions imposed by the city in adopting the zoning ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose sought to be accomplished by the ordinance.
4. **Ordinances: Zoning: Presumptions: Proof.** The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.
5. **Equal Protection: Statutes.** A legislative classification must operate uniformly on all within a class which is reasonable.
6. ____: ____. 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.

7. ____: ____. To be valid, a classification must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified.
8. ____: ____. In an equal protection challenge, when a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose.
9. **Equal Protection: Statutes: Presumptions.** Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Michael E. Kelley, Kearney City Attorney, for appellant.

Donald L. Dunn, of Rembolt Ludtke Parker & Berger, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

I. INTRODUCTION

The defendant, City of Kearney, appeals from a judgment of the district court for Buffalo County, granting the request of the petitioner, Gas 'N Shop, Inc., for a declaratory judgment and finding Kearney's zoning ordinance requiring "separate and distinct" premises for off-sale liquor license holders unconstitutional, void, and ineffective as to the conduct of Gas 'N Shop's business. We conclude that the findings of the district court were correct, and we affirm the judgment.

II. FACTUAL BACKGROUND

To better appreciate the true nature of the current controversy between these parties, it is helpful to have some factual background of the antecedent lawsuit between these two very familiar adversaries. Gas 'N Shop has owned and operated a convenience store in Kearney since November 1987. Initially, the location Gas 'N Shop selected in Kearney was zoned for residential use. While negotiating for the purchase of this site, a representative of Gas 'N Shop approached the Kearney City Council to secure the needed change of zone. At that time, Gas

'N Shop represented to the city council that it did not intend to sell alcohol at the proposed Kearney location. The city council then granted Gas 'N Shop its requested zoning change from residential to C-3, a commercial zone. In October 1987, Kearney adopted an ordinance which eliminated the sale of package liquor from zoning categories C-1 through C-3, the commercial zones of the city, and contemporaneously adopted an ordinance which amended zoning categories C-2 and C-3 to include package liquor sales subject to certain liquor license standards.

On December 12, 1988, subsequent to this court's decision in *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988), Gas 'N Shop applied for a class B (beer only) off-sale liquor license through the city, and a hearing was held before the city council. This application was denied, and Gas 'N Shop appealed the denial to the Nebraska Liquor Control Commission (Commission). On February 15, 1989, the Commission heard Gas 'N Shop's appeal and denied the same on March 1. Gas 'N Shop appealed the Commission's decision to the district court for Lancaster County which, on January 24, 1990, reversed the Commission's decision and remanded, with an order for the Commission to issue a class B (beer only) off-sale liquor license to Gas 'N Shop.

This court affirmed the order of the Lancaster County District Court on November 13, 1992, holding that "convenience stores may not be treated differently from other operations which combine the sale of liquor with the sale of other merchandise or services, for the differing treatment bears no reasonable relationship to the State's policy of furthering temperance." *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 905, 492 N.W.2d 7, 12 (1992) (*Gas 'N Shop II*).

On February 14, 1989, 1 day prior to Gas 'N Shop's hearing before the Commission, Kearney amended its zoning ordinance to specifically include separate and distinct premises language nearly identical to that which had been found unconstitutional as a licensing requirement by this court in *Hy-Vee Food Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 752, 497 N.W.2d 647 (1993). Kearney's separate and distinct premises zoning requirement pertained only to C-2 and C-3 zoning

designations. Package stores or taverns which sold alcohol in original containers or for consumption off the premises could only operate in C-2 or C-3 designated areas, while restaurants and private clubs which sold alcohol on premises could operate in C-1 through C-3 designated areas. Gas 'N Shop is located in a C-3 zone. The relevant portion of ordinance No. 4069 (codified as article I, § 13(11), of Kearney's zoning code), which was passed on February 14, 1989, and was effective on March 1, reads as follows:

> In District C-3, no building . . . shall be used . . . except for . . . the following uses:
>
> . . . .
>
> 11. Sale of alcoholic liquors and alcoholic beverages in original packages or for consumption off the premises must be conducted from premises which are separate and distinct from any other business activity. Premises shall be deemed separate and distinct only when located in a building which is not adjacent to any other building, or, when located within the same building, they shall be so separated by walls (floor to ceiling) that access cannot be had directly from the area of alcoholic liquor sales to any other business activity by means of doors or other openings; provided, nothing herein shall prevent the construction or maintenance of doors that are used by employees . . . . For the purposes of this ordinance "other business activity" shall mean the sale or display of any food, produce, mercantile product, item or service other than keeping or selling of alcoholic liquors at retail for consumption off the premises and the sale or display of ice, drink mix, tobacco, cups, or carbonated beverages.

On January 27, 1993, 1 day before the Commission was to issue Gas 'N Shop its class B liquor license, Kearney informed Gas 'N Shop that it would be in violation of the city's zoning ordinance if it sold beer from its present premises.

III. DISTRICT COURT PROCEEDINGS

Gas 'N Shop filed suit in the Buffalo County District Court on January 28, 1993, seeking a declaratory judgment, temporary restraining order, and temporary injunction against

the enforcement by Kearney of its zoning ordinance requiring separate and distinct premises, and Gas 'N Shop obtained a temporary restraining order from the district court on that date. On February 8, Kearney demurred to Gas 'N Shop's petition, claiming that the petition failed to state facts sufficient to constitute a cause of action and that Gas 'N Shop had failed to serve a copy of the proceedings on the Attorney General as required by Neb. Rev. Stat. § 25-21,159 (Reissue 1989).

A hearing concerning whether the temporary injunction should be entered was held on February 9, 1993. At this hearing, both parties presented evidence which ultimately became the record upon which the district court made its decision concerning the merits of the case. The district court took this matter under advisement on February 9. The record shows that Kearney filed an answer and counterclaim on February 10, wherein Kearney requested a temporary restraining order and temporary injunction be issued restraining Gas 'N Shop from continuing to carry on the sale of beer from its premises in the city. The record further reflects that Gas 'N Shop served the Attorney General with a copy of the proceedings on February 11, pursuant to § 25-21,159. On February 18, the district court overruled Kearney's demurrer and issued a temporary injunction in favor of Gas 'N Shop, restraining Kearney from taking any action to enforce article I, § 13(11), of the zoning code until further order of the court.

The final hearing on the merits of the case was held on August 23, 1993, at which time the record from the February 9 proceeding was stipulated by the parties as the final record in the case. It was from this record that the district court issued its September 16 findings that (1) Gas 'N Shop is within the class of businesses known as "dual business operators"; (2) the on-sale/off-sale distinction created by a separate and distinct premises requirement is violative of the Equal Protection Clause; (3) the evidence did not establish or meet a policy of promoting the health, safety, or welfare of the people of the state and encourage temperance; and (4) the policy considerations for the zoning ordinances of Kearney are similar to those policy considerations relevant to liquor license issuance, and nothing in the evidence established that Kearney's

discriminatory application of zoning ordinances to dual business operators would advance those policies underlying the zoning ordinances.

The district court found that Gas 'N Shop was entitled to the declaratory judgment relief sought and entered judgment against Kearney and held that article I, § 13(11), of Kearney's zoning code was unconstitutional, void, and ineffective as to the conduct of Gas 'N Shop's business.

IV. ASSIGNMENTS OF ERROR

Kearney assigns eight errors, which we summarize as follows: The district court erred (1) in failing to apply principles of zoning law when it found article I, § 13(11), of the zoning code to be unconstitutional; (2) in finding that the zoning ordinance discriminates against dual purpose operators; and (3) in finding that nothing in the evidence established that the zoning ordinance was reasonably related to health, safety, morals, or general welfare concerns of the community.

V. SCOPE OF REVIEW

An action to declare a zoning ordinance void and to enjoin its enforcement is equitable in nature. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994); *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989).

In an appeal from an equitable action, the reviewing court reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 660, 515 N.W.2d 390 (1994); *Giger v. City of Omaha, supra*.

VI. ANALYSIS

Without question, Kearney seeks to do with its zoning code what it cannot do through its liquor licensing laws, that is, to effectively prevent Gas 'N Shop from selling beer within the city. To effect its will, Kearney, 1 day prior to the Commission hearing, amended its zoning code to specifically include a

provision which had been part of the city's liquor licensing law, requiring an off-sale alcohol beverage retailer to sell alcoholic beverages only from premises which are separate and distinct from the sale of other products. We have either disapproved of or found unconstitutional separate and distinct premises requirements in the context of liquor licensing laws in no less than five separate cases. *Hy-Vee Food Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 752, 497 N.W.2d 647 (1993); *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 905, 492 N.W.2d 12 (1992) (*Gas 'N Shop III*); *Gas 'N Shop II*; *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W.2d 312 (1989); *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 229 Neb. 530, 427 N.W.2d 784 (1988) (*Gas 'N Shop I*). Kearney now argues that notwithstanding the fact separate and distinct premises requirements have been held unconstitutional in the context of liquor licensing schemes, this same requirement is not unconstitutional as a part of a zoning ordinance.

1. Equal Protection Violation

(a) Creation of Classification

To successfully challenge the validity of a zoning ordinance, the party challenging must prove that the conditions imposed by the city in adopting the zoning ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose sought to be accomplished by the ordinance. *Giger v. City of Omaha, supra*. The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary. *Id.* However, a legislative classification must operate uniformly on all within a class which is reasonable. *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm.*, 220 Neb. 242, 369 N.W.2d 85 (1985).

Gas 'N Shop clearly established at trial that it is within the class of businesses known as dual business operators: those who sell both alcoholic beverages and other merchandise or services. See *Gas 'N Shop I*. Moreover, Gas 'N Shop established that Kearney's zoning ordinance, requiring separate and distinct premises for sale of alcohol in C-2 and C-3 designated areas, distinguished between members of this class, specifically,

between dual business operators with off-sale liquor licenses and those with on-sale liquor licenses. In *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm., supra*, we addressed liquor license legislation which treated convenience stores differently from, among other things, restaurants. In declaring the legislation unconstitutional, we stated:

> At either one [a convenience store or a restaurant] a person may purchase food as well as alcohol . . . . The only distinction is that the alcoholic beverages purchased at the convenience store will be drunk off the premises. This difference, however, presents no distinctive corollary to furthering temperance, as an individual may drink as much in a private restaurant as he may at home or elsewhere.

Id. at 245-46, 369 N.W.2d at 88. Accord *Hy-Vee Food Stores v. Nebraska Liquor Control Comm., supra.*

Likewise, Kearney has not presented us with a distinctive corollary tying off-premises consumption of alcohol to a legitimate zoning purpose. In addition to the general concerns of the health, safety, and welfare of the people, Kearney's zoning code is concerned with, but not limited to, safety from fire, provision of adequate light and air, and prevention of overcrowding of land. Kearney did not present any evidence which would allow us to conclude that a separate and distinct premises requirement is rationally related to any of the specific concerns of its zoning code. The evidence offered by Kearney was substantially testimony relevant to justifications for the denial of the issuance of a liquor license, not testimony specific to legitimate zoning considerations. For example, Kearney submitted the complete transcript of Gas 'N Shop's liquor license application hearing before the city council. In addition, Kearney offered the affidavits of the mayor and two council members. The affidavits addressed licensing concerns, such as control and distribution of alcoholic beverages, impulse buying of alcohol, and making alcohol less affordable, none of which are concerns that are specific to zoning or provide a justification to treat convenience stores differently than restaurants in a city zoning scheme.

Moreover, the testimony of the expert witness called by Kearney, Dr. Friedner Wittman, actually supported the position

that the zoning restriction was meant to discriminate against dual business operators such as Gas 'N Shop. Dr. Wittman testified that studies indicate there is a direct correlation between the density of minimarts and restaurants and an increase in traffic accidents. In addition, Dr. Wittman testified that there is a direct correlation between the number of all alcohol outlets and automobile-related injuries.

Dr. Wittman's testimony cannot justify Kearney's disparate treatment of a dual business operator such as Gas 'N Shop. The separate and distinct premises zoning requirement does not affect restaurant on-sale alcohol service, and, yet, Dr. Wittman identified both restaurants and minimarts as the source of increased traffic accidents. The alleged correlation between the number of all alcohol outlets and automobile-related injuries also does not distinguish between convenience stores and other operations which combine the sale of liquor with the sale of other merchandise or services, e.g., restaurants.

Therefore, Gas 'N Shop carried its initial burden and established the existence of a legislative classification and disparate treatment of those within the class.

(b) Lack of Legitimate Purpose Related to Zoning

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. *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990). To be valid, a classification must rest on some reason of public policy, some substantial difference of situation or circumstance, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. *Gas 'N Shop I*. In addition, in an equal protection challenge, when a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose. *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994).

We have held a separate and distinct liquor licensing ordinance which, within the class of dual business operators, distinguished between one with an off-sale liquor license and

one with an on-sale liquor license, was without justification. *Hy-Vee Food Stores v. Nebraska Liquor Control Comm.*, 242 Neb. 752, 497 N.W.2d 647 (1993). The record in this case demonstrates that in the context of zoning, just as in the context of liquor licensing, "[t]here is no rationale for treating a chain restaurant, such as Pizza Hut, any differently from a chain of convenience stores . . . . The only distinction is that the alcoholic beverages purchased at the convenience store will be drunk off the premises." *Casey's Gen. Stores v. Nebraska Liq. Cont. Comm.*, 220 Neb. 242, 245, 369 N.W.2d 85, 88 (1985). In addition, this court has repeatedly found separate and distinct premises requirements in the context of liquor licensing laws to be discriminatory without justification and not rationally related to its purported governmental purpose. See, e.g., *Hy-Vee Food Stores v. Nebraska Liquor Control Comm., supra*; *Gas 'N Shop III*; *Gas 'N Shop II*; *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 444 N.W.2d 312 (1989); *Gas 'N Shop I*.

Thus, if Gas 'N Shop is to carry its burden, it must provide sufficient evidence to prove that the separate and distinct premises requirement in Kearney's zoning ordinance is not rationally related to the governmental purpose of the zoning code. Conversely, if Kearney is to support its zoning requirement of separate and distinct premises, then it must provide evidence that its restriction is rationally related to one of the purposes of the zoning code.

Gas 'N Shop demonstrated that the Kearney zoning requirement of separate and distinct premises cannot be justified by merely transferring an unconstitutional licensing standards requirement into a provision of the zoning code. The evidence showed that Kearney had previously attempted to justify this same separate and distinct provision as a liquor licensing standards requirement and that this requirement had repeatedly been held unconstitutional. Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid. *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995). However, the general rule does not require that we turn a blind eye and rubber stamp as presumptively valid an ordinance which has repeatedly been found unconstitutional simply because it has been transferred from a

licensing standards section to a zoning section in a municipal code book.

The district court correctly recognized that the general principles which underlie Kearney's zoning code and Neb. Rev. Stat. § 53-101.01(1)(e) (Reissue 1993) of the Nebraska Liquor Control Act are very similar. Both the zoning code and the act expressly state that one purpose of each is to promote the health, safety, and welfare of the people. Thus, since the zoning code and the act serve the same general governmental purpose, if a separate and distinct premises requirement is unconstitutional as a liquor licensing requirement, then it must also be unconstitutional as a zoning requirement unless a separate and distinct premises requirement is rationally related to a governmental purpose *unique* to zoning.

Aside from general concerns of health, safety, and welfare of the people, Kearney's zoning code sets forth provisions dealing with adequate light and air, and proper planning to prevent overcrowding or misuse of land. Kearney did not adduce evidence demonstrating that the separate and distinct premises requirement was rationally related to furthering a legitimate governmental purpose of proper land use planning or any other legitimate purpose unique to zoning. Instead, the evidence offered by Kearney in support of the separate and distinct premises requirement related solely to the general concerns of health, safety, and welfare of the people. Concerns such as control and distribution of alcoholic beverages, impulse buying, and the correlation between the number of alcohol outlets and automobile-related injuries are general health, safety, and welfare concerns that are not unique to zoning and must be viewed under the same constitutional standard, whether in the context of liquor licensing or zoning provisions.

Kearney did not present evidence which would allow this court to find sufficient justification for Kearney's disparate treatment of dual business operators such as Gas 'N Shop, for the differing treatment bears no reasonable relationship to the city's policies set forth in its zoning code. Moreover, the record in both this and the antecedent lawsuit between these parties evinces a discriminatory intent by Kearney as noted by this court when we stated:

> The record convinces us that the city's recommendation of denial was heavily influenced by its general aversion to licenses of the type in question and to permitting the sale of beer at premises such as the one in question, a facility popularly known as a convenience store, at which a variety of items, including foods and gasoline, are sold. The record also demonstrates that the city was swayed by its longstanding policy, codified into an ordinance, of recommending licensure only of those businesses devoted solely to the sale or dispensing of liquor or those for which the sale or dispensing of liquor constitutes a substantial integral, as distinguished from an incidental, part of the operation.

Gas 'N Shop II, 241 Neb. at 902, 492 N.W.2d at 10-11.

Nothing has substantially changed from the prior record. Kearney clearly seeks to do through its zoning ordinance what it has been told it may not do with its liquor licensing standards ordinance.

VII. CONCLUSION

Thus, the district court was correct in concluding that article I, § 13(11), of Kearney's zoning code, requiring separate and distinct premises for off-sale liquor license holders in certain designated zoning areas, is unconstitutional and in violation of Gas 'N Shop's guarantee to equal protection under the law. The judgment of the district court is affirmed.

AFFIRMED.

NEIL KOSTER, APPELLEE, V. P & P ENTERPRISES, INC., FORMERLY KNOWN AS KEARNEY AG CENTER, INC., APPELLANT.
NEIL KOSTER, APPELLEE, V. P & P ENTERPRISES, INC., FORMERLY KNOWN AS KEARNEY AG CENTER, INC., ET AL., APPELLANTS.

539 N.W.2d 274

Filed November 3, 1995. Nos. S-94-071, S-94-072.

1. **Verdicts: Juries: Appeal and Error.** A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is competent evidence presented to the jury upon which it could find for the successful party.
2. ____: ____: ____. When reviewing a jury verdict, the appellate court considers the evidence and resolves evidential conflicts in favor of the successful party.
3. ____: ____: ____. A jury verdict will not be disturbed on appeal unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.
4. **Employment Contracts: Breach of Contract: Good Cause: Proof.** In proving wrongful termination under an employment agreement, the plaintiff must prove the terms of the contract, his compliance with the terms until discharge, the employers' breach, and damages. The burden then shifts to the employer to prove that good cause existed for discharge of the employee.
5. **Termination of Employment: Proof.** The ultimate burden of proving wrongful termination remains with the employee.
6. **Termination of Employment: Good Cause: Words and Phrases.** Good cause for dismissal is that which a reasonable employer, acting in good faith, would regard as a good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice.
7. **Conspiracy: Liability.** A claim of civil conspiracy is not actionable in itself, but serves to impose vicarious liability for the underlying tort of those who are a party to the conspiracy.
8. **Torts: Intent: Proof.** The elements of tortious interference with a business relationship or expectation are (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.
9. **Conspiracy: Words and Phrases.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
10. **Conspiracy: Corporations: Agents.** A corporation cannot conspire with an agent when the agent is acting within the scope of his or her authority.
11. **Conspiracy: Corporations.** A corporate official can conspire with the corporation only if he is acting in his individual capacity.

12. **Conspiracy: Corporations: Pleadings.** In order to claim conspiracy, a plaintiff must plead in the petition that the corporate officials were acting outside the scope of their authority or other than in the normal course of their duties.
13. **Conspiracy: Proof.** A civil conspiracy need not be established by direct evidence of the acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Jeffrey H. Jacobsen and Timothy M. Welsh, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellants.

Roger G. Steele, of Luebs, Leininger, Smith, Busick & Johnson, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

These are appeals from jury verdicts in favor of the plaintiff-appellee, Neil Koster, on claims of wrongful termination and conspiracy to tortiously interfere with a business relationship. Koster brought two actions in the district court. These actions were consolidated for jury trial and on appeal. The first action was against defendant-appellant P & P Enterprises, Inc., formerly known as Kearney Ag Center, Inc. (Kearney Ag). Koster based this action on a claim of wrongful termination of an employment agreement he had with Kearney Ag. Koster's second action included two additional defendants-appellants, John Payne and Richard Poston. Payne and Poston were shareholders, directors, and officers of Kearney Ag. Koster's second action was based on a claim of conspiracy by Payne, Poston, and Kearney Ag to tortiously interfere with the performance of his employment agreement. Kearney Ag counterclaimed for alleged unearned commissions that Koster had collected. The jury found for Koster on both of his claims. The jury rejected Kearney Ag's counterclaim. Kearney Ag, Payne, and Poston appeal the jury verdicts.

The appellants assign three errors. They contend that (1) the jury verdicts for Koster are not sustained by the evidence and

are contrary to the applicable law, (2) the jury erred in its assessment of the amount of Koster's recovery, and (3) the jury awarded excessive damages to Koster out of passion or prejudice. Since the jury verdicts were not clearly wrong, we affirm.

In August 1989, as a result of a stock sale, Payne, Poston, and Koster each held a one-third interest, or 3,750 shares, in Kearney Ag. Koster had been employed with Kearney Ag since February 1987, and was a 25-percent owner of the company prior to the August 1989 stock sale. Payne, Poston, and Koster were the only members on the board of directors and were the only officers. Payne was president, Koster was vice president, and Poston was secretary-treasurer.

At the same time as the stock sale, Koster entered into a 5-year management contract with Kearney Ag in which he agreed to "faithfully and industriously" perform the duties of manager "to the reasonable satisfaction of the employer." If he failed to comply with the agreement, his position would be terminated and he would be required to forfeit his stock.

In December 1989, Koster and Poston began to disagree on certain business transactions concerning Kearney Ag. Specifically, Koster alleged that Poston entered business transactions with Poston's friends without first consulting Koster. Koster strongly opposed Poston's suggestions to trade Kearney Ag inventory for land in South Dakota and to lease trucks from a local dealership. Also, Koster purchased a piece of equipment in Nebraska which Poston wanted to purchase in California. These incidents created tension between Koster and Poston.

Kearney Ag began experiencing cash flow problems. In July 1990, to remedy the cash flow situation, the three shareholders each loaned Kearney Ag $25,000 in exchange for promissory notes. At the time Koster brought his actions, the note had an unpaid balance of $5,345.01.

During the summer of 1990, an investor from South Dakota was interested in buying 15 acres of land in Kearney owned by Kearney Ag for $150,000. The buyer was using a local Realtor, Norris Olson, to negotiate the purchase. Koster inquired of Olson as to who was interested in purchasing the land. Olson

refused to provide any information because Payne instructed Olson not to discuss any terms of the transaction with Koster. Koster still retained his one-third interest in Kearney Ag at the time he inquired about the land sale. Subsequent to Koster's termination, the land owned by Kearney Ag was purchased by Payne and Poston in their individual capacity for $70,000.

In September 1990, the board of directors passed a resolution that required Koster to attempt to seek the approval of Payne or Poston before entering transactions that were greater than $20,000. If Payne and Poston were not available for approval, Koster was to use his best judgment in whether to go forward with the transaction.

On November 15, Koster's employment as manager was terminated by Payne. He was also removed from the board of directors and lost his position as vice president. As a result of his termination, Koster was also required to forfeit his stock in Kearney Ag. Poston took over as manager after Koster's termination.

The parties presented conflicting evidence as to why Koster was terminated. Payne and Poston testified that Koster was fired for failing to comply with his employment agreement and the board resolution. Specifically, Payne and Poston testified that Koster entered into business transactions in amounts greater than $20,000 without Payne's or Poston's approval. Koster presented evidence showing that he did not violate the employment agreement and resolution. Specifically, he testified that he sought approval of one transaction and that the other transactions were not completed until after his termination.

About 2 weeks after Koster's termination, Payne and Poston were offered $23 per share to sell the company. However, the sale was never completed. Instead, Payne and Poston sold their interest in Kearney Ag in July 1991. The appellants presented evidence from a certified public accountant that as of November 30, 1990, Kearney Ag had a value of only $33,917, or just over $3 per share.

Koster sought damages for loss of salary, commissions not paid, insurance benefits, value of his forfeited stock, and the balance due on his loan to Kearney Ag. Kearney Ag alleged that the termination was for good cause and counterclaimed for

alleged unearned commissions that Koster had collected.

The jury found for Koster and awarded him damages on all of his claims. In the conspiracy lawsuit, the jury awarded Koster $86,250, or $23 per share, for his stock and $6,895.06 for the underpayment on his loan to Kearney Ag. In the wrongful termination lawsuit, the jury awarded Koster $26,112.63 for loss of salary, $3,893.50 for commissions not paid, and $2,748.24 for insurance benefits. Total damages awarded to Koster amounted to $125,899.43.

Regarding the standard of review in this case, a jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is competent evidence presented to the jury upon which it could find for the successful party. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993); *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993). Also, when reviewing a jury verdict, the appellate court considers the evidence and resolves evidential conflicts in favor of the successful party. *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990). Concerning the amount of recovery awarded by a jury, we have held:

> A jury verdict will not be disturbed on appeal unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.

McDonald v. Miller, 246 Neb. 144, 145–46, 518 N.W.2d 80, 82–83 (1994).

The appellants first contend that the jury verdicts were not sustained by the evidence or the applicable law. The jury found that Kearney Ag wrongfully terminated Koster and that the appellants conspired to tortiously interfere with Koster's employment agreement. In proving wrongful termination under an employment agreement, the employee must prove the terms of the contract, his compliance with the terms until discharge, the employers' breach, and damages. *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993). The burden then shifts to the employer to prove that good cause existed for discharge of the employee. *Id.* However, the ultimate

burden of proving wrongful termination remains with the employee. *Id.* "'"[G]ood cause" for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice.' " *Brockley v. Lozier Corp.*, 241 Neb. 449, 457, 488 N.W.2d 556, 562 (1992) (quoting *Stiles v. Skylark Meats, Inc.*, 231 Neb. 863, 438 N.W.2d 494 (1989)).

The terms of Koster's employment agreement were set forth in Koster's employment contract and the resolution adopted by the board of directors in September 1990. Koster presented evidence that he complied with the terms of the contract. Koster presented evidence showing that the transactions in issue were either not completed by Koster or were only completed after he sought approval as required by the resolution. He testified that he was unable to reach Payne and Poston and that he pursued the transactions in his best judgment as permitted by the agreement. Koster's termination resulted in Kearney Ag's breach of the employment contract. Kearney Ag attempted to prove that Koster's termination was for good cause by presenting evidence asserting Koster failed to comply with his employment agreement. This evidence was submitted to the jury, and the jury found in favor of Koster. The jury verdict finding Kearney Ag wrongfully terminated Koster's employment was not clearly wrong based on the evidence presented. Therefore, we uphold the judgment.

In proving conspiracy to tortiously interfere with a business relationship, a claim of civil conspiracy is not actionable in itself, but serves to impose vicarious liability for the underlying tort of those who are a party to the conspiracy. *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994). The elements of tortious interference with a business relationship or expectation are

> (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.

Wiekhorst Bros. Excav. & Equip. v. Ludewig, 247 Neb. 547, 555, 529 N.W.2d 33, 39 (1995) (citing *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991)).

The appellants concede to the first two elements of tortious interference with a business relationship. By wrongfully terminating Koster, the appellants were acting in an unjustified and intentional manner. The interference with Koster's employment caused him financial damage. Therefore, the elements of tortious interference with a business relationship were satisfied.

"A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means." *Wiekhorst Bros. Excav. & Equip.*, 247 Neb. at 555, 529 N.W.2d at 39. Concerning a corporation and its agents, "[a] corporation cannot conspire with an agent when the agent is acting within the scope of his or her authority." *Id.* at 556, 529 N.W.2d at 40. Accord *Renner v. Wurdeman*, 231 Neb. 8, 434 N.W.2d 536 (1989). A corporate official can conspire with the corporation only if he is acting in his individual capacity. *Id.* In order to claim conspiracy, a plaintiff must plead in the petition that the corporate officials were acting outside the scope of their authority or other than in the normal course of their duties. *Id.* A civil "conspiracy need not be established by direct evidence of the acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished." *Davidson v. Simmons*, 203 Neb. 804, 808, 280 N.W.2d 645, 648 (1979).

Koster's second amended petition in the conspiracy action alleged that Payne and Poston acted outside the scope of their authority. Koster presented evidence that Payne and Poston wrongfully terminated Koster in order to pursue transactions without Koster's interference. Payne and Poston purchased land from Kearney Ag for $70,000. A buyer had previously expressed an interest in buying this land for $150,000. Poston often attempted to pursue business transactions which were considered part of Koster's duties as manager. Poston became manager after Koster's termination. Also, Payne and Poston

were negotiating the sale of their shares for $23 per share within 2 weeks of Koster's termination.

Payne and Poston presented evidence that they were merely acting in the best interests of the corporation and in the scope of their employment when terminating Koster. The jury considered the contradicting evidence and concluded that the appellants conspired to tortiously interfere with Koster's employment agreement. When viewing the conflicting evidence in favor of Koster, the jury's finding that the appellants conspired to tortiously interfere with Koster's contract is not clearly wrong and therefore will not be disturbed on appeal.

The appellants' second and third assignments of error contend that the jury erred in its assessment of Koster's damages and that these damages awarded were excessive. As previously stated, this court will not disturb a jury's verdict unless it appears that it was the "result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law." *McDonald v. Miller*, 246 Neb. 144, 145-46, 518 N.W.2d 80, 82-83 (1994).

The appellants' main contention is that the amount awarded for the value of Koster's forfeited Kearney Ag stock was clearly excessive. In a special verdict form, the jury gave specific amounts for each of Koster's claims for damages. The jury awarded Koster $23 per share for his forfeited stock. The evidence showed that Payne and Poston were offered $23 per share for their stock in Kearney Ag within 2 weeks of Koster's termination. It was apparent from the record how the jury determined Koster's stock value at $23 per share.

The appellants also contend that the damages for the unpaid balance of the promissory note, the unearned commissions, and the lost retirement funds were excessive. However, the evidence presented at trial also supported the jury's awards as to these claims. Therefore, the jury's award of damages will not be disturbed.

In conclusion, the jury verdicts were not clearly against the weight and reasonableness of the evidence. Therefore, we affirm.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. MICHAEL J. OGBORN, RESPONDENT.

539 N.W.2d 628

Filed November 9, 1995. No. S-93-163.

1. **Disciplinary Proceedings: States: Proof.** In the context of reciprocal attorney disciplinary proceedings, it is generally held that a judicial determination of attorney misconduct in one state is conclusive proof of guilt and is not subject to relitigation in the second state. However, the second state is entitled to make an independent assessment of the facts and an independent determination of the attorney's fitness to practice law in that state and of what disciplinary action is appropriate to protect the interests of the state.
2. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Disciplinary Proceedings: Proof: Appeal and Error.** The Supreme Court, in its de novo review of the record, must find that the particular complaint has been established by clear and convincing evidence in order to sustain it against an attorney in a disciplinary proceeding.
4. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed, it is necessary that the following factors be considered: (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.
5. ____. The Supreme Court must consider whether there are factors which would mitigate the sanction of disbarment, suggesting that a lesser sanction may be more appropriate.
6. ____. Mitigating circumstances shown in the record should be considered in determining the appropriate discipline imposed on an attorney who has violated the Code of Professional Responsibility.

Original action. Judgment of disbarment.

Dennis G. Carlson, Counsel for Discipline, for relator.

Beverly Evans Grenier, of Scudder Law Firm, P.C., and Michael D. Gross for respondent.

CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and RIST, D.J., and BOSLAUGH, J., Retired.

PER CURIAM.

This is an action for reciprocal discipline filed against

Michael J. Ogborn, who was disbarred by the Colorado Supreme Court on December 19, 1994. The Nebraska State Bar Association requests that Ogborn be disbarred in this state as well.

STANDARD OF REVIEW

In the context of reciprocal attorney disciplinary proceedings, it is generally held that a judicial determination of attorney misconduct in one state is conclusive proof of guilt and is not subject to relitigation in the second state. *State ex rel. NSBA v. Dineen*, 235 Neb. 363, 455 N.W.2d 178 (1990). However, the second state is entitled to make an independent assessment of the facts and an independent determination of the attorney's fitness to practice law in that state and of what disciplinary action is appropriate to protect the interests of the state. *Id.*

A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Schmeling*, 247 Neb. 735, 529 N.W.2d 799 (1995). The Supreme Court, in its de novo review of the record, must find that the particular complaint has been established by clear and convincing evidence in order to sustain it against an attorney in a disciplinary proceeding. *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991).

FACTS

In 1984, Ogborn moved from Lincoln, Nebraska, to Denver, Colorado, and became managing partner of a law firm. As managing partner, Ogborn had the responsibility of reviewing bills submitted for expenses.

Ogborn and his firm represented a large utility company in a matter pending before the Interstate Commerce Commission. Between March 1990 and December 1991, Ogborn submitted bills to the utility company which were not related to his representation of the company. The bills submitted to and subsequently paid by the utility company included bills for

personal expenses and bills which should have been paid by Ogborn's law firm. In addition, Ogborn was reimbursed twice for a number of expenses.

As a result of the false billings, the utility company paid for air travel for Ogborn's children, vacations to Alaska and Hawaii, gifts, clothing, a sculpture, and other similar expenditures. Ogborn contends that the actual amount of improper billings was $117,000, but he agreed to pay restitution in the amount of $150,059.

Ogborn entered into a stipulation of facts in the Colorado disciplinary proceeding, and he admitted to violating the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> . . . .
>
> (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

The hearing board for the Colorado Grievance Committee concluded that Ogborn had also violated Colorado Rule of Civil Procedure 241.6(5), which states that any act or omission violating the criminal laws of a state or the United States constitutes grounds for lawyer discipline. The board also found that Ogborn had violated DR 2-106(A), which states that a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. Ogborn was disbarred by the Colorado Supreme Court on December 19, 1994.

A motion for reciprocal discipline was filed with this court on February 25, 1993, and Ogborn was suspended from the practice of law in Nebraska on March 2. An order to show cause as to why the motion for reciprocal discipline should not be sustained was entered on January 3, 1995, and Ogborn filed his response to the order to show cause on January 13. Following a hearing, the referee recommended an additional 3-year suspension.

ASSIGNMENT OF ERROR

The relator assigns as error the referee's recommendation that Ogborn be suspended from the practice of law in Nebraska for an additional 3 years, arguing that the recommendation is too lenient under the facts in this case.

ANALYSIS

In reciprocal attorney discipline proceedings, if the attorney has not demonstrated a lack of due process of law or an infirmity of proof, a judicial determination of attorney misconduct in one state is conclusive proof of guilt and is not subject to relitigation in the second state. See *State ex rel. NSBA v. Dineen*, 235 Neb. 363, 455 N.W.2d 178 (1990). The Supreme Court, in its de novo review of the record, must find that the particular complaint has been established by clear and convincing evidence in order to sustain it against an attorney in a disciplinary proceeding. *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991); *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991).

Ogborn does not argue that his due process rights were violated in Colorado or that the evidence was insufficient. Ogborn admits that he violated DR 1-102(A)(1), (4), and (6) and Colorado Rule of Civil Procedure 241.6(3). We find that the complaint has been established by clear and convincing evidence.

Next, we must determine the appropriate sanction. Even if a judicial determination of misconduct in the first state is accepted as conclusive proof of guilt in the second state, this does not necessarily mean that the attorney must be disbarred or suspended in the second state. See *State ex rel. NSBA v. Dineen, supra*. The second state is entitled to make an independent assessment of the facts and an independent determination of the attorney's fitness to practice law in that state and of what disciplinary action is appropriate to protect the interests of the state. *Id.* However, the attorney bears the burden of showing that the discipline to be imposed should be less severe than that imposed in the first state. *Id.*

To determine whether and to what extent discipline should be imposed, it is necessary that the following factors be

considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Veith, supra.*

It is undisputed that Ogborn submitted false bills to the utility company between March 1990 and December 1991 and that he used this money to pay for gifts and personal expenses. He also billed the utility company for expenses that should have been paid by his law firm, and he collected double reimbursement for a number of expenses.

We must also consider whether there are factors which would mitigate the sanction of disbarment, suggesting that a lesser sanction may be more appropriate. *Id.* Mitigating circumstances shown in the record should be considered in determining the appropriate discipline imposed on an attorney who has violated the Code of Professional Responsibility. *Id.*; *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987).

Ogborn contends he should not be disbarred because at the time he was engaged in submitting fraudulent bills, he suffered from an "adjustment disorder." Dr. Henry Frey, Ogborn's psychiatrist, testified that Ogborn's behavior was a character aberration caused by the disorder and that this disorder led to improper behavior totally uncharacteristic of Ogborn's moral code.

Dr. Irwin Levy agreed that Ogborn suffered from an adjustment disorder at the time of the fraudulent billings, but he also testified that Ogborn had "no overt or major mental disorders." Levy and Frey offered conflicting testimony with regard to whether the disorder was the direct cause of Ogborn's misconduct.

We decline to find that Ogborn's adjustment disorder was the cause of his billing practices with this particular client.

Based on the facts and circumstances in this case, we find that Ogborn has not sustained his burden of proving that this court should impose discipline less severe than that ordered by the Colorado Supreme Court. The nature and extent of Ogborn's billing practices demonstrate that he should not be

permitted to practice law in Nebraska.

CONCLUSION

After an independent assessment of the facts and an independent determination of Ogborn's fitness to practice law, we find the referee's recommendation of an additional suspension of 3 years to be inadequate. Ogborn is disbarred from the practice of law in Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, C.J., and FAHRNBRUCH, J., not participating.

JOHN F. HOEFT, APPELLEE, V. FIVE POINTS BANK, A NEBRASKA BANKING CORPORATION, APPELLANT.

539 N.W.2d 637

Filed November 9, 1995. No. S-93-954.

1. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
2. **Evidence: Trial.** Where reasonable minds may differ as to the conclusions or inferences to be drawn from the evidence, or where there is a conflict in the evidence, such issues must be submitted to the jury.
3. **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.
4. **Contracts: Proof.** A party seeking to enforce a contract has the burden of establishing the existence of a valid, legally enforceable contract.
5. ____: ____. A party seeking to enforce a contract must show that there was a definite offer and an unconditional acceptance with nothing left open for future arrangement.
6. **Contracts: Parties.** There must be a meeting of the minds or a binding mutual understanding between the parties to a contract.
7. ____: ____. 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 of the details of the proposed agreement; it may be implied from conduct and the surrounding circumstances. Likewise, the acceptance of an offer may be shown by words, conduct, or acquiescence indicating agreement.

8. **Contracts: Rescission.** Rescission implies extinction of the contract which leaves the parties without a right of recovery on the contract itself.
9. ____: ____. In determining whether a rescission took place, courts look not only to the language of the parties but to all the circumstances.
10. **Contracts: Actions: Time.** An action upon an oral contract can only be brought within 4 years of the date on which it accrued.
11. **Limitations of Actions: Time: Damages.** An action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages.
12. **Actions: Contracts: Time.** A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to.
13. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
14. **Contracts: Words and Phrases.** Oral contracts consisting of a special promise to answer for the debt, default, or misdoings of another person are void.
15. **Statute of Frauds: Debtors and Creditors: Consideration.** Where the principal object of a party promising to pay the debt of another is to promote his own interests, and not to become a guarantor or surety, and the promise is made on sufficient consideration, it will be valid although not in writing.
16. **Statute of Frauds: Debtors and Creditors.** A consideration to support a promise, not in writing, to pay the debt of another must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt.
17. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
18. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, District Judge, Retired. Affirmed.

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

John A. Wolf, of Shamberg, Wolf, McDermott & Depue, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, and GERRARD, JJ.

WHITE, C.J.

This is an appeal from a jury award of damages to appellee John F. Hoeft, arising from appellant Five Points Bank's breach of an alleged oral contract. At trial, John Hoeft alleged that, under the terms of the contract, Five Points had promised to bear half of the expenses pertaining to a real estate sale in exchange for an assignment of half of the payments due under the sale. The jury found for John Hoeft. Five Points filed a motion for judgment notwithstanding the verdict and a motion for a new trial. These motions were denied by the district court. Five Points appeals the denial of these motions.

Five Points assigns six errors. Four of the errors are based on the district court's overruling of Five Points' motion for judgment notwithstanding the verdict, which was based on its earlier motion for a directed verdict. Five Points contends that the district court erred (1) in failing to direct a verdict finding that John Hoeft had not met his burden of proof to establish the existence of a valid enforceable contract; (2) in failing to direct a verdict finding that John Hoeft had rescinded the oral contract, if one in fact existed; (3) in failing to direct a verdict finding that John Hoeft's suit was barred by the statute of limitations; (4) in failing to direct a verdict finding that if a contract existed, it was barred by the statute of frauds; (5) in permitting Margaret Hoeft, John Hoeft's wife, to be used as a rebuttal witness; and (6) in permitting John Hoeft's counsel to introduce unfair, prejudicial evidence by making reference to John Hoeft's financial condition and by implying a financial conspiracy between Five Points and others. Since the district court properly refused to direct a verdict and did not abuse its discretion in admitting the evidence, we affirm.

John Hoeft and his brother, Thomas (Tom) E. Hoeft, were partners in a limited partnership known as Nebraska Motel Developers (NMD), which invested in a Ramada Inn in Grand Island. In July 1981, John and Tom Hoeft obtained the interests of the other partners and gained control and ownership of NMD. The terms of this buyout required John and Tom Hoeft

to make payments to former partners in addition to continuing to make payments to the mortgagee, First Federal Savings & Loan.

In June 1982, John and Tom Hoeft agreed to sell their interest in the NMD partnership to outside investors, referred to by the parties as the "Huwaldt group." Because the Ramada was losing money at the time of the sale, the brothers agreed to allow the Huwaldt group to defer payments on the purchase until February 1984.

When John and Tom Hoeft agreed to sell their interest in NMD to the Huwaldt group, Tom Hoeft was experiencing financial problems. Tom Hoeft had been unable to pay his portion of expenses arising from the NMD investment, and the brothers determined it was in their best interest for Tom Hoeft to assign his interest over to John Hoeft. On July 2, 1982, Tom Hoeft assigned all money due and payable to him under the Huwaldt group sales agreement to John Hoeft.

During the following 2 years, Tom Hoeft's financial troubles continued, and he had difficulty keeping current on a loan issued by Five Points. In February 1984, Five Points requested additional security. Tom Hoeft assigned his interest in the proceeds from the Huwaldt group sales agreement to Five Points. The alleged oral contract at the heart of this dispute arose out of John Hoeft's and Five Points' resolution of Tom Hoeft's conflicting assignments.

It is disputed by the parties whether John Hoeft learned of the second assignment before or after it was executed. When John Hoeft learned that Tom Hoeft had executed a second assignment, he arranged a meeting with Bill Marshall, a representative of Five Points. John Hoeft testified that he told Marshall that

> the second assignment, as far as I was concerned was really worthless; but that if he wanted to step into Tom's shoes and take half the payments I would do that in return for the fact that he would pick up half the expenses on any of the present expenses that were occurring and also any future ones that were occurring pertaining to that particular contract.

According to John Hoeft, Marshall agreed.

After the meeting, John Hoeft calculated the expenses that had been incurred to date as a result of the NMD contract. John Hoeft prepared a summary of those expenses and determined that Tom Hoeft's half of the expenses totaled $10,313.71. The expenses included accounting and legal fees and amounts paid to former partner Lyle Fisher.

John Hoeft presented the expense summary to Marshall on or about February 17, 1984. Five Points recalculated Tom Hoeft's indebtedness and added $10,313.71 to the amount loaned. A check for that amount, payable to Tom Hoeft and John Hoeft, was issued on February 17 and was cashed by John Hoeft.

John Hoeft testified that Marshall told him to write up a short letter explaining what the parties had agreed upon. John Hoeft did so and copied it to Larry Huwaldt of the Huwaldt group. That letter, dated February 20, 1984, states:

> Gentlemen:
>
> I have been made aware that Tom Hoeft has assigned his share of future payments to be made to him from Nebr. Motel Developers, starting with payment No. 3 due April 10, 1984, in the amount of $1,234.60 monthly to Five Points Bank, Grand Island. To the extent that he has and continues to meet his 1/2 obligation of any bill that would come up due to this Motel transaction, I will concur in this reassignment of his interest in these proceeds.
>
> I would, therefore, appreciate it Larry, if you would send direct to the Five Points Bank monthly, starting with payment No. 3 due April 10, 1984, the amount of $1,234.60. In accordance with our previous agreement the balance of the monthly payments will be sent directly to me.
>
> /s/ John Hoeft

The prior agreement referenced in the letter provided that a commission payable to a real estate broker involved in the sale to the Huwaldt group was paid first out of the payments, and then the remaining amount was divided equally between John Hoeft and Tom Hoeft/Five Points.

Marshall's testimony regarding the above differs from that of the Hoeft brothers. Marshall testified that Tom Hoeft offered to give Five Points an assignment of the Ramada contract in order

to get Five Points to release a second mortgage on Tom Hoeft's house and in order to pay interest due on his loan. Marshall stated that Tom Hoeft said he owed John Hoeft money on the assignment and that if Tom Hoeft paid his brother, John Hoeft would release his assignment. Marshall denied making any representations to John Hoeft that Five Points would be responsible for any of Tom Hoeft's obligations or debts under the Huwaldt group sales agreement. Marshall testified that he was surprised at the content of John Hoeft's letter of February 20, but because Marshall thought Five Points was first on the assignment he did not respond.

The Huwaldt group defaulted on its payments in August 1986. John Hoeft and Five Points pursued separate lawsuits against the Huwaldt group and eventually obtained judgments. John Hoeft testified that he contacted Marshall several times and told him that he was incurring expenses but that Marshall refused to pay. Marshall agreed that he had casually discussed expenses with John Hoeft, but stated that John Hoeft had made no demands for payment.

On January 8, 1988, John Hoeft wrote Marshall and, referring to his previous letter of "accommodation," stated in part:

> We have now encountered some complex and difficult problems with the sale of Nebr. Motel Developers, which is near disastrous to me and which it also now makes it impossible for Tom Hoeft to be able to uphold his 1/2 in the obligations we are now facing. These obligations being to previous partners, the sales commission at the time of sale to [the Huwaldt group], accumulating legal fees, and other expenses. Therefore, it has become necessary to make the terms of my Febr. 20th. 1984 letter null and void.

Marshall responded to this letter on January 19, 1988. In his letter, Marshall stated that it was his understanding that John Hoeft had been paid for all expenses that he had incurred on Tom Hoeft's behalf at the time Five Points took the assignment. Marshall further stated that he was unaware of any additional amounts that John Hoeft had advanced on Tom Hoeft's behalf since that date.

In response, John Hoeft wrote that he had incurred expenses arising from the sales commission still owing on the sale to the Huwaldt group and the unnecessary duplication of litigation against the Huwaldt group, such expenses including legal fees, long-distance phone bills, et cetera.

Marshall responded on February 2, 1988:

> Please be advised that we would participate in actual out-of-pocket expenses which you have incurred on behalf of the interest which Tom Hoeft assigned to us. This would include money which you actually paid to [the real estate broker] or money paid in the future.
>
> We would like these expenses submitted to us, however, so that we may satisfy ourselves that they were incurred on behalf of Tom Hoeft's interest. Since we know of no other possible breaches which have occurred or may occur in the future, we deny that you have any right to revoke the assignment which we have with Tom Hoeft and deny that you have any authority to compromise our claim against Nebraska Motel Developers or all other obligors of that liability.

From February 1988 to December 1990, legal proceedings continued regarding the Huwaldt group's default. The parties ultimately settled in December 1990. On January 21, 1991, John Hoeft submitted an accounting of his "actual out-of-pocket expenses which I have incurred on behalf of the interest in the Nebr. Motel Developers Memorandum assigned to you by Tom." John Hoeft stated, "This is in accordance to your letter of requested expenses dated February 2, 1988." Hoeft indicated some additional expenses would be incurred. Litigation fees, about half of the total expenses, were approximately $166,000. John Hoeft demanded that Five Points pay $82,988.93 on or before January 31, 1991. Five Points refused to pay. On February 15, John Hoeft filed a petition in the district court for Hall County, seeking damages of $82,988.93 arising from Five Points' breach of an oral contract.

The case was tried to a jury. At the close of John Hoeft's case, Five Points moved for a directed verdict, and the court overruled the motion. Five Points renewed its motion for a directed verdict at the close of its evidence, but that motion was

also overruled. The jury returned a verdict in favor of John Hoeft in the amount of $42,000. Five Points filed a motion for a judgment notwithstanding the verdict based on the reasons set forth in its motion for directed verdict. Five Points also filed a motion for a new trial. These motions were overruled, and this appeal followed.

This court is asked to review the district court's overruling of Five Points' motion for judgment notwithstanding the verdict based on its earlier motion for a directed verdict.

> When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.

Richardson v. Ames Avenue Corp., 247 Neb. 128, 129, 525 N.W.2d 212, 214 (1995) (citing *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994)). "Where reasonable minds may differ as to the conclusions or inferences to be drawn from the evidence, or where there is a conflict in the evidence, such issues must be submitted to the jury." *Schuster v. Baumfalk*, 229 Neb. 785, 792, 429 N.W.2d 339, 344 (1988). 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. *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993); *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993).

Five Points first contends that the district court erred by failing to direct a verdict in favor of Five Points, finding that no oral contract existed. A party seeking to enforce a contract has the burden of establishing the existence of a valid, legally enforceable contract. *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993). That party must show that there was a definite offer and an unconditional acceptance with nothing left open for future arrangement. *Id.* "[T]here must also be a meeting of the minds or a binding mutual understanding between the parties to the contract." *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 652, 508 N.W.2d 820, 825 (1993).

> "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 of the details of the proposed agreement; it may be implied from conduct and the surrounding circumstances. . . . Likewise, the acceptance of an offer may be shown by words, conduct, or acquiescence indicating agreement."

Id.

The record contains sufficient evidence to support the district court's refusal to direct a verdict. John Hoeft testified that, in his February 1984 meeting with Marshall, he told Marshall that he would allow Five Points to receive Tom Hoeft's proceeds under the Huwaldt group sales agreement if Five Points agreed to cover all of Tom Hoeft's financial obligations under the sales agreement. John Hoeft also testified that Marshall agreed and told John Hoeft to write up a letter as to their arrangement. Marshall testified that the February 1984 meeting was not as John Hoeft described, and Marshall claimed there was no agreement as to covering Tom Hoeft's expenses under the Huwaldt group sales agreement. Based on this evidence, reasonable minds could differ as to whether the parties created an oral contract obligating Five Points to pay all of the expenses incurred on Tom Hoeft's behalf in exchange for Tom Hoeft's proceeds under the Huwaldt group sales agreement. Therefore, it was proper for the district court to refuse to direct a verdict and to submit the issue to the jury.

Second, Five Points contends that if there was an oral contract, the district court erred by failing to direct a verdict in favor of Five Points, finding that John Hoeft had unilaterally rescinded the contract. Rescission of contract means

> [t]o abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract by the act of a party. . . . A "rescission" amounts to the unmaking of a contract . . . and it may be effected . . . by one of the parties declaring rescission of contract without consent of [the] other if a legally sufficient ground therefor exists . . . .

Black's Law Dictionary 1306 (6th ed. 1990). Rescission implies extinction of the contract which leaves the parties without a

right of recovery on the contract itself. *Rubin v. Pioneer Fed. S. & L. Assn.*, 214 Neb. 364, 334 N.W.2d 424 (1983).

Five Points contends that John Hoeft, in his January 8, 1988, letter, unilaterally rescinded any oral contract that may have existed by declaring it null and void, John Hoeft's basis for rescission being that Five Points had failed to meet its obligations under the contract. Therefore, if the contract is rescinded, John Hoeft has no right to recover for breach of contract.

On January 8, 1988, John Hoeft wrote to Marshall and stated that it had become impossible for Tom Hoeft to uphold his half of the expenses. In this letter, John Hoeft declared, "Therefore it has become necessary to make the terms of my Febr. 20th. 1984 letter null and void." He concluded the letter by stating that "the accommodation letter of Feb. 20, 1984 . . . is hereby rescinded and in no further effect." When looking at only the language of John Hoeft's letter, Five Points' contention that John Hoeft rescinded the contract has merit.

However, "[i]n determining whether a rescission took place, courts look not only to the language of the parties but to all the circumstances." *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 480, 513 N.W.2d 534, 542 (1994). When looking at all of the circumstances in this case, rescission did not occur. In a note to Marshall accompanying the letter, John Hoeft requested that Marshall call him if Marshall wished to discuss the matter further, leaving open the possibility of rectifying the situation. Five Points responded to John Hoeft's letter by claiming John Hoeft had no right to declare Five Points' assignment as void. Also, in its response, Five Points agreed to pay expenses incurred on Tom Hoeft's behalf and requested that documentation of these expenses be submitted to Five Points. John Hoeft eventually submitted expenses to Five Points which he claimed Five Points owed on Tom Hoeft's behalf. Five Points' letter in response to John Hoeft's January 8, 1988, letter and the parties' subsequent actions together indicate that rescission never occurred.

Because a jury could conclude that, under the circumstances, the contract was not rescinded, the court's denial of the directed verdict on the issue of rescission was proper.

Five Points also contends that John Hoeft's action should have been barred by the statute of limitations and that a directed verdict should have been entered in Five Points' favor. An action upon an oral contract can only be brought within 4 years of the date on which it accrued. Neb. Rev. Stat. § 25-206 (Reissue 1989). An action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages. *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994); *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993). A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994).

The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994); *Central States Resources v. First Nat. Bank, supra*.

Neither party moved to have the statute of limitations issue determined as a separate issue before proceeding with the other issues at trial. There were conflicting claims by the parties as to when the cause of action accrued. The district court submitted the statute of limitations issue to the jury, and the jury evidently concluded that the statute of limitations did not bar John Hoeft's action.

The record reflects that a jury could reasonably conclude that the lawsuit was not barred by the statute of limitations. On February 2, 1988, Five Points assured John Hoeft that it "would participate in actual out-of-pocket expenses which you have incurred on behalf of the interest which Tom Hoeft assigned to us. This would include money which you actually paid to [the real estate broker] or money paid in the future." Five Points' February 2 letter would not place Five Points in breach of any oral contract to pay expenses and supports the conclusion that

John Hoeft's cause of action had not accrued as of that date. The petition was filed within 4 years of Five Points' February 2 letter. Therefore, we find no error in the district court's refusal to direct a verdict in favor of Five Points as to its statute of limitations claim.

Five Points also contends that the district court erred in refusing to direct a verdict in its favor, finding that the alleged oral contract was barred by the statute of frauds. The statute of frauds provides that oral contracts consisting of a "special promise to answer for the debt, default, or misdoings of another person" are void. Neb. Rev. Stat. § 36-202(2) (Reissue 1993).

However, "where the principal object of a party promising to pay the debt of another is to promote his own interests, and not to become a guarantor or surety, and the promise is made on sufficient consideration, it will be valid although not in writing." *Heese Produce Co. v. Lueders*, 233 Neb. 12, 19-20, 443 N.W.2d 278, 283 (1989). " 'A consideration to support a promise, not in writing, to pay the debt of another must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt.' " *VSC, Inc. v. Lilja*, 203 Neb. 844, 845, 280 N.W.2d 901, 903 (1979).

Five Points agreed to pay Tom Hoeft's expenses in exchange for receiving Tom Hoeft's proceeds from the Huwaldt group, not merely to act as a guarantor of Tom Hoeft's liability. The promise was made in order to promote Five Points' interests and was supported by new consideration. Therefore, the case is not within the statute of frauds, and the district court did not err in denying Five Points' motion for a directed verdict.

In addition to assigning error to the district court's refusal to direct a verdict on the issues previously discussed, Five Points contends that the district court erred in admitting certain evidence. First, Five Points contends that the court erred by permitting Margaret Hoeft to be used as a rebuttal witness. Margaret Hoeft testified regarding conversations between her husband, John Hoeft, and Marshall. Second, Five Points contends that the court erred by admitting unfairly prejudicial

evidence regarding John Hoeft's financial condition and evidence implying a financial conspiracy between Five Points and others.

To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994); *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994). The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Walpus v. Milwaukee Elec. Tool Corp., ante* p. 145, 532 N.W.2d 316 (1995); *Kroeger v. Ford Motor Co.*, 247 Neb. 323, 527 N.W.2d 178 (1995); *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994).

Concerning the rebuttal testimony, Marshall denied that he had made any promises to pay expenses to John Hoeft in order to gain his assent to Tom Hoeft's assignment to Five Points. Margaret Hoeft testified she was present at a meeting on or about February 15, 1984, and that expenses were discussed. Margaret Hoeft's testimony counteracted evidence introduced by Five Points in its case in chief. It was within the discretion of the trial court to allow such evidence.

Five Points contends that it was unfairly prejudicial for the district court to allow evidence pertaining to settlement, evidence pertaining to John Hoeft having to sell his home, and evidence implying that Marshall was engaged in a financial conspiracy. The record does not support Five Points' claim that it was unfairly prejudiced by the admission of any such evidence.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

LANPHIER and CONNOLLY, JJ., not participating.

LOUIS G. RIHA AND SHIRLEY A. RIHA, APPELLEES, V. FIRSTIER BANK, NATIONAL ASSOCIATION, OMAHA, TRUSTEE, APPELLANT.

539 N.W.2d 632

Filed November 9, 1995. No. S-94-031.

1. **Equity: Appeal and Error.** In all appeals from the district court in suits in equity in which review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Court of Appeals or the Supreme Court to retry the issue or issues of fact preserved in the bill of exceptions and, upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof.
2. **Injunction: Proof: Appeal and Error.** In de novo review, this court is guided by the rule that a party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle him or her to relief.
3. **Equity: Appeal and Error.** Where the trial court has viewed the premises, the appellate court is required to consider any competent and relevant facts revealed by the view and any findings made by the trial court, provided that the record contains competent evidence to support the findings.
4. **Waters.** The flow of water cannot be interfered with by a lower proprietor to the detriment of the upper proprietor.
5. **Waters: Injunction.** The proper remedy in water drainage disputes is an injunction.
6. **Injunction: Equity.** Injunctions sound in equity.
7. **Waters: Injunction.** Injunctive relief may be granted to an adjoining landowner upon a proper showing that an obstruction in a drainageway or natural watercourse constitutes a continuing and permanent injury to that landowner.

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

George A. Penry for appellant.

Dixon G. Adams for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

This is an appeal from an order granting an injunction brought by Louis G. Riha and Shirley A. Riha against an adjoining landowner, FirsTier Bank. A natural drainageway carried water over the Rihas' land and onto FirsTier's land and then to the Platte River. The Rihas alleged that their land was

being damaged due to the backup of water because of FirsTier's blockage of the natural drainageway for water. The Rihas sought an injunction ordering FirsTier to remove the obstruction on FirsTier's land or to provide an alternative route for the drainage of water.

After a bench trial, the court found that a mandatory injunction was warranted, and an injunction was imposed. FirsTier appealed to the Court of Appeals, and pursuant to our authority to regulate the caseloads of lower courts, we removed the case to our docket. Finding no merit in any of the assignments of error, we affirm the holding of the trial court.

BACKGROUND

The Rihas alleged in a petition filed in the district court for Sarpy County that they owned land which slopes and drains water generally to the south and east and over and across FirsTier's land. They further alleged that a culvert, designated "culvert A" at trial, formerly existed under the roadbed of old state Highway 50 (Old #50) as it existed prior to its relocation. This culvert drained surface waters from the Rihas' land to the south and east over land currently owned by FirsTier. The Rihas further alleged that a natural drainageway from their property existed on FirsTier's land. The Rihas alleged that culvert A had been removed and that the FirsTier land, including the natural drainageway, leveled for farming. They further alleged that these actions resulted in water backing up onto their land. The Rihas requested an injunction ordering FirsTier to remedy the situation.

FirsTier answered in a broad-based pleading. FirsTier admitted that both parties owned land in Sarpy County used for farming and denied everything else. FirsTier then recited six "defenses":

> [1.] Defendant denies the allegations contained in paragraphs IV, V, VI, VII, VIII, IX, X, and XI of Plaintiffs' Petition.
>
> . . . .
>
> [2.] Plaintiffs' Petition does not state facts sufficient to constitute a cause of action.
>
> . . . .

[3.] Plaintiffs have "unclean hands." . . .

. . . .

[4.] In the 1970's, the 1980's and the 1990's on lands lying north and west of State Highway No. 50 the Plaintiffs constructed dikes, roadways and embankments to accumulate and to collect surface waters, diverted the surface waters on such lands from their natural courses, increased the flows and discharges of surface waters, created depressions and drainways that did not previously exist, and attempted to increase the flow and discharge of surface water to other properties. . . .

. . . .

[5.] In January of 1981 the Plaintiff Louis Riha desired to remove the north culvert in the Northwest quarter of section 2 under the old abandoned highway no. 50, and following the removal of such culvert Mr. Riha used a part of the culvert for his own purposes. . . .

. . . .

[6.] Defendant has acted prudently concerning its own land, and has acted properly in using and improving its own property.

Following a hearing and a viewing of the property, the district court filed an order on July 14, 1993. In that order, the court outlined its findings:

With some exceptions, the following findings of fact are made based upon both the evidence and the Court's view of the property. The first two findings are made based only upon the evidence adduced by testimony and exhibits; findings of fact that are made based principally upon the Court's view are identified with an asterisk at the end of each finding.

1. Plaintiffs are the owners, occupiers, and/or mortgage holders of a tract of land lying west and north of new State Highway 50 and south of Buffalo Road;

2. Defendant is the owner of land lying to the east and south of Plaintiffs' land;

3. The Platte River lies to the south and east of both tracts of land;

4. Plaintiffs' land is higher than the land of the

Defendant, and prior to any man-made obstacles, drained to the south and east across the land of the Defendant;

5. These respective tracts of land are separated, from the west to the east, by new State Highway 50 (hereafter referred to as "New #50), an abandoned roadbed for the Missouri-Pacific railroad (hereafter referred to as the "Mo-Pac ROW") and the abandoned roadbed of old State Highway 50 (hereafter referred to as "Old #50");

6. All times subsequent to the construction of roadbeds, drainage from Plaintiffs' land was through three points on the roadbeds, identified as 'A' on the north, 'B' in the center, and 'C' on the south;

7. These three drainage ways still exist through New #50 and the Mo-Pac ROW;

8. There is an old farmstead road (Johnny Kay Road) on Defendant's property that runs in a generally easterly direction from drainage point 'B';

9. There is a drainage ditch located on the north side of Johnny Kay Road in approximate alignment with drainage point 'B' in the roadbeds, which carries runoff water to the Platte River;

10. At all times subsequent to the construction of the roadbeds, after runoff water passed through points 'A', 'B', and 'C', it was collected in the Johnny Kay ditch and carried to the Platte River;

11. At the present time, the collection from point 'C' is through a drainway that exists on the west side of Old #50, another (but separate) drainway on the east side of the Mo-Pac ROW, and by some drainage along the east side of New #50;

12. Water from point 'C' flows north in these mentioned drainways, through a culvert in Johnny Kay Road, and then east in the Johnny Kay ditch to the Platte River;

13. Water draining through point 'B' is collected immediately into the Johnny Kay ditch and carried to the Platte River;

14. Prior to the construction of New #50, water passing through point 'A' drained to the south along the east side

of Old #50 to the Johnny Kay ditch and thence east to the Platte River;

15. The Defendant has leveled the roadbed of Old #50 north of Johnny Kay Road, and converted it to farm land;

16. The Defendant has leveled the roadbed to a height that approximately corresponds with the top of a four-foot culvert existing at point 'A' under new #50;*

17. The only drainage from point 'A' to the Johnny Kay ditch, at the present time, is by a small ditch dug by the Plaintiffs along the east side of the Mo-Pac ROW, and a low spot existing between the west side of the Mo-Pac ROW and the east side of New #50;

18. That the actions of the Defendant in converting the roadbed of Old #50 to farming and leveling it to a height of the existing culvert in New #50 has obstructed the natural flow of water from the Plaintiffs' land;

19. That the actions taken by the Defendant were taken at various and sundry times, but completed in 1990;

20. Plaintiffs have timely brought this litigation and in good faith;

21. Plaintiffs farming practices on the drainways leading from the diversion terrace to drainway 'A' and 'B' has contributed to the silting, but is not the sole proximate cause of the resulting damage;

22. The actions of the Defendant in converting Old #50 to farm land and leveling it to the height aforementioned has caused, and will cause in the future, damage to the property owned by the Plaintiffs as well as damage to the property in which Plaintiffs have a remaining security interest by preventing natural drainage; and

23. Plaintiffs have no adequate remedy at law.

In the same order, the court made specific findings of law:

1. Lower-land owners who build structures in natural water courses have a continuing duty to provide for the passage through such construction of all waters which may reasonably be anticipated to flow or to be carried therein;

2. Where an obstruction in a natural water course constitutes a continuing and permanent injury to adjoining landowners, injunctive relief may be granted;

> 3. The Defendant's actions in removing the culverts and leveling the right-of-way of Old #50 to its present height constitutes an obstruction and structure that prevents the natural flow of surface waters from Plaintiffs' land; and
>
> 4. Plaintiffs are entitled to injunctive relief, although the specific requirements as to the method of its accomplishment are uncertain.

In the order's conclusion, the trial court ordered FirsTier to submit a proposed mandatory injunction in favor of the Rihas within 60 days. The Rihas would then have 30 days to respond. The order provided that if an agreement could not be reached, then a further hearing would be set to determine the specific terms and conditions of the injunction. The order included a dismissal of FirsTier's counterclaim for attorney fees and the taxation of costs to FirsTier.

FirsTier filed a pleading with the court stating that FirsTier objected to the order of the court that FirsTier should be required to suggest what would be an appropriate remedy, if any, in the case. FirsTier, in six pages, apparently sought a rehearing of the case. No proposed mandatory injunction was submitted. Following receipt of FirsTier's pleading, the court scheduled a hearing at which the Rihas, but not FirsTier, appeared. At that hearing, the court accepted the Rihas' suggested injunction which stated:

> Defendant is hereby ordered to locate and construct a drainageway along the western portion of its lands (whether those lands be the old Highway 50 right of way or the Missouri Pacific right of way) which drainageway shall be adequate to provide for the passage of all waters which may reasonably be anticipated to flow or be carried therein, so that surface waters draining through the present culvert under new Highway 50 at the point designated as point "A" in the evidence are carried to the Johnny Kay Road ditch, and then on to the PlatteRiver [sic].

It is this order that FirsTier appeals.

ASSIGNMENTS OF ERROR

FirsTier broadly asserts as errors that the district court erred in entering a mandatory injunction against FirsTier and that the district court should have entered judgment for FirsTier on the

claim of the Rihas and should have heard evidence on FirsTier's claim for attorney fees.

STANDARD OF REVIEW

In all appeals from the district court in suits in equity in which review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Court of Appeals or the Supreme Court to retry the issue or issues of fact preserved in the bill of exceptions and, upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof. Neb. Rev. Stat. § 25-1925 (Cum. Supp. 1992).

In de novo review, this court is guided by the rule that a party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle him or her to relief. *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991).

The court viewed the property in this case. This court has often stated that where the trial court has viewed the premises, this court is required to consider any competent and relevant facts revealed by the view and any findings made by the trial court, provided that the record contains competent evidence to support the findings. *Id.*; *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985); *Burgess v. Omahawks Radio Control Org.*, 219 Neb. 100, 362 N.W.2d 27 (1985); *Darsaklis v. Schildt*, 218 Neb. 605, 358 N.W.2d 186 (1984).

ANALYSIS

In order for the plaintiffs in such circumstances to prevail under their theory that the leveling of the area obstructed a natural drainway, they must show by a preponderance of the evidence that the water traversed through the leveled area, that the drainageway was formed and existed in a state of nature, and that it carried water from a higher estate to a lower estate. *Romshek, supra*; *Gruber v. County of Dawson*, 232 Neb. 1, 439 N.W.2d 446 (1989); *Belsky v. County of Dodge*, 220 Neb. 76, 369 N.W.2d 46 (1985).

FirsTier claims that there never was a natural drainageway, starting at point A, across its land and on to the Platte River. To accept this contention would require a conclusion that the 48-inch culverts under Old #50 provided drainage only up to FirsTier's land and not across its land to the Platte River. As found in other cases, natural drainageways probably existed across FirsTier's land prior to the building of the highways and the culverts that were placed in those drainageways. See *Wilson Concrete Co. v. County of Sarpy*, 189 Neb. 312, 202 N.W.2d 597 (1972). To be sure, culvert B was put in place to provide access for water to flow from the Rihas' land, under Old #50, across FirsTier's land via the Johnny Kay ditch, and on to the Platte River. The same purpose of access can be inferred from the record for culverts A and C. When FirsTier removed culvert A, which removal is clear from the record, the natural flow of water was interrupted.

The record lacks evidence to sufficiently establish FirsTier's "defenses." The evidence does show some farming practices by the Rihas which contributed to drainage problems, but these practices were by no means the significant cause of drainage problems. The record supports the finding that the actions of FirsTier were a proximate cause to the damage to the Rihas' land.

The court's findings upon viewing the premises are supported by the record. The water had traversed through the leveled area of Old #50, that is, culvert A, and through that point flowed from the Rihas' land to and over FirsTier's land to the Platte River. The record also clearly shows that the flow of water from the Rihas' land over FirsTier's land and then to the Platte River has now been obstructed by FirsTier's actions.

The evidence of injury suffered by the Rihas is also clear from the record. The water will not drain off their land upon which they intend to farm.

The flow of water cannot be interfered with by a lower proprietor to the detriment of the upper proprietor. *Romshek, supra*; *Belsky, supra*; *Fink v. O'Neill Country Club*, 218 Neb. 30, 352 N.W.2d 166 (1984). The proper remedy in water drainage disputes is an injunction. *Romshek, supra*. Injunctions sound in equity. *University Place-Lincoln Assocs. v. Nelsen*,

247 Neb. 761, 530 N.W.2d 241 (1995); *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 523 N.W.2d 676 (1994); *CAE Vanguard, Inc. v. Newman*, 246 Neb. 334, 518 N.W.2d 652 (1994).

Injunctive relief may be granted to an adjoining landowner upon a proper showing that an obstruction in a drainageway or natural watercourse constitutes a continuing and permanent injury to that landowner. *Romshek, supra*; *Gruber, supra*; *Wilson, supra*.

The record establishes that the mandatory injunction ordered against FirsTier was and is necessary and proper to stop the damage to the Rihas' land.

CONCLUSION

Our de novo review establishes that there is a proper showing of continuing and permanent injury to an upper proprietor of land due to the lower proprietor's interference with the flow of water. The mandatory injunction was necessary and appropriate. The decision of the district court is hereby affirmed.

AFFIRMED.

ERVIN MELCHER, APPELLEE, V. THE BANK OF MADISON, APPELLANT.

539 N.W.2d 837

Filed November 17, 1995. No. S-93-670.

1. **Verdicts: Juries: Appeal and Error.** A verdict is not to be set aside on appeal 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.
2. **Judgments: Directed Verdict.** A motion for judgment notwithstanding the verdict may be granted when the movant's previous motion for directed verdict, made at the conclusion of all the evidence, should have been sustained.
3. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; the party against whom the motion is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
4. **Directed Verdict: Evidence.** In order to sustain a motion for directed verdict, the

court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion from the evidence.

5. **Estoppel.** Under the doctrine of judicial estoppel, one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.
6. ____. Judicial estoppel may be applied even if detrimental reliance or privity does not exist.
7. ____. The doctrine of judicial estoppel is to be applied with caution so as to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement.
8. ____. Absent judicial acceptance of the inconsistent position, application of judicial estoppel is unwarranted because no risk of inconsistent results exists.
9. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
10. **Trial: Evidence.** Where evidence is admitted generally, it may be considered for any purpose for which it is relevant and competent.
11. **Verdicts: Evidence.** A verdict amount within the range of the evidence is adequately supported by the evidence.
12. **Juries: Witnesses.** The credibility of a witness is an issue for the jury.
13. **Jury Instructions.** It is the meaning of a jury instruction, not its phraseology, that is crucial.
14. ____. It is not error to refuse to give a requested instruction if the substance of the request is included in the instructions given.
15. **Jury Instructions: Appeal and Error.** All 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 a reversal.
16. ____: ____. Absent plain error, failure to object to a jury instruction after it has been submitted for review precludes raising an objection on appeal.
17. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and MILLER-LERMAN, Judge, and HOWARD, District Judge, Retired, on appeal thereto from the District Court for Madison County, RICHARD P. GARDEN, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Daniel A. Fullner, of Moyer, Moyer, Egley, Fullner & Warnemunde, for appellant.

Vince Kirby for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. INTRODUCTION

In this conversion action, the district court, pursuant to the verdict, entered judgment in the amount of $28,000 in favor of the plaintiff-appellee, Ervin Melcher, and against the defendant-appellant, The Bank of Madison. The bank thereupon appealed to the Nebraska Court of Appeals asserting, in summary, that the district court erred in overruling the bank's motion for judgment notwithstanding the verdict or a new trial because (1) it was entitled to the directed verdict it sought at the close of all the evidence and (2) the district court incorrectly instructed the jury. The Court of Appeals reversed the judgment of the district court, *Melcher v. Bank of Madison*, 3 Neb. App. 665, 529 N.W.2d 814 (1995), and Melcher thereafter successfully petitioned this court for further review. We now reverse the judgment of the Court of Appeals and remand with direction.

II. SCOPE OF REVIEW

A verdict is not to be set aside on appeal 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. *Hoeft v. Five Points Bank, ante* p. 772, 539 N.W.2d 637 (1995); *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995).

III. FACTS

Melcher's son owned a John Deere 4430 tractor, which had a number of mechanical deficiencies. As a result, the son considered buying a John Deere 4450 tractor to replace the 4430 unit, but concluded that the 4450 version was too expensive for him.

Melcher then traded in the son's 4430 for a 4450 at a

purchase price of $39,500.50 plus sales tax of $857, for a total of $40,357.50. Melcher signed the purchase contract and was allowed $15,000 for the trade-in of the 4430, but a promissory note having a balance of $7,693 remained due on the 4430, so Melcher only received a credit of $7,307. In addition, Melcher paid $5,000 cash on the purchase price. Thus, a balance of $28,050.50 remained due on the 4450. Melcher signed a promissory note to John Deere for that amount, and he eventually paid it in full.

Although Melcher had the 4450 delivered to the son, Melcher testified that he never gave title to the unit to the son or anyone else and that he maintained possession of it and allowed his family members to use it any time they wanted, free of charge. Nonetheless, the son stated that he and Melcher had agreed that if the 4450 needed repairs, the son would pay for them.

The testimony as to how Melcher came to trade in the 4430 is in conflict. Melcher testified that the son told him to trade it in on the 4450. At one point, the son stated that he was surprised by the arrival of the 4450 and that he wished Melcher would have told him about the trade-in, but at another point, stated that he "gave" the 4430 to Melcher to purchase the 4450. The record does not explain what the son meant by the word "gave."

Following Melcher's purchase of the 4450, he had the son sign promissory notes in the amount of $28,000 during each of 7 successive years. Apparently, the son made no payments on the notes, but he did pay Melcher $5,000 from the proceeds of a loan he obtained from the bank as the final payment on the 4430.

Melcher did not claim depreciation of the 4450 on his tax returns and did not list it as an asset in the financial statements he supplied the bank. The son did both and, when filing for protection under chapter 12 of the U.S. Bankruptcy Code, listed the 4450 in his schedule of assets and named Melcher as a creditor. Melcher did not file any objection to the son's listing of the 4450 as his property.

The son had given a security interest in all of his farm equipment, including the 4430 and after-acquired property, to

the bank during all pertinent times. Thus, when Melcher converted his chapter 12 bankruptcy proceeding to a proceeding under chapter 7 of the code, the bank sought, and was granted, relief from the automatic stay in order to bring an action in replevin to recover the son's farm equipment. After obtaining such judgment, the bank repossessed the 4450 and, after making some repairs, sold the unit at auction.

This suit then followed. Although Melcher testified that at the relevant time the 4450 was worth $40,000, there was evidence that it was sold at the auction for $31,100.

IV. ANALYSIS

It is true that a motion for judgment notwithstanding the verdict may be granted when the movant's previous motion for directed verdict, made at the conclusion of all the evidence, should have been sustained. *Getzschman v. Miller Chemical Co.*, 232 Neb. 885, 443 N.W.2d 260 (1989). See, also, *Hoeft v. Five Points Bank, ante* p. 772, 539 N.W.2d 637 (1995).

1. Directed Verdict

The first question then is whether the bank was, as it claims, entitled to a directed verdict at the close of all the evidence because of Melcher's conduct and because of the status of the evidence. In this connection, it is to be recalled that in reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. The party against whom the motion is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. In order to sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion from the evidence. *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995). See, also, *Hoeft, supra*.

(a) Conduct

The bank urges it was entitled to a directed verdict because

as Melcher failed to object to the son's listing of the 4450 as one of his assets in his bankruptcy proceeding, Melcher became judicially estopped from asserting an ownership interest in the 4450 and because pursuant to the U.S. Bankruptcy Code, title to the 4450 passed from the son to the bankruptcy estate.

(i) Judicial Estoppel

The doctrine of judicial estoppel holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir. 1982); *DeMers v. Roncor, Inc.*, 249 Mont. 176, 814 P.2d 999 (1991). The doctrine protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. *Reynolds v. C.I.R.*, 861 F.2d 469 (6th Cir. 1988). It has been said that unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist. *Edwards, supra*. However, the doctrine is to be applied with caution so as to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement. See *Reynolds, supra*. Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent results exists. *Edwards, supra*.

While we adopt the doctrine, it has no application here. Melcher did not successfully or unequivocally assert in the son's bankruptcy proceeding that the 4450 belonged to the son or that Melcher himself had no ownership interest. Indeed, as Melcher did not file an objection, the issue of ownership of the 4450 was, in fact, never litigated and was never clearly in issue. See *In re Greene*, 145 B.R. 714 (Bankr. S.D. Ga. 1992) (objection to allowance of claim filed in accordance with 11 U.S.C. § 502 (1988) and relevant bankruptcy rules clearly places in issue allowance or disallowance of claim). Consequently, Melcher's failure to object to the son's listing of the 4450 as his does not judicially estop Melcher from asserting an ownership interest in the 4450 in this action. See, *In re*

Montgomery, 80 B.R. 385 (Bankr. W.D. Tex. 1987) (failure of creditor to object to debtor's exemptions did not operate as estoppel preventing creditor from raising debtor's entitlement to exemption in debtor's lien avoidance action); *Matter of Simicich*, 71 B.R. 48 (Bankr. M.D. Fla. 1987) (defendant's initial failure to assert ownership interest in items of personal property did not operate as estoppel that could be invoked to divest him of title and create title in debtor); *Eames v. Philpot*, 72 Cal. App. 151, 236 P. 373 (1925) (debtor's scheduling of chattel in bankruptcy did not divest third-party owners of right of possession).

(ii) Operation of Bankruptcy Code

While it is true that pursuant to 11 U.S.C. § 541 (1994) of the U.S. Bankruptcy Code the estate comprises all the legal and equitable interests in property of a debtor, that section "does not address the threshold questions of the existence and scope of the debtor's interest in a given asset." *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1402 (9th Cir. 1986). These questions are resolved pursuant to nonbankruptcy law. *Id.*; *Collins v. Federal Land Bank of Omaha*, 421 N.W.2d 136 (Iowa 1988).

(b) Status of Evidence

The bank also urges the evidence was insufficient to sustain the verdict. In assessing that claim, we recall the corollary to the rule set forth in part IV(1) above concerning the circumstances under which a directed verdict at the close of all the evidence may be granted; that is, that on a motion for judgment non obstante veredicto, or notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Critchfield v. McNamara, ante* p. 39, 532 N.W.2d 287 (1995); *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993).

First, the bank urges that as the amount of the verdict was less than Melcher's opinion as to the value of the 4450, there is no evidence to support that amount. The argument overlooks the

evidence as to the price at which the unit was sold at auction; that evidence was received without objection. The applicable rule is that where evidence is admitted generally, it may be considered for any purpose for which it is relevant and competent. See *Baxter v. National Mtg. Loan Co.*, 128 Neb. 537, 259 N.W. 630 (1935). That being so, the verdict amount, being within the range of the evidence, is adequately supported by the evidence. *Sayer Acres, Inc. v. Middle Republican Nat. Resources Dist.*, 205 Neb. 360, 287 N.W.2d 692 (1980) (condemnation award within range of evidence not clearly wrong).

Additionally, the bank argues that the evidence does not support a finding that Melcher owned the 4450. While it is true that reasonable minds could well conclude from the evidence that the son owned the unit, it cannot be said that reasonable minds could not conclude that Melcher owned it. Melcher had testified that he bought the 4450, that he was in continuous possession of it, and that he had never given or transferred title to anyone. The credibility of a witness is an issue for the jury. *Roberts v. Weber & Sons, Co., ante* p. 243, 533 N.W.2d 664 (1995).

Viewed in the light most favorable to Melcher, the evidence establishes a prima facie case for conversion, and the question was thus properly submitted to a jury. See *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992) (plaintiff in conversion must show (1) immediate right to possession of property and (2) its wrongful possession by tort-feasor).

(c) Resolution of Claim

Accordingly, the bank was not entitled to a directed verdict.

2. Jury Instructions

The foregoing determination leads us to a consideration of the bank's claim that the district court erred in its instructions to the jury by failing to instruct as the bank requested with regard to five specific matters and in misstating the law in an instruction given on its own motion.

(a) Instructions Refused

The bank first complains of the district court's failure to give

its tendered instruction defining the issues and the facts the bank had the burden to prove and its tendered instruction concerning the equitable estoppel defense it asserted based upon Melcher's alleged knowledge of the security interest the son gave the bank. However, although the district court did not use the bank's tendered instructions concerning those matters, it properly instructed the jury on the applicable law concerning them. It is the meaning of an instruction, not its phraseology, that is crucial. *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995). Thus, it is not error to refuse to give a requested instruction if the substance of the request is included in the instructions given. See *id.* See, also, *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993); *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991).

Next, the bank complains that the district court failed to define "conversion," as requested. While the district court did not instruct that conversion means "any distinct act of dominion, wrongfully asserted over another's property in denial of, or inconsistent with that person's rights," as the bank asked, the district court did instruct that the case involved a claim for the "wrongful taking" of the 4450. All 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 a reversal. *Hamernick v. Essex Dodge Ltd.*, 247 Neb. 392, 527 N.W.2d 196 (1995). While a more complete definition might have been desirable, within the context of the facts in this case, it cannot be said that the lack of such constituted prejudicial error necessitating a reversal.

Additionally, the bank tendered two instructions defining promissory notes having certain characteristics as negotiable instruments. The bank argues in that connection that if the jury had been instructed as to the definition of a promissory note and that a promissory note is a negotiable instrument, it might have found that the promissory notes given by the son to Melcher were negotiable instruments and, therefore, adequate consideration for the sale of the 4450. However, the negotiability of a promissory note does not affect whether it constitutes adequate consideration for a sale. Consideration is

sufficient to support a contract if there is any detriment to the promisee or benefit to the promisor. *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991). Generally, a court will not inquire into the adequacy of consideration for a contract, inasmuch as consideration based on value of property or performance of a promise is a matter of personal judgment by parties to a contract. *Id.* Consequently, the bank was not prejudiced by the district court's refusal to give the two tendered instructions at issue.

(b) Instruction Given

Finally, the bank urges that the district court erred by instructing the jury that the bank had the burden to prove it had no knowledge that Melcher claimed a security interest in the 4450. We agree that under the circumstances, the bank's knowledge or lack of knowledge of Melcher's alleged claim of a security interest in the 4450 was not a relevant consideration in determining its liability.

The difficulty from the bank's point of view is that it did not object to that instruction when it was given an opportunity to do so. Absent plain error, failure to object to a jury instruction after it has been submitted for review precludes raising an objection on appeal. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995); *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993). Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Long, supra*; *Dike v. Dike*, 245 Neb. 231, 512 N.W.2d 363 (1994); *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993).

Although the instruction now complained of was erroneous, it does not amount to plain error. In order to consider the instruction, the jury would have had to find by a preponderance of the evidence that Melcher was the owner of the 4450 and had an immediate right to possession. Logically, that means the jury

necessarily found that the 4450 did not belong to the son at the time he gave the security interest to the bank and that the bank did not have an immediate right to possession. Therefore, the bank would have failed to carry its burden of proof on the issue of this affirmative defense, regardless of the instruction. Thus, the error in giving the instruction could not cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

(c) Resolution of Claim

Consequently, the district court's instructions do not provide a basis for reversal.

V. JUDGMENT

The record failing to support either the bank's claim that it was entitled to a directed verdict or its claim that it was entitled to a new trial because of error in the jury instructions, it necessarily follows that the district court did not err in overruling the bank's motion for judgment notwithstanding the verdict or for a new trial.

The judgment of the Court of Appeals is therefore reversed and the cause remanded to that court with the direction that it affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTION.

GERRARD, J., dissenting.

I respectfully dissent from the result reached by the majority, which reverses the decision of the Nebraska Court of Appeals and affirms the judgment of the district court. In my opinion, the trial court erred in denying the bank's motion for directed verdict at the close of the evidence and in denying the bank's posttrial motions, because there is no competent evidence which would support the conclusion that Ervin Melcher was the owner of the John Deere 4450 tractor eventually sold by the bank in satisfaction of its judgment against Melcher's son, Donald.

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. *Hoeft v. Five Points Bank, ante* p. 772, 539 N.W.2d 637 (1995); *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993); *Kozeny v. Miller*, 243

Neb. 402, 499 N.W.2d 75 (1993). The majority found Melcher's testimony and the testimony of his son to be sufficient evidence in support of Melcher's claim of ownership and possession of the 4450. Essentially, Melcher testified that he purchased the 4450, that he was in continuous possession of the tractor, and that he had never transferred title of the 4450 to anyone. Melcher's claims are not supported by the record.

The record reflects that Melcher was not the sole payor for the 4450. Instead, Melcher was responsible for $5,050.50 of the total $40,357.50 cost of the new 4450. The remainder of the purchase price, $35,307, was attributable to his son. When Melcher negotiated the purchase of the 4450, he received $15,000 for the trade-in of *his son's old John Deere 4430 tractor*. After a promissory note covering the 4430 was paid off, the credit received in exchange for Melcher's son's old tractor was $7,307. Melcher's son, on direct examination as a hostile witness, revealed more of the background of the tractor trade-in and subsequent indebtedness to Melcher in the following colloquy:

> [Bank's attorney:] Did you ask your father what he had done with your 4430 tractor?
>
> [Melcher's son:] Yes.
>
> Q. And didn't he tell you that he traded it in?
>
> A. Yes.
>
> Q. And didn't you tell him that you wished he would have told you about that first?
>
> A. Yes.
>
> Q. And didn't you then ask him, well, what am I suppose to do?
>
> A. I was suppose to make payments to him.
>
> Q. My next question is, didn't he say, you make payments on this one?
>
> A. Yes.
>
> Q. Was there anything else that you and your father talked about and discussed concerning the absence of your 4430 tractor and the arrival of the 4450 tractor?
>
> A. He traded that one in for the 4450, and I was out of the 4430.
>
> Q. Did your father later come to you and have you sign

a promissory note?

A. Yes.

In fact, *at the direction of Melcher*, his son signed promissory notes in the amount of $28,000 for the 7 consecutive years prior to trial evidencing his son's indebtedness to Melcher for the purchase of the new 4450. Thus, Melcher's son contributed $35,307 to the purchase of the 4450, which included $7,307 equity in the old tractor and his annually renewed promissory notes to pay Melcher $28,000. Therefore, contrary to Melcher's claim, his son was responsible for paying at least 87 percent of the cost of the new tractor.

Melcher never possessed the 4450 as he claimed. The tractor was delivered directly to Melcher's son, and at all relevant times, his son was the sole possessor of the 4450. Regardless of Melcher's nebulous claim that the 4450 was available for other family members' use "whenever they needed it," Melcher's son testified that he had, in fact, been using the tractor from the date of delivery in June 1986 until the date that the bank repossessed it. Moreover, it is undisputed that Melcher's son was solely responsible for the maintenance of the tractor, he was the only one who claimed depreciation of the tractor on his tax returns, and only he listed the 4450 as an asset on financial statements.

Finally, Melcher claims that he never transferred title of the 4450 to anyone. No record of "title" was offered or received into evidence, and there is good reason for that omission. Melcher never had "title" to the tractor because tractors are excluded as motor vehicles covered by the certificate of title act. Neb. Rev. Stat. § 60-101 et seq. (Reissue 1993). Section 60-102 states that the act shall apply to motor vehicles, commercial trailers, and semitrailers required to be registered under Neb. Rev. Stat. §§ 60-301 to 60-306 (Reissue 1993). Section 60-301(14), now codified at § 60-301(16) (Supp. 1995), states "[m]otor vehicle shall mean any vehicle propelled by any power other than muscular power except . . . (b) farm tractors . . . ." Therefore, Melcher's claim that he never gave title to the tractor to anyone is correct, but only because he never had a title to give any more than his son would have had a title to give to anyone.

In the instant case, the only evidence to support the jury

verdict was the testimony of Melcher and his son—and even their testimony, given the benefit of every inference which can reasonably be deduced from the evidence, does not support the conclusion that Melcher was the owner of the 4450 at the time of its taking by the bank. This case should not have been submitted to a jury. Once Melcher was able to dodge the bullet of a directed verdict, he successfully crafted the legal equivalent of a silk purse out of evidence that equated to something less than a sow's ear.

I would affirm the decision of the Court of Appeals which had reversed the judgment of the district court.

VILLAGE OF ORLEANS, APPELLEE, V. BILL DIETZ, APPELLANT.

539 N.W.2d 440

Filed November 17, 1995. Nos. S-93-855, S-93-856.

1. **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.
2. **Judgments.** If a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment.
3. **Judgments: Final Orders.** A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
5. **Jurisdiction: Appeal and Error.** Where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.

Appeal from the District Court for Harlan County, STEPHEN ILLINGWORTH, Judge, on appeal thereto from the County Court for Harlan County, JACK ROBERT OTT, Judge. Appeal dismissed.

Bill Dietz, pro se.

Douglas R. Walker, of Duncan, Duncan, Jelkin & Walker, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Bill Dietz appeals the decision of the district court for Harlan County affirming the county court's conviction of Dietz on misdemeanor nuisance charges. The county court fined Dietz $100 on each of 48 counts in one case and on each of 2 counts in a separate case. These cases have been consolidated for appeal. Dietz asserts that the Village of Orleans did not have the authority to prosecute him in its own name; however, we do not reach this issue because we find that we do not have jurisdiction.

ASSIGNMENT OF ERROR

Dietz assigns one error, that the village erred in bringing an action in the name of the Village of Orleans when it does not have the authority to bring actions in its own name.

FACTUAL BACKGROUND

This case began as a nuisance action in the Harlan County Court by the village against Dietz for violating various village ordinances forbidding the maintenance of property in a filthy or littered condition. After conviction of the misdemeanor nuisance violations, the county court sentenced Dietz to pay $100 on each of the 50 counts and gave him 120 days from that date, October 22, 1992, to clean up the property. If the property was cleaned up within the 120 days, the judge agreed to reduce the fine to a "minimal amount."

Dietz filed a notice of appeal to the district court for Harlan County on November 10, 1992, stating that the village had erred in bringing an action in the name of the village when it had no authority to do so. On March 26, 1993, the district court affirmed the county court's verdict and sentence with the modification that Dietz was given an additional 120 days to clean up the property.

On April 6, 1993, Dietz filed a motion for a new trial or, in the alternative, motion to vacate. Both motions were denied at

a hearing held on August 19, and the court's judgment was entered on the trial docket on that date. A journal entry and order, stating that the court entered an order affirming the March 26 ruling of the district court, was signed and dated by the judge on August 30. The village filed a motion for summary dismissal, because Dietz failed to appeal within 30 days as required by Nebraska law.

ANALYSIS

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. *Lemburg v. Adams County*, 225 Neb. 289, 404 N.W.2d 429 (1987); *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986). If a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment. See *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991). A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474 (1992).

In the instant case, the judgment of the county court was not a final determination of the rights of the parties. The order gave Dietz 120 days to comply, and if he complied, the fine would be reduced. Thus, the court's judgment was subject to modification during the 120 days allowed for compliance and did not establish the obligation of Dietz as it presently existed. Therefore, the order of the county court was not a final judgment.

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. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995); *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). Thus, the district court did not obtain jurisdiction on this claim because there was no final, appealable order from the county court.

Where the court from which an appeal was taken lacked

jurisdiction, the appellate court acquires no jurisdiction. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995); *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994).

CONCLUSION

Because the record does not contain a final, appealable order, this appeal is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. DIXIE A. LINN, APPELLANT.

539 N.W.2d 435

Filed November 17, 1995. No. S-94-290.

1. **Prior Convictions: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court, viewing and construing the evidence most favorably to the State, will not set aside a finding of a previous conviction for the purposes of sentence enhancement supported by relevant evidence.
2. **Prior Convictions: Proof.** In a proceeding to enhance a sentence because of prior convictions, the State has the burden to prove such prior convictions.
3. **Prior Convictions: Judgments: 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.
4. **Prior Convictions: Records: Proof.** There is no requirement that the State prove a prior conviction by a transcript of the judgment if the defendant admits that he was, in fact, convicted as alleged in the complaint.
5. **Prior Convictions: Right to Counsel: Waiver.** In accepting a waiver of counsel, the trial court must address the defendant and ascertain that the defendant was represented by counsel at the time of the prior conviction or waived his right to counsel.
6. **Judicial Notice.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.
7. **Constitutional Law: Due Process: Judicial Notice.** The Due Process Clause of the U.S. Constitution requires that a defendant be informed when a court judicially notices facts.

8. **Prior Convictions: Appeal and Error.** When evidence lacks sufficient probative force as a matter of law, an appellate court may set aside a finding of a previous conviction for the purposes of sentence enhancement as unsupported by the evidence.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and MUES, Judges, on appeal thereto from the District Court for Hall County, JOSEPH D. MARTIN, Judge, on appeal thereto from the County Court for Hall County, GRATEN D. BEAVERS, Judge. Judgment of Court of Appeals reversed, and cause remanded.

Thomas J. Gaul, Deputy Hall County Public Defender, for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and HICKMAN, D.J., Retired.

FAHRNBRUCH, J.

Dixie A. Linn claims that the Hall County Court erred in sentencing her for driving under the influence of alcohol (DUI), third offense, because the State's evidence was insufficient to prove an earlier DUI conviction.

Specifically, Linn's sole contention is that one of the records of an alleged prior conviction offered by the State in support of sentence enhancement was insufficient for such purposes because it was not signed by a judge.

We agree with Linn; we vacate her sentence for third-offense DUI and remand the cause to the district court for Hall County with direction to remand the cause to the Hall County Court for further proceedings.

STANDARD OF REVIEW

On a claim of insufficiency of the evidence, an appellate court, viewing and construing the evidence most favorably to the State, will not set aside a finding of a previous conviction for the purposes of sentence enhancement supported by relevant evidence. See, *State v. Marks, ante* p. 592, 537 N.W.2d 339 (1995); *State v. Cisneros, ante* p. 372, 535 N.W.2d 703 (1995);

State v. Derry, ante p. 260, 534 N.W.2d 302 (1995).

FACTS

Linn, with counsel present, pled guilty to DUI in Hall County Court on December 2, 1993. At an enhancement hearing held the same day, the State entered into evidence two exhibits purporting to show two earlier convictions for DUI.

Exhibit 1 contains a copy of a complaint for DUI filed against Linn in Hall County Court on June 2, 1992. The third and fourth pages consist of a checklist labeled "Journal Entry." The checklist reflects that Linn appeared with counsel, was apprised of her constitutional rights, and entered a plea of guilty on October 2, 1992. The checklist also shows that Linn stipulated that the June 2 offense was her second DUI offense.

The checklist is signed by the judge, stamped on its face with the seal of the court, and, on the reverse, bears the seal of the Hall County Court clerk attesting that it is a true copy of an original document on file with the court. Linn did not object to exhibit 1's admission into evidence and assigns no error regarding that exhibit.

Exhibit 2 contains a copy of a complaint for DUI filed against Linn in Hall County Court on December 10, 1991. The third and fourth pages also consist of a two-page checklist titled "Journal Entry." This checklist reflects that Linn appeared with counsel, was apprised of her constitutional rights, and entered a guilty plea to DUI.

In contrast to exhibit 1, exhibit 2 fails to reflect that the "Journal Entry" was signed by a judge. The county clerk certified that exhibit 2 is "a true copy of the original on file with this court." The court's seal is affixed to that certification. Exhibit 2 was received into evidence without objection. After receiving it into evidence, the court noted the lack of a judge's signature on the "Journal Entry."

The court then found Linn guilty of DUI, third offense, and sentenced her to 3 months in jail, fined her $500, assessed costs to her, and revoked her motor vehicle operator's license for a period of 15 years.

Linn appealed to the district court for Hall County, claiming that the State's evidence was insufficient to support a conviction

for third-offense DUI because exhibit 2 lacked the signature of a judge. The district court affirmed the judgment of the county court.

Linn appealed to the Nebraska Court of Appeals, arguing that because the journal entry contained in exhibit 2 was not signed by a judge, the district court erred in not finding that the State failed to prove a valid conviction for sentence enhancement. The Court of Appeals' panel, in a two to one decision, affirmed the district court's holding. *State v. Linn*, 3 Neb. App. 332, 526 N.W.2d 683 (1995). After Linn's timely petition, we granted further review.

ASSIGNMENT OF ERROR

Restated, Linn's sole contention is that the Court of Appeals erred in finding that a sentence for DUI may be enhanced by an earlier conviction where the evidence of the conviction fails to show that a judge signed the judgment or that the judgment was properly filed in the convicting court.

ANALYSIS

The question before us is whether the "Journal Entry" contained in exhibit 2 is sufficient evidence to prove a conviction in order to enhance a sentence for DUI.

In a proceeding to enhance a sentence because of prior convictions, the State has the burden to prove such prior convictions. *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994); *State v. Nowicki*, 239 Neb. 130, 474 N.W.2d 478 (1991).

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. See Neb. Rev. Stat. § 27-901 (Reissue 1989). Exhibit 1 does this, and exhibit 2 does not.

Exhibit 1 contains a journal entry signed by the judge, stamped on its face with the court's seal, and certified by the court clerk that it is a true copy of an original document on file with the court. The judge's signature and the court's seal reflect the court's act of rendering judgment, and the document's origin is supported by the court clerk's certification that it is a true

copy of an original document on file with the court. See, Neb. Rev. Stat. § 25-2729(3) (Reissue 1989); § 27-901.

In contrast, exhibit 2 is not signed by a judge. It bears only the certification of the Hall County Court clerk that it is a true copy of a document found in the court's files. The court clerk's certification stamp attesting to the accuracy of the copy provided is of little value in weighing the document's probative weight when its contents are not supported by a judge's signature. As such, we agree with Linn that exhibit 2 fails to reflect the judicial act of rendering judgment and is insufficient to prove an earlier conviction for the purposes of sentence enhancement.

We note, however, that exhibit 1 shows that Linn stipulated at her October 2, 1992, trial that the June 2 DUI offense was her second DUI offense. There is no requirement that the State prove a prior conviction by a transcript of the judgment if the defendant admits that he or she was, in fact, convicted as alleged in the complaint. *Ristau, supra*; *State v. Smyth*, 217 Neb. 153, 347 N.W.2d 859 (1984). In Linn's case, there is no evidence in the record that the trial court asked Linn if she had, or waived, counsel at the conviction proceedings to which she stipulated. In accepting a waiver of counsel, the trial court must address the defendant and ascertain that the defendant was represented by counsel at the time of the prior conviction or waived his right to counsel. See, *Ristau, supra*; *Smyth, supra*; *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984).

There is no evidence in the record that the court took judicial notice of the fact that Linn had stipulated at her October 2, 1992, trial that the June 2, 1992, offense was her second DUI offense. Neb. Rev. Stat. § 27-201(5) (Reissue 1989) states in part that "[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." In discussing Fed. R. Evid. 201, which is identical to Nebraska's § 27-201, Wright and Graham state that implicit in subsection (e) of the federal rule is a requirement that the judge "notify the parties that he is taking judicial notice of an adjudicative fact." 21 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5107 at 507 (1977). See § 27-201(5). Moreover, the Due Process Clause of the U.S. Constitution

requires that a defendant be informed when a court judicially notices facts. See *Garner v. Louisiana*, 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961).

Finally, there is no evidence in the record that the trial judge used Linn's stipulation made at her October 2, 1992, trial to determine that Linn's latest DUI offense was her third. The record plainly shows that the trial court treated exhibits 1 and 2 as evidence of two separate earlier DUI convictions.

Viewing and construing the evidence most favorably to the State, an appellate court will not set aside a finding of an earlier conviction used for sentence enhancement which is supported by relevant and competent evidence. See, *State v. Marks, ante* p. 592, 537 N.W.2d 339 (1995); *State v. Cisneros, ante* p. 372, 535 N.W.2d 703 (1995); *State v. Derry, ante* p. 260, 534 N.W.2d 302 (1995). When evidence lacks sufficient probative force as a matter of law, an appellate court may set aside a finding of a previous conviction for the purposes of sentence enhancement as unsupported by the evidence. See *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995).

The State offered no other evidence of Linn's purported 1991 conviction for DUI. Even when viewing and construing exhibit 2 most favorably to the State, Linn's sentence for DUI, third offense, is unsupported by the evidence. We vacate her sentence for third-offense DUI and remand the cause to the district court for Hall County with direction to remand the cause to the Hall County Court for further proceedings.

REVERSED AND REMANDED.

CONNOLLY, J., dissenting.

I dissent. Reliance on both exhibits 1 and 2 is not necessary to sustain the enhancement to third-offense DUI, and for the reasons set forth below, exhibit 1 is sufficient for the enhancement.

The majority relies on the requirements for the appropriate use of prior convictions in enhancement proceedings set forth in *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994). Under *Ristau*, the State has the burden to prove prior convictions during enhancement proceedings, and may do so either by introducing transcripts of the judgments or by securing the

defendant's voluntary and intelligent admission that he was in fact convicted as alleged in the complaint. *State v. Ristau, supra*; *State v. Smyth*, 217 Neb. 153, 347 N.W.2d 859 (1984).

While *Ristau* sets forth the standard required when using prior convictions to enhance a penalty for DUI, Linn's case is easily distinguishable on its facts from the facts in *Ristau*. In *Ristau*, the defendant's second-offense conviction for DUI was reversed because the county court judge failed to ascertain whether the defendant was represented by counsel during his prior conviction. The State obtained neither the defendant's stipulation to the prior offense nor a certified copy of the prior conviction. The prosecutor merely listed the defendant's prior offense in the complaint and recited the facts of the previous offense into the record at the second-offense proceeding.

In the instant case, during the enhancement hearing on Linn's third-offense DUI, the State used exhibit 1 to prove the existence of the second-offense DUI of which Linn was convicted on October 2, 1992. Linn made no objection to the validity of the conviction contained therein. Exhibit 1 demonstrates that during the enhancement hearing on her second offense of DUI, and while represented by counsel, Linn stipulated that this was her second offense. This stipulation is recorded on the fourth page of exhibit 1. The counseled stipulation by Linn that exhibit 1 was a counseled second-offense conviction is a waiver by Linn, and Linn cannot complain or assert that the second-offense conviction was based upon an uncounseled first-offense conviction. See *State v. Ristau, supra*.

In the criminal context, this court has held that "a party who has stipulated to the admission of evidence cannot on appeal complain about evidence admitted pursuant to and in accordance with such stipulation." *State v. Roggenkamp*, 224 Neb. 914, 921, 402 N.W.2d 682, 687 (1987). Pursuant to Neb. Rev. Stat. § 39-669.07(3) (Cum. Supp. 1992) at her enhancement hearing for second-offense DUI, Linn with counsel had an opportunity to review the record of her prior conviction and make objections as to the validity of such prior conviction. Therefore, exhibit 1 was sufficient to sustain the enhancement to third offense, and exhibit 2, the unsigned

journal entry, is not necessary to prove the first conviction for DUI.

The question which this court has not previously decided is, Did Linn's counseled stipulation contained in exhibit 1 constitute a stipulation as to the constitutional validity of that conviction? The Ohio Supreme Court has addressed this issue in *State v. Adams*, 37 Ohio St. 3d 295, 525 N.E.2d 1361 (1988). In *Adams*, the defendant was indicted on one count of grand theft and four counts of passing bad checks. Prior to trial, counsel for the State and for the defendant stipulated that the defendant had two prior theft offenses. The prior theft offenses had the effect of enhancing the degree of the bad check indictments. The defendant raised no constitutional challenge at trial.

After a conviction on all counts, the defendant in *Adams* appealed, claiming that the State had failed to prove that he had been represented by counsel or had knowingly waived that right with regard to the prior convictions. The Ohio Supreme Court decided that the defendant's stipulation as to the fact of his prior convictions was a stipulation that the prior convictions were constitutionally sufficient. The court noted that the defendant had failed to challenge the constitutionality of the prior convictions at trial and announced that the only appropriate time to raise the issue of the constitutionality of prior convictions is at the enhancement proceeding. If the defendant fails to do so, the challenge is waived.

I find the reasoning of the Ohio Supreme Court persuasive. Therefore, I conclude that the counseled stipulation found in exhibit 1 is sufficient to prove Linn's previous conviction for second-offense DUI and that the stipulation overcomes any constitutional attack on the prior convictions. Reliance on exhibit 2, the unsigned journal entry of another second-offense conviction, is completely unnecessary to prove the enhancement to third-offense DUI. I would affirm the decision of the district court.

WRIGHT, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS F. NELSON, APPELLANT.

539 N.W.2d 442

Filed November 17, 1995. No. S-94-794.

Drunk Driving: Prior Convictions. Neb. Rev. Stat. § 60-6,196 (Reissue 1993) is a mere affirmance and continuation of Neb. Rev. Stat. § 39-669.07, and convictions under § 39-669.07 can be used to enhance the penalty for driving while under the influence of alcohol under § 60-6,196.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Lancaster County, EARL J. WITTHOFF, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of Court of Appeals affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Susan R. Tast for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

This case involves an appeal from a conviction of driving while under the influence of alcohol (DWI), third offense, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993). The defendant, Douglas F. Nelson, contends that his two prior convictions, imposed under Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986 & Supp. 1987), cannot be used to enhance his DWI sentence under § 60-6,196. On appeal to the Nebraska Court of Appeals, the court held that § 60-6,196 is a mere affirmance of § 39-669.07 and that the prior convictions can be used for enhancement purposes under § 60-6,196. *State v. Nelson*, 95 NCA No. 17, case No. A-94-794 (not designated for permanent publication). Nelson successfully petitioned this court for further review.

Our recent decision in *State v. Sundling, ante* p. 732, 538 N.W.2d 749 (1995), is controlling. *Sundling* held that

§ 60-6,196 is a mere affirmance and continuation of § 39-669.07 and that convictions under § 39-669.07 can be used to enhance the penalty for a DWI conviction under § 60-6,196. Therefore, we affirm.

AFFIRMED.

LADDIE DITTRICH, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE.

539 N.W.2d 432

Filed November 17, 1995. No. S-95-103.

1. **Judgments: Jurisdiction.** A jurisdictional question does not involve a factual dispute and is resolved as a matter of law.
2. **Judgments: Appeal and Error.** On questions of law, a reviewing court reaches a conclusion independent from that of the inferior courts.
3. **Jurisdiction.** Lack of subject matter jurisdiction may be raised sua sponte by a court.
4. **Administrative Law: Prisoners: Appeal and Error.** Neb. Rev. Stat. § 83-4,123 (Reissue 1994) permits judicial review of disciplinary cases in adult institutions only when the disciplinary action imposed on the inmate involves the imposition of disciplinary isolation or the loss of good-time credit.
5. **Administrative Law: Prisoners: Words and Phrases.** A 7-day room restriction imposed under the provisions of a Department of Correctional Services rule, 68 Neb. Admin. Code, ch. 6, § 010.02, does not constitute isolation.
6. **Administrative Law: Appeal and Error.** In the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.
7. ____: ____. An appellate court will not resort to interpretation to ascertain the meaning of words in a rule or regulation which is plain, direct, and unambiguous.
8. **Jurisdiction: Appeal and Error.** Where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Lancaster County, EARL J. WITTHOFF, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Laddie Dittrich, pro se.

Don Stenberg, Attorney General, and Terri M. Weeks for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

The appeals board of the respondent-appellee, Nebraska Department of Correctional Services, affirmed the decision of the department's disciplinary committee restricting the petitioner-appellant, Laddie Dittrich, to his room for 7 days because of drug abuse. Dittrich thereupon instituted proceedings for judicial review under the provisions of Neb. Rev. Stat. § 83-4,123 (Reissue 1994) and the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 through 84-920 (Reissue 1994). The district court affirmed the department's decision, and Dittrich, assigning a number of errors to the district court, appealed to the Nebraska Court of Appeals. The Court of Appeals summarily affirmed the judgment of the district court under Neb. Ct. R. of Prac. 7A(1) (rev. 1992), whereupon Dittrich successfully petitioned for further review by this court. We now reverse the judgment of the Court of Appeals and remand the matter with the direction to order dismissal of the action.

The case turns on a jurisdictional question which does not involve a factual dispute and thus is resolved as a matter of law. In such a situation, a reviewing court reaches a conclusion independent from that of the inferior courts. See, *Jones v. State, ante* p. 158, 532 N.W.2d 636 (1995); *K N Energy, Inc. v. Cities of Broken Bow et al., ante* p. 112, 532 N.W.2d 32 (1995); *Wagner v. Unicord Corp.*, 247 Neb. 217, 526 N.W.2d 74 (1995).

There is no question that lack of subject matter jurisdiction may be raised sua sponte by a court. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994); *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994); *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994). We have previously held that § 83-4,123 permits judicial review

of disciplinary cases in adult institutions only when the disciplinary action imposed on the inmate involves the imposition of disciplinary isolation or the loss of good-time credit. *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994). Dittrich's punishment did not include the loss of good-time credit. Therefore, the jurisdictional issue presented is whether a 7-day room restriction constitutes isolation so as to confer jurisdiction upon a reviewing court.

A department rule, 68 Neb. Admin. Code, ch. 6, § 010.02, defines "restriction" thusly:

> An inmate may be restricted from any correctional facility activities for disciplinary reasons except recognized religious activities, dining hall, designated group or individual therapy, and school, for a period of time not to exceed ninety (90) days. Restrictions on clothing, bedding, mail, visitations, use of toilets, wash bowls, scheduled showers or facilities and materials needed for access to the courts shall be imposed only for abuse of such privileges or facilities.

Dittrich was therefore able to eat, pray, go to therapy, and go to school with others. In addition, he was able to have visitation. His state does not constitute isolation as that term is generally understood. As is the case with statutory language, *Seevers v. Potter, ante* p. 621, 537 N.W.2d 505 (1995), in the absence of anything to the contrary, the language of rules or regulations is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of words in a rule or regulation which is plain, direct, and unambiguous. See, *Sunrise Country Manor v. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994); *Kliment v. National Farms, Inc.*, 245 Neb. 596, 514 N.W.2d 315 (1994). Therefore, the district court lacked jurisdiction to hear Dittrich's petition for judicial review and should have dismissed the case.

Where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995); *State ex rel. Grape v. Zach, supra.*

Not only did the Court of Appeals lack jurisdiction to adjudicate this matter on the merits, this court lacks jurisdiction to do so as well.

Accordingly, the judgment of the Court of Appeals is reversed and the matter remanded thereto with the direction that it direct the district court to dismiss Dittrich's action.

REVERSED AND REMANDED WITH DIRECTION.

REBECCA BUCKINGHAM, APPELLANT, V. CREIGHTON UNIVERSITY, APPELLEE.

539 N.W.2d 646

Filed November 17, 1995. No. S-95-275.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), 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: Courts: Jurisdiction: Statutes.** As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
3. **Workers' Compensation: Courts: Jurisdiction: Summary Judgment.** As a court of limited jurisdiction, the Workers' Compensation Court must be specifically authorized to grant motions for summary judgment.
4. **Workers' Compensation: Courts: Judgments.** The Workers' Compensation Court has no inherent power to vacate or modify its own judgment.
5. **Workers' Compensation: Motions for New Trial.** The Workers' Compensation Court cannot grant a motion for a new trial.
6. **Workers' Compensation: Courts: Statutes.** Because the Workers' Compensation Court is of statutory creation, its powers are appropriately limited to those delineated in the statute.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

John C. Nimmer for appellant.

Dennis R. Riekenberg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Rebecca Buckingham appeals an order of the Nebraska Workers' Compensation Court review panel granting partial summary judgment on claims for medical expenses and for injury to her right hand and arm as described in a petition for modification of her initial workers' compensation award.

The question we are asked to decide is whether the Workers' Compensation Court is empowered to grant summary judgments. We conclude that the compensation court does not have such power and therefore reverse the court's order granting partial summary judgment to the appellee, Creighton University, and remand the cause for further proceedings.

FACTUAL BACKGROUND

On March 31, 1993, Buckingham filed a petition with the Nebraska Workers' Compensation Court seeking benefits for a work-related injury to her left wrist and arm that occurred while she was employed with Creighton. At trial, Buckingham added to the petition by interlineation, a claim for injury to her right hand and arm. The trial judge specifically found that Buckingham "failed to prove by a preponderance of the evidence that she sustained any right hand or arm injury as a result of a work related accident while employed [with Creighton]."

The trial court judge found that Buckingham was entitled to benefits of $228.03 per week for $41^{2}/_{7}$ weeks for temporary total disability and $228.03 per week for $17^{1}/_{2}$ weeks for a 10-percent permanent partial disability to the left hand. The Workers' Compensation Court trial judge ordered that Creighton receive credit for $2,358.74 in medical bills that were paid prior to the hearing date.

After Buckingham applied for a rehearing, the review panel affirmed the trial judge's decision without opinion. Buckingham filed a petition for modification, citing unpaid medical

expenses, increase in the injury to her right hand and arm, and increased incapacity and requesting additional vocational benefits. Creighton filed a motion for partial summary judgment on the issues of medical expenses and the right-hand and right-arm injury, stating that both claims were barred by collateral estoppel and res judicata.

The trial judge granted Creighton's motion for partial summary judgment, and Buckingham filed an application for rehearing on the issue of medical expenses. The review panel affirmed the order of the trial judge. Buckingham appeals.

ASSIGNMENTS OF ERROR

Buckingham assigns three errors: (1) The trial court and the review panel erred in granting summary judgment because the compensation court does not have the authority to grant summary judgments, and in the alternative, (2) the trial court and review panel erred in granting summary judgment with respect to the pre-October 19, 1993, medical bills and (3) the trial court and review panel erred in granting summary judgment with respect to Buckingham's right-arm and right-hand injury.

STANDARD OF REVIEW

Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), 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. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995); *Shade v. Ayars & Ayars, Inc.*, 247 Neb. 94, 525 N.W.2d 32 (1994).

ANALYSIS

The threshold issue in this case is whether the compensation court has the power to grant motions for summary judgment.

The Nebraska Workers' Compensation Court was created pursuant to the Legislature's power to create courts inferior to

the state court as found in Neb. Const. art. V, § 1. See, *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967); *City of Lincoln v. Nebraska Workmen's Compensation Court*, 133 Neb. 225, 274 N.W. 576 (1937). As a statutorily created court, the compensation court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984). Therefore, we must determine if the granting of preliminary motions such as summary judgment motions is statutorily authorized for the compensation court.

Neb. Rev. Stat. § 48-162 (Reissue 1993) explains the powers of the compensation court. It provides in part:

> The Nebraska Workers' Compensation Court, or any judge thereof, is authorized and empowered to examine under oath or otherwise [certain persons], to issue subpoenas for the appearance of witnesses and the production of books and papers, to solemnize marriages, and to administer oaths with like effect as is done in other courts of law in this state. In the examination of any witness and in requiring the production of books, papers, and other evidence, the compensation court shall have and exercise all of the powers of a judge, magistrate, or other officer in the taking of depositions or the examination of witnesses, including the power to enforce his or her orders by commitment for refusal to answer or for the disobedience of any such order.

Furthermore, the compensation court may by a majority vote of judges, adopt and promulgate all reasonable rules and regulations necessary for carrying out the intent and purpose of the Nebraska Workers' Compensation Act and shall administer and enforce all provisions of the act. Neb. Rev. Stat. § 48-163 (Reissue 1993). Additionally, the compensation court is authorized to require production of books or papers and to expedite the hearing of a disputed case. *Id.*

The procedure before the compensation court is described in Neb. Rev. Stat. §§ 48-173 through 48-177 (Reissue 1993). When a dispute arises with regard to workers' compensation, the statutory procedure in § 48-173 requires the filing of a

petition which sets forth

> the names and places of residence of the parties and the facts relating to the employment at the time of the injury for which compensation is claimed, the injury in its extent and character, the amount of wages being received at the time of the injury, the knowledge of or notice to the employer of the occurrence of such injury, and such other facts as may be considered necessary for the information of the compensation court . . . .

After being served with a petition, a party has 7 days to file an answer. § 48-176. The next procedural step is a hearing on the merits. § 48-177. No provision is made in this statute for a motion for summary judgment.

The absence of authorization for summary judgment motions found in the workers' compensation statutes contrasts with the express statutory authorization for the use of summary judgment motions in the district and county courts. The procedure for summary judgments in district courts is set forth at Neb. Rev. Stat. §§ 25-1330 through 25-1336 (Reissue 1989). County courts are authorized to grant summary judgments through Neb. Rev. Stat. § 25-2701 (Reissue 1989) which provides:

> All provisions in the codes of criminal and civil procedure governing actions and proceedings in the district court not in conflict with statutes specifically governing procedure in county courts and related to matters for which no specific provisions have been made for county courts shall govern and apply to all actions and proceedings in the county court.

As there are no specific statutory provisions prohibiting the use of summary judgment motions in the county courts, § 25-2701 specifically authorizes their use in county courts.

While the district courts and county courts are given specific authorization to use the summary judgment procedure, no provision is made for the procedure in the workers' compensation statutes. As a court of limited jurisdiction, the compensation court must be specifically authorized to grant motions for summary judgment. See *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984).

Furthermore, this court has recognized several situations in

which the compensation court is limited by its statutory authorization. For example, 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). However, the compensation court has no inherent power to vacate or modify its own judgment. *Smith v. Fremont Contract Carriers, supra*. Additionally, this court has held that the compensation court cannot grant a motion for a new trial. *Carter v. Weyerhaeuser Co.*, 234 Neb. 558, 452 N.W.2d 32 (1990). See, also, *Black v. Sioux City Foundry Co.*, 224 Neb. 824, 401 N.W.2d 679 (1987).

As the previous authorities indicate, this court has recognized that the compensation court is limited by its statutory authorization. Because the compensation court is of statutory creation, its powers are appropriately limited to those delineated in the statute. See *Smith v. Fremont Contract Carriers, supra*. There is no authorization for a grant of a summary judgment motion in the statute; therefore, the compensation court acted outside its powers when it granted Creighton's motion for partial summary judgment.

A judgment, order, or award of the compensation court may be modified, reversed, or set aside upon grounds that the compensation court acted without or in excess of its powers. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995).

CONCLUSION

The Workers' Compensation Court's grant of partial summary judgment was improper because the court is not statutorily authorized to grant motions for summary judgment. As we find the granting of summary judgment to be improper in this case, we need not consider the other errors assigned by Buckingham. This case is reversed and remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ALPHONS M. ENGELHAUPT AND LAURINA E. ENGELHAUPT, APPELLEES, v. VILLAGE OF BUTTE, NEBRASKA, APPELLANT.

539 N.W.2d 430

Filed November 17, 1995. No. S-95-425.

1. **Pretrial Procedure: Pleadings.** The issues set out in a pretrial order supplant those raised in the pleadings.
2. **Eminent Domain: Legislature.** The power of eminent domain may be exercised only on the occasion, and in the mode or manner, prescribed by the Legislature.
3. **Eminent Domain: Statutes.** Statutes conferring and circumscribing the power of eminent domain must be strictly construed.
4. **Eminent Domain.** In a condemnation proceeding, the amount of property needed and the estate or interest in such property are questions of fact for the court.
5. **Equity: Appeal and Error.** In an equity 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.

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

Gary J. Nedved, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellant.

Shelley A. Horak, of Baron, Sar, Goodwin, Gill, Lohr & Horak, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

Finding, among other things, that the defendant-appellant condemner, Village of Butte, sought to take more land than it presently required for the expansion of its water system, the district court, on the petition of the plaintiffs-appellees condemnees, Alphons M. Engelhaupt and Laurina E. Engelhaupt, entered a decree enjoining the village from acquiring the portion of the Engelhaupts' land it sought. Asserting a number of errors, including that the district court wrongly found the attempted taking to be excessive, the village undertook an appeal to the Nebraska Court of Appeals. To equalize the caseloads of the two courts, we, on our own

motion, removed the matter to this court. We now affirm the decree of the district court.

In general, Neb. Rev. Stat. § 17-531 (Reissue 1991) grants villages the power to provide water for the "purpose of fire protection and public use and for the use of the inhabitants . . . ." Neb. Rev. Stat. § 17-535 (Reissue 1991) further empowers villages to, among other things, "condemn any and all necessary property" for said purpose.

Alleging that it needed to expand its present water system, the village filed a petition seeking to condemn 11.92 acres of the Engelhaupts' land. Although the Engelhaupts did not plead that the proposed taking was excessive, the district court's pretrial order listed the scope of the taking as one of the trial issues. Since the issues set out in a pretrial order supplant those raised in the pleadings, *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987), the scope of the taking, contrary to the position of the village, was an issue in the trial court and is thus a proper issue before us.

In that regard, the engineer testifying on behalf of the village said that the existing water treatment plant, located on an easement on the Engelhaupts' land, is beyond its original service life; that the condition of the plant contributes to the poor quality of the water; that the village is operating with a single well and needs to build redundancy into the system to provide for maintenance and emergencies; and that the land sought was needed so as to provide for the proper spacing of the wells, a new treatment plant, a small lagoon, and "expansion for additional wells, come the time that they are needed." The evidence does not disclose how much of the 11.92 acres is required for the village's present need.

We begin by recalling that the power of eminent domain may be exercised only on the occasion, and in the mode or manner, prescribed by the Legislature and that statutes conferring and circumscribing such power must be strictly construed. *Krauter v. Lower Big Blue Nat. Resources Dist.*, 199 Neb. 431, 259 N.W.2d 472 (1977). Thus, under a statutory scheme permitting the condemner to take only property for which it had a present plan and present public purpose use, we held in *Krauter, supra*, that the lower court had properly dismissed the condemner's

action to take fee title to 320 acres of land where the evidence showed that only an easement on 140.68 acres was needed for the public use then planned. In so ruling, we specifically rejected the condemner's argument that it could take property that "might be needed and used for a public purpose in the future." *Id.* at 437, 259 N.W.2d at 475.

We also held therein that the amount of property needed and the estate or interest in such property are questions of fact for the court. Whatever constitutional provisions might otherwise protect the condemnees, here, § 17-535 specifically limits the village to taking only such property as is "necessary" for providing the purposes described in § 17-531. In an equity 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. *Gas 'N Shop v. City of Kearney, ante* p. 747, 539 N.W.2d 423 (1995). So reviewed, the evidence convinces us that the village seeks to condemn more land than it presently requires.

We therefore affirm the district court's decree without reaching the other errors assigned by the village.

AFFIRMED.

LEE SAPP LEASING, INC., APPELLEE, V. THE CATHOLIC ARCHBISHOP OF OMAHA, DOING BUSINESS AS DANIEL J. GROSS HIGH SCHOOL, APPELLANT.

540 N.W.2d 101

Filed December 1, 1995. No. S-93-781.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.

2. ____: ____. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Uniform Commercial Code: Contracts.** The Nebraska Uniform Commercial Code provides that general principles of contract law supplement its provisions unless displaced by particular provisions of the code.
4. **Contracts: Time.** Instruments made in reference to and as part of the same transaction are to be considered and construed together; that the instruments were made or dated at different times is not significant if they are related to and were part of the transaction.
5. **Contracts.** If an agreement provides for the payment of money upon the happening of certain contingencies, the cause of action will usually not arise until occurrence of the conditions.
6. **Contracts: Intent: Words and Phrases.** The existence of a condition precedent depends upon the intent of the parties as gathered from the words they have employed.
7. **Contracts: Testimony.** Testimony will not be allowed to vary the meaning of the document. If the contents of a document are not ambiguous, the document is not subject to interpretation and will be enforced according to its terms.
8. **Contracts.** The nonoccurrence of a condition precedent cannot be excused if occurrence of the condition was a material part of the agreed exchange.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded.

Edward D. Hotz and Patrick M. Flood, of Betterman Katelman & Hotz, for appellant.

Bradley K. Schweer, of Schweer & Ferraro, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

The Catholic Archbishop of Omaha, doing business as Daniel J. Gross High School (Gross High) refused to make payments to Lee Sapp Leasing, Inc. (LSL), due under a "lease." Under the agreement, Gross High was to purchase surge suppressors from Midwest Energy Controls, Inc. (Midwest Energy), and LSL was to finance the sale. Payment was to be made by LSL to Midwest Energy when Gross High accepted delivery. After some of the suppressors blew up on installation, Gross High asked Midwest Energy to remove the suppressors, refused to accept delivery, and refused to pay LSL. LSL filed a collection action against Gross High in the district court for Sarpy County.

Both parties waived jury trial. After a bench trial, the district court found that under the Nebraska Uniform Commercial Code, the agreement was intended as security governed by article 9 rather than a lease governed by article 2, and that, therefore, Gross High's only remedies were against the true seller of the goods, Midwest Energy. Gross High was ordered to pay the purchase price of the equipment, plus court costs, to LSL. Gross High appealed to the Nebraska Court of Appeals, and we removed the case to our docket. Finding that the duties to perform under the agreement were subject to a condition precedent of Gross High's acknowledgment of delivery which did not occur, we reverse, and remand the cause with directions.

BACKGROUND

In September 1990, Midwest Energy approached Gross High for the purpose of selling to Gross High surge suppressors which would purportedly save Gross High money on electric bills. Gross High did not want to pay cash for the suppressors, so in order to consummate the sale to Gross High, Midwest Energy contacted LSL for financing. LSL was not in the energy or equipment business, but it agreed to provide financing for the surge suppressors in the form of a lease. Dennis Monahan, general manager of LSL, prepared a lease, dated November 15, 1990.

The agreement provided for 39 surge suppressors made by Redi-Volt and sold by Midwest Energy to be furnished to Gross High in return for monthly rental. The terms of the agreement provided for monthly rental payments of $846.72 for 48 months.

The scheduled payments would return to LSL the cost of the equipment, plus interest. Gross High would become owner of the surge suppressors at the end of the term without additional consideration. Gross High, through its agent, signed the lease.

The language of the lease stated: "**22. INTEGRATION.** This lease and any schedules or addendums attached hereto constitutes the full agreement of the parties . . . ." LSL presented a letter of acceptance and delivery with the lease. The acceptance and delivery letter was attached to the lease, referred to the lease, and was presented to Gross High at the same time as the lease. The letter stated:

> **ACCEPTANCE AND DELIVERY LETTER**
>
> The *undersigned* Lessee hereby acknowledges receipt of the equipment described below or on any attached schedule (the "Equipment") fully installed and in good working condition, and Lessee hereby accepts the Equipment after full inspection thereof as satisfactory for all purposes of the above referenced lease executed by Lessee with Lee Sapp Leasing, Inc. (the "Lessor"). . . .
>
> . . . .
>
> . . . [Gross High] understands that [LSL] is relying upon this receipt *as a condition for* making payment for the cost of the leased Equipment to [Midwest Energy].

(Emphasis supplied.)

Although the letter was dated November 15, 1990, the same date as the lease, a handwritten notation stated it was to be signed when the equipment was delivered. LSL does not dispute that the acceptance and delivery letter was a part of the transaction. LSL did maintain that contrary to the language of the documents, the receipt of the letter was a condition of LSL paying only the final 10 percent due to Midwest Energy.

Gross High neither signed nor returned this letter to LSL. Notwithstanding that fact, LSL paid Midwest Energy. Midwest Energy paid the first month's rent and a security deposit to LSL. Midwest Energy's employees attempted to install the surge suppressors at Gross High, but encountered problems. Robert Priborsky, Midwest Energy's installer, wrote to LSL and stated:

> As you know, I have been trying desperately to get Global Marketing [Midwest Energy's supplier] to replace the Redi-Volt units, that went out during installation at Gross High School.
>
> . . . .
>
> So in closing, because of Global Marketings [sic], lack of interest and support of their product, I am unable to complete the installation at Gross High School, for Midwest Energy Controls, Inc.

During installation of 24 of the 39 surge suppressors by Midwest Energy, 3 of the suppressors "blew up." Midwest Energy never completed installation of all 39 suppressors. Gross High requested that Midwest Energy remove the installed surge

suppressors, but Midwest Energy did not comply. Gross High never accepted delivery of the suppressors or made a payment to LSL on the agreement.

ASSIGNMENTS OF ERROR

Gross High contends that the trial court erred (1) in refusing to recognize that article 2 of the Nebraska Uniform Commercial Code governed the sales aspects of the agreement transaction, (2) in concluding that Gross High's defenses amounted to a breach of warranty, and (3) in refusing to apply the provisions of Neb. U.C.C. § 2-606 (Reissue 1992), entitled "What constitutes acceptance of goods," to the evidence presented at trial.

STANDARD OF REVIEW

In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Lincoln Lumber Co. v. Fowler, ante* p. 221, 533 N.W.2d 898 (1995); *First Westside Bank v. For-Med, Inc.*, 247 Neb. 641, 529 N.W.2d 66 (1995); *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995).

However, when reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995); *Dolan v. Svitak*, 247 Neb. 410, 527 N.W.2d 621 (1995); *Hausse v. Kimmey,* 247 Neb. 23, 524 N.W.2d 567 (1994).

ANALYSIS

Gross High urges that it has certain rights under article 2 of the Nebraska Uniform Commercial Code which govern the defects in the goods and its nonacceptance of same. LSL urges that article 9 of the Nebraska Uniform Commercial Code governs and that LSL as a financing entity has no responsibility for a defect in the goods and, in any event, that Gross High's refusal to accept delivery and the fact that the goods may have been defective are affirmative defenses which were not pled.

Within that framework, the parties argue over the legal effect of the undisputed fact of Gross High not signing or returning the acceptance and delivery letter to LSL.

The Nebraska Uniform Commercial Code provides that general principles of contract law supplement its provisions unless displaced by particular provisions of the code. Neb. U.C.C. § 1-103 (Reissue 1992).

The general principle of contract law at issue here is not displaced by the particular provisions of the code at issue. See, *Cyberchron Corp. v. Calldata Systems Development*, 831 F. Supp. 94 (E.D.N.Y. 1993), *aff'd in part, vacated in part, and remanded* 47 F.3d 39 (2d Cir. 1995); *Brown Mach. v. Hercules, Inc.*, 770 S.W.2d 416 (Mo. App. 1989); *Armco Steel Corp. v. Isaacson Struct. Steel*, 611 P.2d 507 (Alaska 1980).

The threshold question of law which must be addressed is, what is the legal significance of the refusal of Gross High to accept delivery, given that LSL paid Midwest Energy without receiving the acceptance and delivery letter from Gross High?

Both the lease and the acceptance and delivery letter were part of the LSL-Gross High agreement. The lease itself made the letter part of the agreement. The applicable terms in the lease stated, "This lease and any schedules or addendums attached hereto constitutes the full agreement of the parties . . . ." The acceptance and delivery letter was attached to the lease and presented at the same time as the lease.

The law of Nebraska also makes the letter part of the agreement. Instruments made in reference to and as part of the same transaction are to be considered and construed together; that the instruments were made or dated at different times is not significant if they are related to and were part of the transaction. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993) (citing *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992)); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992); *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983); and *Northland Mortgage Co. v. Royalwood Estates, Inc.*, 190 Neb. 46, 206 N.W.2d 328 (1973)). The acceptance and delivery letter was made in reference to and as part of the same transaction.

The acceptance and delivery letter stated, "[Gross High] understands that [LSL] is relying upon this receipt as a condition for making payment for the cost of the leased Equipment to [Midwest Energy]." Is LSL's receipt of the letter

from Gross High a condition precedent to performance of Gross High's duty to pay LSL?

Clearly, if LSL were not to pay Midwest Energy then LSL would have no standing to sue Gross High. It is also clear that if LSL were to pay Midwest Energy after receipt of the letter, Gross High would have no standing to contest its obligation to LSL. Here payment was made by LSL to Midwest Energy without receiving the acceptance and delivery letter from Gross High. If an agreement provides for the payment of money upon the happening of certain contingencies, the cause of action will usually not arise until occurrence of the conditions. *Creighton Real Estate Co. v. City of Omaha*, 112 Neb. 802, 201 N.W. 657 (1924), *rev'd on other grounds* 112 Neb. 802, 204 N.W. 66 (1925).

The existence of a condition precedent depends upon the intent of the parties as gathered from the words they have employed. *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991). Testimony will not be allowed to vary the meaning of the document. If the contents of a document are not ambiguous, the document is not subject to interpretation and will be enforced according to its terms. *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993). Thus, the testimony of LSL that the payment LSL was to make to Midwest Energy, which payment was conditional on receipt of the acceptance and delivery letter and was only the final 10 percent, will not be allowed to vary the terms of the documents.

The words "as a condition for" in the acceptance and delivery letter are clearly language intended to create a condition precedent. See, *Harmon Cable Communications, supra*; *ConAgra, Inc. v. Cargill, Inc.*, 222 Neb. 136, 382 N.W.2d 576 (1986) (White, J., dissenting) (citing *Omaha Public Power Dist. v. Employers' Fire Insurance Co.*, 327 F.2d 912 (8th Cir. 1964)).

The Restatement (Second) of Contracts § 224 (1981) provides, "A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." LSL's receipt of the acceptance and delivery letter from Gross High was a

condition precedent to LSL paying Midwest Energy. Due to the poor quality of the surge suppressors and the abandonment of installation by Midwest Energy, Gross High neither signed nor returned the acceptance and delivery letter to LSL.

The Restatement (Second) of Contracts § 229 (1981) states, "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange."

The nonoccurrence of a condition precedent cannot be excused if occurrence of the condition was a material part of the agreed exchange. Gross High was to pay Midwest Energy for purchase, delivery, and installation of goods at Gross High via its agreement with LSL. The condition precedent was apparently put in place to ensure that the goods arrived and were installed before Gross High was liable for the cost of the goods.

The payment by LSL to Midwest Energy prior to delivery of the acceptance and delivery letter from Gross High is not an affirmative defense which must be pled by Gross High. It is a condition precedent which LSL must comply with and prove to be entitled to demand performance from Gross High. See *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994).

In a similar case, it has been held that equivalent language in a lease between two parties created a condition precedent to a third party's duty to repay money. *Suburban Transfer Serv. v. Beech Holdings, Inc.*, 716 F.2d 220 (3d Cir. 1983). In *Suburban Transfer Serv.*, A and B entered into an agreement whereby A would grant a lease to C. However, in order to enter the premises C needed extra cash. A therefore agreed to loan the cash to C if B would guarantee the loan. B agreed to guarantee the loan. A and C then entered into a lease. The lease had a loan provision which stated: " '[A would make a loan to C] provided, however, that the Loan shall be in the form of a Note and Security Agreement as set forth in Exhibit C attached hereto and made a part hereof . . . .' " (Emphasis omitted.) *Id.* at 222. A gave C the loan but failed to use the stated form attached to the agreement. C subsequently defaulted on the

loan. A demanded that B pay the loan. B refused. A filed an action.

The U.S. Court of Appeals for the Third Circuit in *Suburban Transfer Serv.* held that the specified form of the loan, a "Note and Security Agreement," was clearly a condition precedent to B having to repay the loan to C. Basically, the condition precedent of the initial payment of money was also a condition precedent to the third party's repayment of that money.

In the instant case, LSL argues that Gross High has a duty to make payment to LSL, because LSL made payment to Midwest Energy. However, a condition precedent existed which provided that LSL would not make payment to Midwest Energy until LSL received the acceptance and delivery letter from Gross High. LSL did not receive the letter from Gross High. Disregarding the condition precedent in the agreement, LSL made payment to Midwest Energy prior to receiving the letter. LSL's payment to Midwest Energy was therefore contrary to the agreement with Gross High. The nonoccurrence of the condition precedent cannot be excused. It is a material part of the exchange. The condition precedent of receipt of the acceptance and delivery letter from Gross High prior to the payment of money by LSL to Midwest Energy was also a condition precedent to Gross High's being required to repay the money to LSL.

The first dissent to this opinion correctly states the majority's holding. The dissent states that "the signing of the acceptance and delivery letter was a condition precedent to Gross High's duty to perform under the lease agreement." The dissent then takes issue with this holding. The premise for this disagreement is that the letter was not part of the lease transaction because it was never executed. The dissent defines execution as "to sign." The dissent argues that because the letter which acknowledged receipt of the leased goods was never signed, it is meaningless to the lease transaction.

The letter states that signing it acknowledges receipt of the leased goods and that receipt of the signed letter is a condition of payment by lessor for those goods. As exemplified in *Suburban Transfer Serv., supra*, payment by lessor for the

goods was a condition for repayment by lessee. Therefore, signing the letter satisfies the condition precedent.

The dissent reasons that to be part of the transaction the letter had to be signed. Requiring that a condition precedent be satisfied before it becomes "part of the transaction" eviscerates the law of condition precedent.

The dissent also reasons that even if the letter had been signed, it would still not be part of the lease transaction. The dissent attempts to buttress this premise with the case of *Gerdes v. Omaha Home for Boys*, 166 Neb. 574, 89 N.W.2d 849 (1958). *Gerdes*, which dealt with testamentary instruments which varied one another, is inapplicable to the issues in this case.

The other dissent to this opinion, after citing the entire acceptance and delivery letter, asserts:

> Had the document been signed, Gross High would have admitted that it received and accepted the equipment on November 15, 1990, fully installed, in good working condition, and satisfactory for all purposes; that LSL had fully performed all covenants and conditions; that LSL made no warranties; and that Gross High had no defenses or counterclaims against LSL in connection with the lease.

The above is accurate; however, it omits one further result which is the central issue in this case. Had the document been signed and returned to LSL, "a condition for making payment for the cost of the leased Equipment to [Midwest Energy]" would have been satisfied. Without satisfying that condition, LSL could not pay Midwest Energy and that is a condition precedent to require repayment from Gross High.

CONCLUSION

The duty of Gross High to pay LSL did not arise. The condition precedent of payment by LSL after receipt of the acceptance and delivery letter from Gross High did not occur. It is unnecessary to discuss whether article 9 or article 2 of the Nebraska Uniform Commercial Code applies to the transaction.

The judgment is hereby reversed, and this cause is remanded with directions to enter judgment for Gross High.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., dissenting.

Gross High's duties to perform under the lease agreement were not dependent upon its acknowledgment of delivery of the surge suppressors.

The majority finds that the acceptance and delivery letter was part of the agreement between LSL and Gross High, because it constituted an addendum to the lease. However, there are several problems with considering the acceptance and delivery letter as an addendum. First, the majority states that the acceptance and delivery letter was attached to the lease and delivered at the same time. While the record indicates that the acceptance and delivery letter was delivered at the same time as the lease, there is no evidence in the record that the acceptance and delivery letter was attached to the lease. Additionally, the lease contains no reference to the acceptance and delivery letter.

Second, the majority concludes that the letter was an addendum despite the fact that it was not labeled as such. The parties' actions demonstrated that when they intended a writing to be considered an addendum to the lease, it was labeled an addendum. For example, the lease makes explicit reference to addendum 1, which describes the property that is the subject of the lease. The lease makes no such reference to the acceptance and delivery letter.

Third, the acceptance and delivery letter was not executed at the same time as the lease. Execute is defined in relevant part as "[t]o complete; to make; to sign." Black's Law Dictionary 567 (6th ed. 1990). While the parties signed the lease on November 15, 1990, Gross High never signed the acceptance and delivery letter. In fact, Monahan testified that he told Gross High's principal not to sign the acceptance and delivery letter until after the surge suppressors were received and installed. Nevertheless, the majority determines that the unsigned acceptance and delivery letter must be construed together with the lease as one contract.

The majority cites a number of cases stating the proposition that instruments made in reference to and as part of the same transaction are to be considered and construed together. The majority asserts that *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993), should control this case. In

Feldman, a supplemental lease executed at a later date was held to supersede inconsistent provisions in the original lease. However, neither *Feldman* nor any of the cases cited by the majority concern transactions in which one instrument is never executed. All of the cases cited by the majority concern situations in which the two separate instruments were executed at some time.

While the majority concludes that instruments "made or dated at different times" may be construed together "if they are related to and were part of the transaction," the majority fails to recognize that in this case, the acceptance and delivery letter was never executed. The authority cited by the majority indicating that documents executed separately can be construed together is not on point, because it applies to documents that have actually been executed.

Even if the acceptance and delivery letter had been executed, it would not need to be read together with the lease. This court has stated that

> a provision of one document [need not be] imported bodily into another contrary to the intent of the parties or the express provision of the [document]. They may be intended to be separate writings though made at the identical time by the same parties and to provide for entirely different things.

Gerdes v. Omaha Home for Boys, 166 Neb. 574, 585, 89 N.W.2d 849, 856 (1958).

The majority correctly asserts that we cannot look to the intent of the parties to vary the meaning of the lease document. However, this court has held that parol evidence is generally admissible when offered for the purpose of explaining and showing the true nature of the transaction between the parties. *Peterson v. Hynes*, 220 Neb. 573, 371 N.W.2d 664 (1985). In this case, parol evidence would not be used to vary the meaning of the lease. Instead, evidence of the intent of the parties would assist in determining whether the acceptance and delivery letter was intended to be a part of the lease agreement.

The record indicates that the parties did not intend for the acceptance and delivery letter to be a part of the lease agreement. LSL's general manager, Dennis Monahan, testified

that while he delivered the acceptance and delivery letter at the same time as the lease, it was intended to be a separate document and not a part of the lease agreement. Gross High's business manager, Julien Van Haute, did not contradict Monahan's testimony. While Van Haute testified that the acceptance and delivery letter was received at the same time as the lease, he did not dispute Monahan's characterization of the parties' understanding. In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994).

As *Gerdes* indicates, the court may not do violence to a complete, unambiguous contract by consolidating it with another writing if the effect of doing so would be to avoid an essential part of the contract. By consolidating the acceptance and delivery letter with the lease, Gross High will be able to avoid its obligation under the lease. This violates the terms of the clear, unambiguous lease agreement signed by the parties.

Nevertheless, the majority contends that the signing of the acceptance and delivery letter was a condition precedent to Gross High's duty to perform under the lease agreement. However, there is no language in the lease to indicate that there are any conditions precedent to the performance of Gross High's obligation under the agreement. In fact, the lease states that the first lease payment was due on November 15, 1990, which was the date that the lease agreement was executed. As stated previously, the acceptance and delivery letter was not to be signed until the equipment was received, "fully installed and in good working condition"; however, no mention is made in the lease that Gross High could withhold payment until such time as the acceptance and delivery document was signed. Therefore, Gross High's obligation under the lease was independent of its signing of the acceptance and delivery letter.

The majority seizes upon one sentence of an unsigned document to determine that Gross High should be released from its clear obligation under the lease, because Gross High never signed the letter acknowledging delivery of the equipment. I disagree. The letter clearly did not create a condition precedent

as to Gross High's obligation to pay LSL. The district court's judgment should be affirmed.

WRIGHT and GERRARD, JJ., join in this dissent.

WRIGHT, J., dissenting.

The majority finds that the "duties to perform under the agreement were subject to a condition precedent of Gross High's acknowledgment of delivery which did not occur." I disagree with this conclusion. The full contents of the document are set forth below:

> **ACCEPTANCE AND DELIVERY LETTER**
>
> The undersigned Lessee hereby acknowledges receipt of the equipment described below or on any attached schedule (the "Equipment") fully installed and in good working condition, and Lessee hereby accepts the Equipment after full inspection thereof as satisfactory for all purposes of the above referenced lease executed by Lessee with Lee Sapp Leasing, Inc. (the "Lessor"). Lessee certifies that Lessor has fully and satisfactorily performed all covenants and conditions to be performed by Lessor under the Lease and has delivered the Equipment selected solely by Lessee in accordance with Lessee's directions.
>
> **LESSEE AGREES THAT THE LESSOR HAS MADE AND MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE, DIRECTLY OR INDIRECTLY, EXPRESS OR IMPLIED, AS TO ANY MATTER WHATSOEVER, INCLUDING THE SUITABILITY OF SUCH EQUIPMENT, ITS DURABILITY, ITS FITNESS FOR ANY PARTICULAR PURPOSE, ITS MERCHANTABILITY, ITS CONDITION, AND/OR ITS QUALITY, AND AS BETWEEN LESSEE AND LESSOR OR LESSOR'S ASSIGNEE, LESSEE LEASES THE EQUIPMENT "AS IS" AND LESSEE AFFIRMS THAT IT HAS NO DEFENSES OR COUNTER-CLAIMS AGAINST LESSOR IN CONNECTION WITH THE LEASE.**
>
> Lessee represents and warrants that none of the equipment was delivered prior to the date the undersigned

executed the subject lease unless Lessor shall have previously consented thereto. Lessee understands that Lessor is relying upon this receipt as a condition for making payment for the cost of the leased Equipment to Vendor.

Daniel J. Gross High School
(Lessee)

Date Equipment

Accepted: November 15, 1990 By: _____

DESCRIPTION and Serial Number(s) of

PROPERTY DELIVERED AND ACCEPTED:

SEE LEASE ADDENDUM #1 DATED AND SIGNED THIS DATE

The majority claims that a condition precedent is created by the following: "Lessee understands that Lessor is relying upon this receipt as a condition for making payment for the cost of the leased Equipment to Vendor." I disagree. Had the document been signed, Gross High would have admitted that it received and accepted the equipment on November 15, 1990, fully installed, in good working condition, and satisfactory for all purposes; that LSL had fully performed all covenants and conditions; that LSL made no warranties; and that Gross High had no defenses or counterclaims against LSL in connection with the lease.

The document clearly does not create a condition precedent for the performance of Gross High's duty to pay LSL.

CENTRA, INC., A DELAWARE CORPORATION, ET AL., APPELLANTS, V. CHANDLER INSURANCE COMPANY, LTD., A CAYMAN ISLANDS CORPORATION, ET AL., APPELLEES.

540 N.W.2d 318

Filed December 1, 1995. No. S-93-964.

1. **Courts: Attorney and Client.** The courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all its dimensions.
2. **Trial: Attorneys at Law: Appeal and Error.** A motion to disqualify an attorney is addressed to the discretion of the trial court, whose findings will not be disturbed absent evidence of abuse.
3. **Actions: Attorneys at Law: Appeal and Error.** An attorney disqualification matter is ancillary to the main case, whether the main case is at law, in equity, or is a special proceeding; thus, factual findings in disqualification cases will not be disturbed on appeal if substantial evidence supports those findings.
4. **Mandamus: Attorneys at Law: Conflict of Interest.** Mandamus is a viable means of addressing perceived attorney conflicts of interest.
5. **Attorneys at Law: Mandamus: Appeal and Error.** When an appeal from an order denying attorney disqualification involves issues collateral to the basic controversy, and when an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, the party should seek mandamus or other interlocutory review.
6. **Administrative Law: Statutes: Insurance.** An administrative body such as the Department of Insurance has only that authority specifically conferred upon it by statute or by construction necessary to achieve the purpose of the relevant act.
7. **Administrative Law: Statutes.** An agency must administer a statute in accordance with the standards prescribed in the statute and may not exceed those standards.
8. **Administrative Law: Statutes: Appeal and Error.** On review, an appellate court determines the meaning of a statute independently of the determination made by an administrative agency. However, the court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent.
9. **Administrative Law: Insurance.** The Legislature has granted to the Department of Insurance general supervision, control, and regulation of insurance companies, associations, and societies and the business of insurance in Nebraska.
10. **Statutes.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.
11. **Administrative Law: Insurance.** It is the responsibility of the Department of Insurance to manage and oversee the regulation of insurers and the protection of policyholders in Nebraska, and the department must have powers adequate to carry out that responsibility.

12. **Administrative Law: Insurance: Corporations.** Pursuant to the grants of plenary authority contained in Neb. Rev. Stat. §§ 44-2139 and 44-2153 (Reissue 1993), the director of the Department of Insurance may issue the necessary protective orders until policyholders' interests are no longer jeopardized by outlaw corporate raiders.
13. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is unconstitutional is a question of law. Accordingly, this court is obligated to reach a conclusion independent of the decision reached by the trial court.
14. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before this court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
15. **Constitutional Law: Statutes.** Even when a law may be constitutionally suspect, a court will attempt to interpret it in a manner consistent with the Constitution.
16. **Constitutional Law: Federal Acts: Insurance: States.** The McCarran-Ferguson Act permits states to regulate insurance companies within their boundaries and removes all Commerce Clause limitations upon that authority.
17. **Federal Acts: Insurance: States.** The McCarran-Ferguson Act grants states authority to regulate insurers only to the extent that state law governs the business of insurance.
18. **Federal Acts: Insurance.** The inquiry of whether a practice is part of the business of insurance under the McCarran-Ferguson Act has been reduced to a three-part test: (1) The practice must relate to the transferring and spreading of risk, (2) the practice must be an integral part of the policy relationship between the insurer and the insured, and (3) the practice must be limited to entities within the insurance industry.
19. **Insurance: Corporations: Stock: Tender.** A restriction on stock disposition issued pursuant to the Insurance Holding Company System Act relates, albeit indirectly, to the transferring and spreading of risk because the act and its implied powers are triggered only when a person who makes a tender offer for voting securities of a domestic insurer would acquire control of that domestic insurer.
20. **Insurance: Corporations.** The Insurance Holding Company System Act affords the Director of Insurance a chance to review the financial stability of an acquiring company and the opportunity to bring any threatened change of control under his own control so that he can consider the impact of such a change on policyholders.
21. ____: ____. Since a change of control of an insurer can affect the quality and stability of policies, the Insurance Holding Company System Act satisfies the requirement that it relates to the transferring and spreading of risk.
22. ____: ____. The review and evaluation by the director of the Department of Insurance involves the relationship between an insurance company and its policyholders.
23. ____: ____. The Insurance Holding Company System Act concerns itself solely with the acquisition of domestic insurance companies. It affects entities outside the insurance industry only insofar as those entities choose to enter this rightly regulated arena.
24. **Constitutional Law: Federal Acts: Insurance.** The Insurance Holding Company System Act relates to the business of insurance and thereby qualifies for the protection of the McCarran-Ferguson Act against a Commerce Clause challenge.

25. **Constitutional Law: Statutes.** Where a statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the burden that will be tolerated will, of course, depend on the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate activities.
26. **Constitutional Law: Corporations: Discrimination.** The mere fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.
27. **Constitutional Law: Insurance: Statutes: Corporations: Discrimination.** The Insurance Holding Company System Act applies equally, regardless of whether the would-be acquiring party is a Nebraska resident. As such, the act does not resemble the principal objects of dormant Commerce Clause scrutiny, which are statutes that discriminate against interstate commerce.
28. **Insurance: Corporations.** The Insurance Holding Company System Act poses no threat of inconsistent regulations, since it regulates only the internal affairs of insurers registered in Nebraska.
29. **Constitutional Law: Statutes: Insurance.** The local purpose of protecting Nebraska insurance policyholders is legitimate and qualifies as a valid use of police power.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Alan E. Peterson and Henry E. Pfeiffer, of Cline, Williams, Wright, Johnson & Oldfather, for appellants.

William M. Lamson, Jr., Michael J. Dugan, and Raymond E. Walden, of Kennedy Holland DeLacy & Svoboda, and Kenneth N. McKinney, Robert L. Roark, and Mary E. Nelson, of McKinney Stringer & Webster, P.C., for appellees Chandler Insurance Co. et al.

Don Stenberg, Attorney General, and Fredrick F. Neid for appellee Nebraska Department of Insurance.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

This appeal from the Lancaster County District Court arises from a corporate takeover battle wherein the Nebraska Department of Insurance (the department) denied the application of the appellant corporations (applicants) to acquire

National American Insurance Company (NAICO). Applicants assign error to two holdings of the district court, which affirmed the decision of the department to deny the application for acquisition. Applicants allege error in the court's refusal to disqualify counsel for Chandler Insurance Company, Ltd., and its subsidiaries, and in the court's refusal to find that the Director of Insurance exceeded his statutory and constitutional authority in requiring applicants to seek department approval before selling or otherwise alienating their Chandler stock. We affirm.

I. THE PARTIES

CenTra, Inc., is a Delaware corporation whose principal place of business is in Michigan. CenTra is a holding company primarily concerned with motor freight transportation. Its subsidiaries and related entities include Can-Am Investments, Ltd., a Bahamian corporation whose directors are also the directors of CenTra; Ammex, Inc., a Michigan corporation; and DuraRock Underwriters, Ltd., a Barbados corporation and reinsurance company. Ownership and control of each of these entities traces back to one Manuel J. Moroun, an individual who resides in Michigan and who is the president and/or chief executive officer of each of these entities.

NAICO is a Nebraska corporation and a domestic insurer; it is authorized to write property and casualty insurance in Nebraska and 43 other states. NAICO is a wholly owned subsidiary of Chandler (U.S.A.), Inc.; Chandler (U.S.A.), Inc., is an Oklahoma corporation and a wholly owned subsidiary of Chandler Insurance (Barbados), Ltd.; Chandler Insurance (Barbados), Ltd., is a Barbados corporation and a wholly owned subsidiary of Chandler Insurance Company, Ltd., which is a Cayman Islands corporation. The role of Chandler Aviation, Inc., in this litigation is unclear, given that neither party explained either on brief or in oral argument what, if anything, Chandler Aviation did that was relevant to these events. All of these parties (collectively, Chandler) were represented throughout this litigation by the Omaha law firm of Kennedy Holland DeLacy & Svoboda (Kennedy Holland), whose disqualification from the case applicants seek, alleging several

conflicts of interest.

II. THE EVENTS

The CenTra-Chandler relationship began in 1987, when NAICO began providing reinsurance to CenTra. Under the reinsurance program (also known as a fronting program), NAICO issued a number of workers' compensation, automobile, and general liability insurance policies to cover CenTra and its affiliates. Those policies were then reinsured through Can-Am Underwriters (a now defunct Moroun entity) and its corporate successor, DuraRock Underwriters, thereby allowing NAICO to spread its risk through a contract of indemnity. See, generally, 19 George J. Couch, Cyclopedia of Insurance Law § 80.2 (rev. 2d ed. 1983). At that time, NAICO was owned and controlled by Chandler Insurance Company, Ltd., which in turn was owned by a number of shareholders.

Prior to 1987, none of Chandler's shareholders held more than 10 percent of its outstanding capital stock. In that same year, however, Moroun concluded that CenTra ought to acquire NAICO so as to maximize its control over both its insurance company and the handling of its own claims. Because NAICO was wholly owned by Chandler Insurance, CenTra launched an effort to acquire Chandler, ultimately acquiring an ownership interest that approximated 22 percent.

That acquisition triggered the scrutiny of the department pursuant to the Insurance Holding Company System Act, Neb. Rev. Stat. §§ 44-2120 to 44-2153 (Reissue 1993) (the Act). (We note that the Act was enacted in 1991, during the course of these transactions, and replaced the previous Neb. Rev. Stat. §§ 44-2101 through 44-2119 (Reissue 1988 & Cum. Supp. 1990). For ease of reference, we use the 1991 version of all statutes cited herein.) Under the Act, "control" of an insurer is presumed to exist if any person, directly or indirectly, owns or otherwise holds 10 percent or more of the voting securities of any other person. § 44-2121(2). The Act further requires that the department must approve the acquisition of control of any domestic insurer. § 44-2126. The approval process requires an applicant to file a "Form A" application for acquisition of control and affords the applicant a hearing before the

department, before the department renders its decision. *Id.* Even despite apparent ownership of an insurer, however, the Act allows an acquiring party to escape department scrutiny by filing a disclaimer of control. § 44-2121(2). CenTra filed such a disclaimer in 1989, and the department approved the disclaimer subject to CenTra's voluntary "Standstill Agreement" to cease its stock purchases.

In 1992, an inside management group of Chandler tried to acquire control of Chandler so as to convert it to a privately held corporation. This attempt was aborted when the management group and applicants failed to reach an agreement on what should be their respective ownership interests in Chandler; the management group ultimately withdrew its tender offer for control of Chandler. In the meantime, CenTra had directed its broker to increase its Chandler holdings by acquiring more Chandler stock from other Chandler stockholders.

Upon learning of CenTra's actions, the department issued a "cease and desist" order to CenTra. CenTra responded by creating a straw corporation, Can-Am Investments, Ltd., whose sole reason for existence apparently was to acquire Chandler stock. Since Can-Am Investments had not been formed at the time of the cease and desist order, applicants argue that Can-Am Investments was not bound by the order and allowed Moroun to continue his acquisition of Chandler stock by way of this new entity. CenTra and Moroun halted their acquisition efforts only after the department issued a second cease and desist order, revised to include Can-Am Investments. By that point, CenTra had acquired 49.2 percent of all issued and outstanding stock of Chandler. Significantly, only after achieving this quantum of ownership did CenTra file its Form A application for acquisition of control; despite that CenTra's disclaimer of control was approved in 1989, the Form A would have become relevant again upon renewal of CenTra's acquisition efforts in 1992.

Following applicants' Form A hearing in September 1992, the department denied applicants' request. The department based its denial of acquisition on criteria enumerated in § 44-2127. In particular, the department found that the financial

condition of applicants could jeopardize the financial stability of the insurer or prejudice its policyholders; that applicants' competence, experience, and integrity were such that their acquisition of the insurer would not be in the policyholders' best interests; and that the acquisition of the insurer was likely to be hazardous to the public. The department's order included a requirement that applicants seek department approval before disposing of their ownership in any manner.

On de novo review of the substantial record in this case, the Lancaster County District Court affirmed both the department's findings and the scope of its order. Applicants appeal from that decision to this court, seeking a remand of their application with instructions to disqualify Kennedy Holland and to limit the scope of any further orders issued by the department.

III. DISQUALIFICATION OF COUNSEL

Applicants first assign error in the failure by both the department and the district court to find multiple conflicts of interest warranting disqualification of Kennedy Holland from this litigation. Applicants ask this court not only to find that disqualification was proper, but also to find that all proceedings below were inherently erroneous by virtue of Kennedy Holland's representation and, as such, to remand this cause for rehearing without the alleged taint of conflict.

The alleged conflicts arise from three peculiar interactions between Kennedy Holland and the parties to this suit. The first of these interactions was between applicants (in particular, CenTra) and now-Governor E. Benjamin Nelson, who in 1987 worked in an of-counsel relationship for Kennedy Holland. CenTra sought Nelson's advice in 1987 and 1988 as an insurance law expert. Whether Nelson was also retained as an attorney associated with Kennedy Holland is disputed by the parties; notably, despite that applicants' primary argument for disqualification of Kennedy Holland depends on the truth of their allegations concerning Nelson, little discovery was conducted into the allegations. In an affidavit, Nelson states that he reviewed existing and potential insurance agreements with NAICO with an eye toward whether the department would approve those agreements. CenTra also discussed with Nelson

the possibility of nominating him to the NAICO board of directors. CenTra's chief financial officer, Norman Harned, stated in an affidavit that he had told Nelson "about CenTra, the history of our insurance agreements, [and] the reinsurance Can-Am provided to NAICO." Applicants allege no personal impropriety on Nelson's part. Rather, applicants argue that matters reviewed by Nelson for CenTra are substantially related to the matters that now are the subject of Kennedy Holland's representation.

The second interaction applicants cite as grounds for disqualification of Kennedy Holland is that between Chandler and Michael J. Dugan, who is a partner in Kennedy Holland. Applicants allege that Dugan represented the inside management group in its dealings with the department during the management group's 1991 attempt to take control of Chandler and convert it into a privately held corporation. See *Attorney Griev. Comm'n v. Lockhart*, 285 Md. 586, 403 A.2d 1241 (1979) (holding that simultaneous representation of a corporation and of those seeking to purchase its stock is improper).

The third interaction with which applicants find fault is that between Chandler and Dugan, insofar as Dugan served both as a director of Chandler subsidiary NAICO and as a lawyer for Chandler. Applicants argue that Dugan could not properly balance these competing responsibilities. As a lawyer, Dugan owed a duty of loyalty, including acceptance of the corporate client's judgment on interests and objectives, to the corporate entity under Canon 5, EC 5-18, of the Code of Professional Responsibility. As a corporate director, Dugan had to exercise his independent judgment and act in the best interests of the shareholders. See *ConAgra, Inc. v. Cargill, Inc.*, 222 Neb. 136, 382 N.W.2d 576 (1986).

Applicants also call into question whether Dugan, by virtue of his dual roles as director and lawyer, could both uphold his duty to hold inviolate the secrets and confidences of his clients under Canon 4, DR 4-101(B), of the Code of Professional Responsibility and uphold his affirmative duty of disclosure as a corporate director. See *National Credit Union Admin. Bd. v. Regine*, 749 F. Supp. 401 (D.R.I. 1990). Although little

authority supports their contention, applicants claim that the disclosure obligations of a director override the attorney-client privilege. As such, applicants maintain that Dugan's duty as a NAICO director renders him unable to preserve his client's confidences, while his duty as a lawyer for Chandler renders him unable to disclose to other NAICO directors (who include at least one director of CenTra) the material facts he learns in his capacity as an attorney.

This court does not take lightly accusations that a Nebraska law firm has knowingly continued representation where it should withdraw. The courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all its dimensions. *U.S., Lord Elec. Co. v. Titan Pacific Const.*, 637 F. Supp. 1556 (W.D. Wash. 1986). The weight of our duty does not diminish in response to the profile of the parties or the amount of money at stake in the litigation, for the appearance of impropriety has an even more pernicious effect when the high stakes of the litigation heighten a lawyer's visibility. See *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994). We are also mindful that disqualification can wreak considerable havoc on a party's efforts to resolve its dispute. At a minimum, the practical effect is that a party must seek and find new counsel; furthermore, a party may be substantially prejudiced because its new attorney must litigate against an opposing counsel who inarguably is more familiar and more facile with the case. See *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993). At the worst, a litigant can use a motion for disqualification as a technique for harassment and delay. *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715 (7th Cir. 1982). Thus, we hesitate from the appellate bench to disqualify counsel and "reward a continuing pattern aimed at frustrating adjudication of the case in district court." *U.S., Lord Elec. Co.*, 637 F. Supp. at 1563.

The potential to gain an advantage in litigation through collateral attack cannot be lost on applicants. Applicants have raised no objections to the department's findings on the merits, and yet applicants ask this court to remand this cause for a second bite at the apple versus different opposing counsel.

For two reasons, disposition of applicants' allegations at this final stage in the litigation process is an imperfect remedy for the claimed evils. First, this court accords a good deal of deference to the judgment of the lower court and the administrative tribunal, both of which refused to disqualify Kennedy Holland. After a case has been adjudicated on the merits, we agree with authorities elsewhere who hold that a motion to disqualify an attorney is addressed to the discretion of the trial court, whose findings will not be disturbed absent evidence of abuse. See *Grahams Service Inc. v. Teamsters Local 975*, 700 F.2d 420 (8th Cir. 1982). An attorney disqualification matter is ancillary to the main case, whether the main case is at law, in equity, or is a special proceeding; thus, factual findings in disqualification cases will not be disturbed on appeal if substantial evidence supports those findings. *Killian v. Iowa Dist. Ct. for Linn Cty.*, 452 N.W.2d 426 (Iowa 1990).

Second, at this very late hour, whatever alleged damage was threatened by either Nelson's or Dugan's involvement most likely has been done. An appellate action is an inadequate means of presenting attorney conflicts of interest for review. *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990). By the time disqualification issues can be presented to an appellate court, any divulgence of confidences will already have occurred, and an appellate court cannot return the parties to the status quo ante. *Id.* Applicants contend that their circumstances merit a draconian remedy from this court—to disqualify counsel and order both the department and the state courts to brace themselves for the consequences of remand of this complex, time-consuming case—despite that applicants raise no objection to the department's findings on the merits of their application. If the circumstances are in fact so exigent, and the potential for injustice is so great, that such an order is warranted, then applicants should have sought from this court a writ of mandamus ordering disqualification much earlier in the litigation. See *id.*

Baker v. Farnsworth, 117 Neb. 504, 221 N.W. 17 (1928), appears to require an automatic reversal of the decision of a trial court after an unsuccessful attempt at the trial level to disqualify counsel. However, that case is distinguishable. In *Farnsworth*,

there were errors assigned, possibly meritorious, in addition to the claim of conflict of interest. In this case, no contention is made that the evidence does not support the decision of the department and the district court, and applicants conceded as much at oral argument.

In *Fitzsimmons v. State*, 116 Neb. 440, 218 N.W. 83 (1928), a criminal conviction was reversed where associates appeared for both the prosecution and the defense. We have noted that the standard for determination of whether error in a criminal case requires reversal is whether the error is harmless beyond a reasonable doubt. See *State v. Vogel*, 247 Neb. 209, 526 N.W.2d 80 (1995). Since the conflict could not be demonstrated to meet that standard, the conviction was properly reversed. Obviously, in the civil context of this case, where all parties concede the result is correct, the error may be said to be harmless.

We have held that mandamus is a viable means of addressing perceived attorney conflicts of interest. See, *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994); *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993). Disqualification, upon a showing of conflict of interest, is a clear and absolute ministerial duty which a trial court has no discretion to disregard. See *Buckley, supra*. Given that applicants sat on their rights during the phase of litigation wherein mandamus may have been appropriate, however, this court will not impose that result from appellate review at the costs of greater delay, greater prejudice, and needless waste of judicial resources.

We hold that when an appeal from an order denying disqualification involves issues collateral to the basic controversy, and when an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, the party should seek mandamus or other interlocutory review. See *Maddocks v. Ricker; Casson*, 403 Mass. 592, 531 N.E.2d 583 (1988) (addressing guidelines for interlocutory appeals). In this case, any facts found even by virtue of breach of client confidences still will be facts and still will be available as evidence on remand. They will be no less facts merely because applicants' counsel might be more cagey

on their second try. This court will not commit judicial resources to applicants' hope that relitigation against new opposing counsel yields improved results.

IV. SCOPE OF REMEDY

In its order denying applicants' Form A application, the department restricted applicants' ability to dispose of their stock in Chandler. Applicants must seek department approval before selling or transferring any of their Chandler stock to any other person. Discontented with this restriction, applicants argue that in issuing this order, the director has exceeded the authority granted him by the Nebraska Revised Statutes and by the federal Constitution.

1. Statutory Authority

An administrative body such as the department has only that authority specifically conferred upon it by statute or by construction necessary to achieve the purpose of the relevant act. See *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). An agency must administer a statute in accordance with the standards prescribed in the statute and may not exceed those standards. *NAPE v. Game & Parks Comm.*, 220 Neb. 883, 374 N.W.2d 46 (1985). On review, an appellate court determines the meaning of a statute independently of the determination made by an administrative agency. *In re Application A-16642, supra*. However, this court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). As no particular statute of the Act expressly provides for a restriction on sale of securities, our question is whether the Act provides for such a restriction by implication.

Because of the significant public interest in a well-regulated insurance industry, the Legislature has granted to the department general supervision, control, and regulation of insurance companies, associations, and societies and the business of insurance in Nebraska. See Neb. Rev. Stat. § 44-101.01 (Reissue 1993). The Legislature further granted to the director of the department statutory power to perform all acts the department has the power and authority to do. See *id.*

Notably, in two separate provisions, the Act specifically reserves implied powers not enumerated in the Act for the department and its director. See §§ 44-2139 (allowing the director to "issue such orders as necessary" to carry out the Act) and 44-2153 (providing that enumerated powers and remedies in the Act shall be in addition to and not in limitation of any other powers and remedies provided by law).

In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose. *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984). The district court in this case found that the purpose of the Act is "to protect the policy holders by probing the competence of those seeking to control insurance companies." We agree with this finding. It is the department's responsibility, and not this court's, to manage and oversee the regulation of insurers and the protection of policyholders in Nebraska, and the department must have powers adequate to carry out that responsibility. See *Clark v. Lincoln Liberty Life Ins. Co.*, 139 Neb. 65, 296 N.W. 449 (1941).

With respect to the "evils and mischiefs sought to be remedied," the Director of Insurance was presented with both a unique risk that NAICO policyholders could be subjected to needless prejudice by virtue of CenTra's acquisition and a unique opportunity to protect those policyholders. Moroun's entities—including DuraRock Underwriters and its corporate predecessor, Can-Am Underwriters—have a history of difficulties in obtaining clean audits because of consistent undercapitalization, undercollateralization, and underreserving. Moroun's stock remedy for borderline insolvency seems to be liquidation of existing, underreserved entities and creation of new entities whose only "assets" are unsecured notes and debentures drawn from other Moroun entities. The values of those debentures tend to be generously and suspiciously magnified. Consequently, DuraRock Underwriters and its predecessor, Can-Am Underwriters, have come under—and failed to survive—scrutiny of insurance regulators in Barbados.

James Adler, an expert accountant who testified for Chandler, stated that CenTra is "highly ill-liquid," that CenTra was experiencing severe cash-flow problems, and that Moroun uses his companies as his personal bank account. The director was thus legitimately concerned about how best to prevent such business practices from creeping into the operation of a Nebraska domestic insurer.

Beyond the problems experienced by and caused by Moroun entities in the past, however, the conduct of those entities in this litigation triggers legitimate concern that the only way for the department to protect NAICO policyholders is to retain jurisdiction over this matter and monitor applicants' disposition of their Chandler stock. No party may acquire statutory control of an insurer without department approval, and yet applicants boldly disregarded this very clear prohibition by amassing nearly five times that amount of stock specified for statutory control. That applicants broke the law is so clear that applicants do not even raise an objection to that finding. Even when the director issued his first cease and desist order, applicants unhesitatingly circumvented the order by creating a sham corporation, pausing not even long enough to explain to the sham corporation's new directors what its purpose would be. The deposition testimony of Robert Berquist, a director of Can-Am Investments since its inception, is telling as to the motive for creating Can-Am: Berquist did not know what securities Can-Am would invest in; nor when or where Can-Am was incorporated; nor whether Can-Am had any assets or liabilities; nor, for that matter, whether Can-Am had any articles, bylaws, financial information, or minutes of meetings. This testimony cuts against applicants' denial that the creation of Can-Am was a sidestep of department orders.

Copious evidence supports the director's conclusion that the remedies expressly provided in the Act would not eliminate the policyholders' exposure to hazard and prejudice. Applicants' unapologetic disregard for Nebraska law raises the specter of future disregard for the interests of NAICO policyholders. Accordingly, we find that the director should not be impeded in his choices of remedy and protective measures by the enumerated powers of the Act. See *Workman v. Great Plains*

Ins. Co., Inc., 189 Neb. 22, 200 N.W.2d 8 (1972) (holding that public policy as to insurance may be expressed and enforced by department through exercise of its powers under statutes). The importance of the director's duties as a watchdog for policyholders, and the fact that the director is the only watchdog whose authority can bind applicants, counsel in favor of a broad construction of the Act and the remedies provided therein. Pursuant to the grants of plenary authority contained in §§ 44-2139 and 44-2153, the director may issue the necessary protective orders until policyholders' interests are no longer jeopardized by outlaw corporate raiders.

2. CONSTITUTIONAL AUTHORITY

Having concluded that the director acted within his statutorily granted authority, we turn next to applicants' contention that the order violates the Commerce Clause of the federal Constitution. Applicants claim that either under an insurance-specific analysis of the Commerce Clause or under an all-purpose Commerce Clause analysis, the director has impermissibly burdened interstate commerce by restricting the activities not exempted from Commerce Clause scrutiny.

Whether a statute is unconstitutional is a question of law. *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994). Accordingly, this court is obligated to reach a conclusion independent of the decision reached by the trial court. *Id.* The unconstitutionality of a statute must be clearly demonstrated before this court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Henry v. Rockey*, 246 Neb. 398, 518 N.W.2d 658 (1994). Even when a law may be constitutionally suspect, a court will attempt to interpret it in a manner consistent with the Constitution. *Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642 (1994). As applicants attack an order issued pursuant to the Act, and as we have held that the order was issued within the authority granted by the Act, we will examine the constitutional validity of the order as if it were a statutory part of the Act. See *Stratbucker Children's Trust v. Zoning Bd. of Appeals*, 243 Neb. 68, 497 N.W.2d 671 (1993).

(a) The McCarran-Ferguson Act

Article I, § 8, of the U.S. Constitution grants Congress the power to regulate commerce among the states. Contained within that grant of power to the federal government is an implicit limitation on the power of the states to interfere with or impose burdens on interstate commerce. *Edgar v. MITE Corp.*, 457 U.S. 624, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982). If Congress expressly authorizes the states to regulate an area of interstate commerce, however, any action taken by the state within that authorization will be invulnerable to Commerce Clause challenge. *Western & Southern L. I. Co. v. Bd. of Equalization*, 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981). Relevant to this case is the authorization Congress granted with respect to the states' regulation of insurance companies domiciled within their boundaries by enacting the McCarran-Ferguson Act (MFA). 15 U.S.C. § 1011 et seq. (1994). The MFA permits states to regulate insurance companies within their boundaries and removes all Commerce Clause limitations upon that authority. See *Western & Southern L. I. Co., supra.*

Even the auspices of the MFA, however, do not exempt all state regulation of the activities of insurers. *SEC v. National Securities, Inc.*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969). Rather, the MFA grants states authority to regulate insurers only to the extent that state law governs "the business of insurance." *Id.* See, also, 15 U.S.C. § 1012(a) and (b). Herein lies the critical inquiry: whether a restriction on the sale of stock in a domestic insurer is sufficiently connected to "the business of insurance" to be shielded by the MFA from Commerce Clause attack. Applicants argue that this restriction intrudes impermissibly into the federal realm of securities regulation.

The U.S. Supreme Court has reduced the inquiry of whether a practice is part of "the business of insurance" to a three-part test: (1) The practice must relate to the transferring and spreading of risk, (2) the practice must be an integral part of the policy relationship between the insurer and the insured, and (3) the practice must be limited to entities within the insurance industry. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119,

102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982). As applied to the Act and orders issued pursuant to the Act, these criteria support our finding that the director's order does relate to "the business of insurance."

First, the restriction on stock disposition relates, albeit indirectly, to the transferring and spreading of risk. The Act and its implied powers are triggered only when a person who makes a tender offer for voting securities of a domestic insurer would acquire control of that domestic insurer. See § 44-2126. The Act affords the Director of Insurance a chance to review the financial stability of the acquiring company so that he can determine whether acquisition is in the best interests of Nebraska policyholders. See *id.* See, also, *Hoylake Investments Ltd. v. Gallinger*, 722 F. Supp. 573 (D. Ariz. 1989). The director is further afforded, by virtue of §§ 44-2139 and 44-2153, the opportunity to bring any threatened change of control under his own control so that he can consider the impact of such a change on policyholders. See *Gallinger, supra*.

Whether a domestic insurer will remain reliable to its policyholders certainly relates to the transferring and spreading of risk. In this case, the director is justifiably concerned that the stock will be transferred to more Moroun entities, legitimate or otherwise, thereby prejudicing the interests of policyholders. Notably, in states with laws similar or identical to those composing the Act, courts have found that such laws do relate to the transferring and spreading of risk. See, *Gallinger, supra* (Arizona law); *Hoylake Investments Ltd. v. Bell*, 723 F. Supp. 576 (D. Kan. 1989) (Kansas law); *Hoylake Investments Ltd. v. Washburn*, 723 F. Supp. 42 (N.D. Ill. 1989) (Illinois law). Those courts reasoned that because a change of control of an insurer can affect the quality and stability of policies, these laws satisfy the requirement that they related to the transferring and spreading of risk. The same is true for the Nebraska Act and for orders issued pursuant to the Act.

The second criterion of "the business of insurance" is that the regulated practice must be an integral part of the policy relationship between the insurer and its insured. *Pireno, supra*. The Nebraska Act satisfies this criterion as well. The review and evaluation by the director involves the relationship between

an insurance company and its policyholders. Cf. *Alleghany Corp. v. Pomeroy*, 700 F. Supp. 460 (D.N.D. 1988), *rev'd on other grounds* 898 F.2d 1314 (8th Cir. 1990) (stating that policyholder is concerned only with whether claim will be paid, not with who controls direction of company). Unfortunately, the individual policyholder is not in a position to understand the ramifications of a change of control in his insurer until the insurer becomes insolvent and unable to pay claims. The director has both the ability and the statutory responsibility to ensure that the relationship between the insurer and the policyholder is one of mutual understanding and not one of deceit. See, *Bell, supra*; *Washburn, supra*.

The third criterion of "the business of insurance" requires that the regulation be limited to entities within the insurance industry. This criterion is also satisfied. It is true that the Act affects not only policyholders, but also investors and stockholders who seek to own stock in Nebraska domestic insurers. See *Alleghany Corp., supra*. We further recognize that the Act restricts the ability of an out-of-state stockholder to sell his interest to a willing purchaser whenever the sale would result in the purchaser's owning more than 10 percent of the domestic insurer. See *id*. The focus of all of these restrictions, however, remains the interest of the individual policyholder.

Irrespective of what sort of concern pursues ownership and control, the Act concerns itself solely with the acquisition of domestic insurance companies. See *Washburn, supra*. This is not an instance of the department reaching out to invade the stock market. Rather, it was applicants who wished to control the handling of CenTra's insurance claims; it was applicants who sought to gain control of their insurer by owning its stock; and it was applicants who chose to cast into jeopardy the one policy concern for whose protection the department was created: that an insurer should remain as reliable as it promises its insureds it will be. The director has not intruded into securities regulation. If anything, it is applicants who have intruded impermissibly into insurance regulation. The Act affects entities outside the insurance industry only insofar as those entities choose to enter this rightly regulated arena.

Applicants assert that *SEC v. National Securities, Inc.*, 393

U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969), supports their contention that the director's order transgresses the regulation of "the business of insurance." In *National Securities, Inc.*, the U.S. Supreme Court invalidated a portion of the Arizona version of the Act, a body of law substantially similar to the Nebraska Act. The portion in question required the director to find that a merger of insurers would not substantially reduce the services to be rendered to policyholders. The Court concluded that regulation whose focus is the protection of stockholders does not sufficiently relate to the MFA to be shielded from Commerce Clause attack.

In contrast to the facts of *National Securities, Inc.*, the provisions questioned in this case protect not stockholders, but policyholders. No part of the Nebraska Act is concerned with security of or services rendered to stockholders; whether merger or acquisition is equitable to stockholders is immaterial in the eyes of the director. Significantly, however, the *National Securities, Inc.*, Court found that the section of the Arizona act that empowered the director to determine whether acquisition would substantially reduce the security of *policyholders'* interests "clearly relates to the 'business of insurance.' " 393 U.S. at 462. This holding of *National Securities, Inc.*, and not the holding pertaining to stockholders, controls our disposition of the Act's conformity with the MFA.

Policyholders' interests can come under attack from many fronts, including manipulation of ownership and control by individuals to whom an insurer's solvency is a negligible priority. In his concurrence to *S. E. C. v. Variable Annuity Co.*, 359 U.S. 65, 90-91, 79 S. Ct. 618, 3 L. Ed. 2d 640 (1959), Justice Brennan wrote that "[t]he prevention of insolvency and the maintenance of 'sound' financial condition in terms of fixed-dollar obligations is precisely what traditional state regulation [of insurance] is aimed at." We agree, and accordingly we hold that the Nebraska Act and the director's order relate to "the business of insurance" and thereby qualify for the protection of the MFA against a Commerce Clause challenge.

(b) Commerce Clause Analysis Under *Pike v. Bruce Church, Inc.*

Finally, applicants argue that even if the MFA applies, the director's order violates the Commerce Clause under the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). The general rule arising from *Pike* states that

> [w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citation omitted.] If a legitimate local purpose is found, then . . . the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues [citation omitted], but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.

397 U.S. at 142. See, also, *Heath Consultants v. Precision Instruments*, 247 Neb. 267, 527 N.W.2d 596 (1995) (applying *Pike* balancing test).

The U.S. Supreme Court applied its *Pike* analysis in *Edgar v. MITE Corp.*, 457 U.S. 624, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982), finding that the Illinois Business Take-Over Act directly regulated transactions that take place wholly outside the State of Illinois. Because the statute prevented offerors from conducting interstate transactions with stockholders both within the State of Illinois and in foreign states bearing no relation to Illinois, the Court found that statute to be a direct restraint on interstate commerce with an impermissibly sweeping extraterritorial effect. Significantly, however, neither the Nebraska Act nor the director's order has by its terms such extraterritorial reach. The mere fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978).

We find stronger authority for analysis of the Nebraska Act in the case *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987). In *CTS Corp.*, the U.S. Supreme Court upheld an Indiana takeover statute against a Commerce Clause challenge. The Indiana statute protected shareholders of Indiana corporations by placing certain obstacles in the path of any party making a hostile tender offer for those shares. The respondent alleged unconstitutional interference with interstate commerce. In rejecting this Commerce Clause attack, the *CTS Corp.* Court stated that the act did not prohibit any entity of any state from attempting to gain control of an Indiana corporation: "It only provides regulatory procedures designed for the better protection of the corporations' shareholders." 481 U.S. at 93.

The Nebraska Act does not have the reach of the invalidated statute of *MITE Corp.* The Act applies equally, regardless of whether the would-be acquiring party is a Nebraska resident. As such, the Act does not resemble the " 'principal objects of dormant Commerce Clause scrutiny,' " which are statutes that discriminate against interstate commerce. See *Hoylake Investments Ltd. v. Washburn*, 723 F. Supp. 42, 47 (N.D. Ill. 1989). The Act, further, poses no threat of inconsistent regulations, since it regulates only the internal affairs of insurers registered in Nebraska. See *id.* The local purpose of protecting Nebraska policyholders is legitimate and qualifies as a valid use of police power. See *State ex rel. Neff v. Christian Brotherhood of America Burial Assn.*, 186 Neb. 525, 184 N.W.2d 643 (1971). Moreover, the order is not an outright prohibition of stock sales by applicants, but only a prior-approval requirement: the order impedes applicants from nothing except skating around department authority. The scales thus tip in favor of the legitimate local purpose when balanced against the incidental effects on commerce.

In issuing the prior-notice restriction, the director of the department did not exceed the authority granted him under the Act. The director, furthermore, acted within the confines of the Commerce Clause, applying either the MFA analysis or the *Pike* balancing test. Applicants' second assignment of error fails.

V. CONCLUSION

Because applicants' request to disqualify counsel is irredeemably late, and because the director acted within the scope of his statutory and constitutional authority, we affirm the holdings of the Lancaster County District Court.

AFFIRMED.

WRIGHT, J., not participating.

IN RE INTEREST OF LISA O., A CHILD UNDER 18 YEARS OF AGE. KEITH COUNTY, NEBRASKA, APPELLEE, V. DEPARTMENT OF SOCIAL SERVICES, APPELLANT.

540 N.W.2d 109

Filed December 1, 1995. No. S-93-1047.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **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.
3. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
4. **Minors: Juvenile Courts.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests.
5. ____: ____. The juvenile code must be construed to assure the rights of all juveniles to care and protection. Neb. Rev. Stat. § 43-246 (Reissue 1993).
6. ____: ____. When a juvenile is committed to the care and custody of the Department of Social Services, and temporary detention results for the protection of the child, or is found to be in the best interests of the juvenile's physical or mental health needs, that type of detention is "treatment" of the juvenile as that term is used in Neb. Rev. Stat. § 43-290 (Reissue 1993).

Appeal from the District Court for Keith County, DONALD E. ROWLANDS II, Judge, on appeal thereto from the County Court

for Keith County, KRISTINE R. CECAVA, Judge. Judgment of District Court affirmed.

Don Stenberg, Attorney General, Royce N. Harper, and Lisa G.T. Swinton for appellant.

Deborah R. Gilg, Keith County Attorney, and Jeffrey M. Eastman for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

The Nebraska Department of Social Services (DSS) appeals from an October 27, 1993, judgment of the Keith County District Court which affirmed a July 8 order of the juvenile division of the Keith County Court directing DSS to pay the detention costs for Lisa O., a minor child. These costs were incurred while Lisa was temporarily held at the Panhandle Youth Detention Center from November 26 to 30, 1992. For the reasons stated below, we conclude that the district court was correct and, accordingly, affirm the judgment.

FACTS

In August 1990, the juvenile division of the Keith County Court adjudicated Lisa as a child who is in a situation injurious to the health or morals of herself under Neb. Rev. Stat. § 43-247(3)(a) and (b) (Reissue 1993) and placed her in the temporary custody of DSS pending disposition. As part of its disposition, on December 4, 1990, the juvenile court placed Lisa in the care and custody of DSS for appropriate placement. DSS has retained the care and custody of Lisa at all times since this December 4 order.

Lisa has frequently run away from her various DSS treatment and foster care placements. In 1992, just prior to the beginning of the Thanksgiving holiday, Lisa ran away from her placement in Norfolk, Nebraska. On November 24, before Lisa was located and apprehended, Lisa's DSS case manager contacted the Keith County Attorney to advise the county attorney of the situation and to discuss possible weekend placements in the event Lisa was found before the Thanksgiving weekend.

During this telephone conversation, the case manager suggested that if Lisa is found, she could be placed in a foster home with 24-hour supervision. The county attorney suggested that in light of Lisa's propensity to run away, she should be placed in a more secure setting. The case manager thought placement in the Wayne Detention Center could provide the needed security for the minor child. The county attorney instead offered to draft an order for the juvenile court, placing Lisa in the Panhandle Youth Detention Center at Gering, Nebraska, in the event she was located. In addition, the county attorney insisted DSS was to be the transporting agency. Payment of the cost for Lisa's temporary detention was never discussed.

The county attorney drafted an order which was signed by the clerk magistrate of Keith County and filed in the county court on November 24, 1992, directing that Lisa be transported by an agent of DSS to the Panhandle Youth Detention Center for placement until a review hearing could be scheduled in the juvenile court following the Thanksgiving weekend. The Norfolk Police Department found Lisa at approximately 4 a.m. on Thanksgiving morning, November 26. DSS made the necessary arrangements and transported Lisa to the Panhandle Youth Detention Center, where Lisa remained until November 30. A hearing was held on November 30 in the juvenile court, where an order continuing Lisa's care and custody in DSS was issued.

On December 12, 1992, Keith County filed a motion in the juvenile court requesting the court to direct DSS to pay the amount due to the Panhandle Youth Detention Center for Lisa's temporary detention. After notice and hearing, the juvenile court entered an order directing DSS to pay the costs in dispute, the sum total of $566.60. In its order, the court found that Lisa's detention was necessary to prevent Lisa from harming herself, that Lisa's acts were not criminal in nature but based upon her mental health, and that DSS had been and continues to be responsible for the care and custody of Lisa, including her mental health needs. DSS appealed the entry of this order to the district court. The district court, finding no error, affirmed the juvenile court's order, and this appeal followed.

ASSIGNMENTS OF ERROR

DSS essentially argues that the district court erred in affirming the order of the juvenile court assessing the costs of Lisa's detention to DSS, because detention costs are not the statutory responsibility of DSS pursuant to Neb. Rev. Stat. § 43-290 (Reissue 1993). Secondly, DSS asserts that because Lisa's detention was ordered by the county attorney, the responsibility for payment is with Keith County under the authority of Neb. Rev. Stat. §§ 29-1001 and 29-1004 (Reissue 1989).

STANDARD OF REVIEW

The issue in this case is solely one of statutory interpretation. Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue, ante* p. 518, 537 N.W.2d 312 (1995); *Sylvis v. Walling, ante* p. 168, 532 N.W.2d 312 (1995); *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995).

ANALYSIS

The facts in this case, or even the inferences to be drawn from the facts, are not in dispute. Both parties agree that the issue in this case involves the statutory interpretation of § 43-290, which reads, in pertinent part:

> [W]henever the care or custody of a juvenile is given by the court to someone other than his or her parent, which shall include placement with a state agency, or when a juvenile is given medical, psychological, or psychiatric study or treatment under order of the court, the court shall make a determination of support to be paid by a parent for the juvenile at the same proceeding at which placement, study, or treatment is determined or at a separate proceeding. . . .
>
> At such proceeding . . . the court may order and decree that the parent shall pay, in such manner as the court may direct, a reasonable sum that will cover in whole or part the support, study, and treatment of the juvenile, which

> amount ordered paid shall be the extent of the liability of the parent. The court in making such order shall give due regard to the cost of study, treatment, and maintenance of the juvenile, the ability of the parent to pay, and the availability of money for the support of the juvenile from previous judicial decrees, social security benefits, veterans benefits, or other sources. . . .
>
> . . . .
>
> *If the juvenile has been committed to the care and custody of the Department of Social Services, the department shall pay the costs for the support, study, or treatment of the juvenile which are not otherwise paid by the juvenile's parent.*

(Emphasis supplied.)

DSS asserts that § 43-290 cannot be read so broadly as to require DSS to pay any and all costs associated with a juvenile in its care and custody. Accordingly, DSS argues that § 43-290 cannot be construed to include detention as a cost which devolves to DSS, since detention is not specifically referenced in the statute.

In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994); *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994).

The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *In re Application of City of Grand Island*, 247 Neb. 446, 527 N.W.2d 864 (1995); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993).

Temporary Detention as Treatment

In support of its position, DSS urges us to examine the

Nebraska Juvenile Code and other statutes which address detention costs to see how the Legislature has allocated the payment for detention costs in other circumstances. Presumably, such an examination would help us determine if the Legislature intended to have DSS pay this type of detention cost under the provisions of § 43-290. In actuality, we are required to determine if the temporary detention of a wayward juvenile is considered "treatment" of the juvenile as that term is used in § 43-290. The fact of the matter is that once a juvenile has been committed to the care and custody of DSS, then if temporary detention of a wayward juvenile is considered a part of "treatment" of the juvenile, DSS is *mandated* by statute to pay the costs of the detention which are not otherwise paid by the juvenile's parent. Where statutory words are plain, direct, and unambiguous, it does not matter how the Legislature has allocated the payment for detention costs in other circumstances or under other statutory schemes.

The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests. *In re Interest of D.D.P.*, 235 Neb. 864, 458 N.W.2d 193 (1990). Moreover, the juvenile code must be construed to assure the rights of all juveniles to care and protection. Neb. Rev. Stat. § 43-246 (Reissue 1993).

"Treatment" is defined as meaning "preventive guidance and corrective training esp. of juvenile delinquents and youthful criminal offenders . . . ." Webster's Third New International Dictionary, Unabridged 2435 (1993). The temporary confinement of Lisa in a juvenile detention center over the Thanksgiving weekend was, in fact, the exact type of *treatment* that was necessary for her guidance and safekeeping until the juvenile court had an opportunity to review the circumstances on Monday, November 30, 1992. The plain meaning of the phrase "support, study, [and] treatment" within the context of § 43-290 is that these are words of inclusion, not words of exclusion. Under these circumstances, a temporary detention which effects the *treatment* of a wayward juvenile equates to assuring the right of the juvenile to the provision of care and protection. When a juvenile is committed to the care and custody of DSS, and temporary detention results for the

protection of the child or is found to be in the best interests of the juvenile's physical or mental health needs, we hold that type of detention is, in fact, "treatment" of the juvenile as that term is used in § 43-290.

ASSESSMENT OF DETENTION COSTS

In addition, the clear focus of § 43-290 is to identify the party responsible for the provision of the support, study, and treatment of the juvenile. Section 43-290 explicitly delegates to DSS the costs for the support, study, or treatment of a juvenile in its care and custody which are not otherwise paid by the juvenile's parent. Lisa has been in the care, custody, and control of DSS since December 1990. This disposition did not change during the 5-day period when she was detained in the Panhandle Youth Detention Center.

In addition, it was DSS who first suggested to the Keith County Attorney that if Lisa should be located, she could be detained in a secure facility, the Wayne Detention Center. When the county attorney resisted this suggestion and countered with her own offer to draft an order to detain Lisa at the Panhandle Youth Detention Center, DSS either acquiesced or at least did not voice any concern as to who would pay the costs of detention. Moreover, DSS agreed to transport Lisa to the Panhandle Youth Detention Center should she be found. If DSS had any reservations about Lisa's placement in the Gering facility or payment of the detention costs, it should have protested prior to transporting Lisa to the Panhandle Youth Detention Center or, at the very latest, at the November 30, 1992, hearing in juvenile court, instead of waiting until after the bill for detention costs had arrived.

As its second assignment of error, DSS argues that any county-ordered detention should be considered an expense within the local administration of justice, and such expenses are the responsibility of the individual county. In support, DSS cited provisions of the criminal code and offered the proposition that since Lisa was detained pursuant to a court order, she was therefore a prisoner and that §§ 29-1001 and 29-1004 require the cost for confinement of prisoners to be paid by the county.

The law in this state is clear that a juvenile offender is not

similarly situated as an adult criminal offender. That is so because a juvenile offender is ordinarily committed to a public institution to effect treatment or rehabilitation, and not for the purpose of punishment. See *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989). Moreover, there is even less reason to treat a status offender like Lisa similarly to an adult offender, as Lisa was not a criminal offender in any sense of the word. Lisa was a child in need of help and treatment at the time of her detention. The State of Nebraska has never treated prisoners confined for punishment and those juveniles who must regrettably be confined for their own good in the same manner.

Thus, the cost of detention under these circumstances is a cost which should devolve to DSS when a juvenile is committed to its care and custody. It is clear from our holding that the temporary detention of Lisa was to effect her treatment. Therefore, the cost of her detention is properly assessed to DSS.

CONCLUSION

The argument of DSS that it is not obligated to pay for the care of Lisa for the 5-day period in which she was confined in the Panhandle Youth Detention Center is without merit. The plain statutory language of § 43-290 compels the conclusion that when a juvenile is committed to DSS' care and custody, DSS is required to pay the costs for the support, study, or treatment that is in the best interests of the child which are not otherwise paid by the juvenile's parent. If temporary detention is necessary to effect the child's treatment, then detention is a cost which must be borne by DSS. The judgment of the district court is affirmed.

AFFIRMED.

ROBERT W. GILLIS, APPELLEE AND CROSS-APPELLANT, V. THE CITY OF MADISON, A CITY OF THE SECOND CLASS OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

540 N.W.2d 114

Filed December 1, 1995. No. S-93-1091.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party or parties against whom the judgment is granted and gives such party or parties the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Ordinances.** Where there is a direct conflict between a city ordinance and a state statute, the statute is the superior law.
4. ____: ____. If a city ordinance and a state statute in question are not contradictory and can coexist, then both are valid.
5. **Courts: Statutes: Ordinances.** A court has a duty to harmonize state and municipal legislation on the identical subject.
6. **Ordinances.** When an ordinance is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes the ordinance clearly valid will be given.
7. **Employer and Employee: Termination of Employment.** When employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Reversed and remanded with direction.

Gail S. Perry and David D. Zwart, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Joel E. Carlson and Richard E. Mueting, of Mueting & Stoffer, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

This is an appeal from an action for wrongful termination of employment. Defendant-appellant, the City of Madison (Madison), appeals from the judgment of the district court for

Madison County holding that the plaintiff-appellee, Robert W. Gillis, was wrongfully terminated from his position as city administrator of Madison. Prior to trial, both parties filed summary judgment motions. Gillis filed a motion for partial summary judgment as to the issue of liability, claiming that Madison did not follow the appropriate procedures for the removal of Gillis as required by the municipal code of Madison. Madison filed a motion for summary judgment, claiming that Gillis' employment was properly terminated by the acting mayor of Madison pursuant to Neb. Rev. Stat. § 17-107 (Reissue 1991). The district court granted partial summary judgment in favor of Gillis on the issue of liability. A bench trial was held on the issue of damages, and the court awarded Gillis $14,512.30. Gillis cross-appeals.

Madison assigns three errors. It contends that the district court erred (1) in sustaining Gillis' motion for partial summary judgment, finding Gillis' employment was wrongfully terminated on August 20, 1992; (2) in overruling Madison's motion for summary judgment; and (3) in awarding Gillis $14,512.30 in damages for wrongful termination. In his cross-appeal, Gillis assigns several errors concerning the amount of damages awarded. Since we hold that the mayor of Madison properly invoked his power to terminate Gillis' employment pursuant to § 17-107, we reverse the decision of the district court and remand the cause with direction.

The undisputed facts establish that on June 18, 1989, the city council of Madison offered a motion to offer Gillis the position of city administrator. The terms of employment under the city council motion were as follows: a base salary of $27,000; 3 weeks' vacation annually after the first year; Blue Cross-Blue Shield insurance; an employee retirement plan; and a cost-of-living and annual wage review, which had a 6-month probationary period. Gillis was hired as city administrator on July 17.

The terms of Gillis' employment did not include a term of employment or state a basis for which Gillis' employment could be terminated. The procedure for termination of the city administrator of Madison is derived from both a state statute and a Madison municipal code ordinance. Section 17-107 states

in relevant part, "The mayor, with the consent of the council, may appoint such officers as shall be required by ordinance or otherwise required by law. Such officers may be removed from office by the mayor." Madison Mun. Code, ch. 6, art. I, § 6-102, states in relevant part, "The City administrator may be removed at pleasure by vote of majority of all members of the Council with the approval of the Mayor."

On August 20, 1992, John Bomar, the acting mayor of Madison, sent Gillis a notice of termination, which stated, "[y]our authority over the employees of the City of Madison and your authority as City Administrator for the City of Madison is hereby terminated, effective immediately." The notice listed several reasons for his termination.

On December 2, Gillis' counsel filed a claim with the city clerk for Madison for compensation and benefits allegedly due to Gillis. The claim stated that Bomar's termination of Gillis' employment was null and void in violation of § 6-102.

On December 17, Gillis filed this action. Gillis alleged that Bomar was required to follow the removal procedure set forth in the city ordinance, rather than that set forth in § 17-107. He alleged that because Bomar did not follow the city ordinance, Gillis' employment was wrongfully terminated.

On February 10, 1993, in reaction to the lawsuit, the city council passed a resolution to ratify Bomar's action on August 20, 1992, terminating Gillis' employment. In the resolution, the city council stated, "The adoption of this procedure is solely in defense of the pending lawsuit and is not an admission that the previous method of termination was not effective or that this method of termination is necessary in any way."

On May 26, Gillis filed a motion for partial summary judgment, arguing that no genuine issue of fact existed as to whether his employment was wrongfully terminated on August 20, 1992. Madison also filed a motion for summary judgment, alleging that no material issue of fact existed and that Madison was entitled to judgment as a matter of law. The court sustained Gillis' motion for partial summary judgment, finding that there was no issue of material fact as to Madison's liability.

On September 9, 1993, the district court, after trial, awarded Gillis $14,512.30 for lost wages and benefits. Madison filed a

motion for new trial, which was overruled. This appeal followed.

> Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

Poppleton v. Village Realty Co., ante p. 353, 355, 535 N.W.2d 400, 402 (1995). "In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party or parties against whom the judgment is granted and gives such party or parties the benefit of all reasonable inferences deducible from the evidence." *Id.*

The critical issue in this case is whether the procedure for the removal of the city administrator of Madison set forth in § 6-102 supersedes a mayor's authority to terminate city officers under § 17-107. " 'Where there is a direct conflict between a city ordinance and a state statute, the statute is the superior law. . . .' " *Herman v. Lee*, 210 Neb. 563, 567, 316 N.W.2d 56, 59 (1982). However, if the city ordinance and the statute in question are not contradictory and can coexist, then both are valid. See *id.* We find that the procedures for removal of the city administrator provided for under § 17-107 and under § 6-102 are alternative procedures for removal that are not contradictory and that can coexist.

The state statute allows for the complete removal from office process to be conducted by the mayor in his discretion, while the city ordinance allows removal from office by initiation of the city council with final consent by the mayor.

Gillis contends that the city ordinance constitutes a special law regarding a specific subject, namely, the removal from office of the city administrator of Madison. His contention concludes that the ordinance should therefore control the state statute. If we followed his reasoning, the city ordinance would be in conflict with the state statute and this result would run contrary to the rule stated earlier from *Herman v. Lee*, 210 Neb. at 567, 316 N.W.2d at 59: " 'Where there is a direct conflict between a city ordinance and a state statute, the statute is the

superior law. . . .' "

A court has a duty to harmonize state and municipal legislation on the identical subject. *State v. Kubik*, 159 Neb. 509, 67 N.W.2d 755 (1954). When an ordinance is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes the ordinance clearly valid will be given. *State ex rel. Bouc v. School Dist. of City of Lincoln*, 211 Neb. 731, 320 N.W.2d 472 (1982); *Starman v. Shirley*, 162 Neb. 613, 76 N.W.2d 749 (1956).

Concluding that the mayor of Madison has the power to remove a city administrator under § 17-107, Bomar's notice of termination to Gillis on August 20, 1992, was effective and valid. "[W]hen employment is not for a definite term and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability." *Overmier v. Parks*, 242 Neb. 458, 462, 495 N.W.2d 620, 623 (1993). Accord *Renner v. Wurdeman*, 231 Neb. 8, 434 N.W.2d 536 (1989).

Gillis' employment was not for a definite term, and no restrictions were set forth either in the resolution passed by the council that offered Gillis the position or in § 17-107. Because the procedure invoked by Bomar was valid under § 17-107 and did not require termination for good cause, termination of Gillis' employment on August 20, 1992, was not wrongful. Therefore, Madison is entitled to judgment as a matter of law.

Since Madison is entitled to judgment relieving it of liability, we need not address Madison's other assignments of error or Gillis' assignments of error on cross-appeal concerning damages.

For the reasons stated above, the decision of the district court is reversed and the cause is remanded with direction to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTION.

IN RE ESTATE OF FLOYD J. SOULE, SR., DECEASED. CARL SOULE ET AL., APPELLEES, V. FLOYD J. SOULE, JR., AND BILLY G. SOULE, INDIVIDUALLY AND AS COPERSONAL REPRESENTATIVES OF THE ESTATE OF FLOYD J. SOULE, SR., DECEASED, APPELLANTS.

540 N.W.2d 118

Filed December 1, 1995. No. S-94-116.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Courts: Appeal and Error.** Appellate review is limited to those errors specifically assigned in the appeal to the district court and again assigned as error in an appeal to a higher appellate court.
3. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
4. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
5. **Courts: Rules of the Supreme Court: Notice: Appeal and Error.** The purpose of Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992) is to direct the attention of the reviewing court to precisely what error was allegedly committed by the lower court and to advise the nonappealing party of specific issues on appeal.
6. **Courts: Rules of the Supreme Court: Jurisdiction: Appeal and Error.** Compliance with Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992) is not a prerequisite to district court or appellate court jurisdiction over an appeal of a decision rendered by the county court but the rule does limit appellate review to those errors specifically assigned in the appeal unless the appellate court at its discretion, notices a plain error not assigned.
7. **Decedents' Estates: Wills.** The doctrine of advancements or ademptions applies to wills and intestate estates in Nebraska.
8. **Decedents' Estates: Wills: Gifts.** Neb. Rev. Stat. § 30-2310 (Reissue 1989) provides that an inter vivos transfer is to be treated as an advancement against an heir's share of an estate passing in intestacy only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement.
9. ____: ____: ____. Neb. Rev. Stat. § 30-2350 (Reissue 1989) provides that property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part only if the will provides for deduction of the lifetime gift, or the testator declares in a writing contemporaneous with the gift that it is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in a writing

contemporaneous with the gift that it is in satisfaction.

10. ____: ____: ____. Absent a clause in the testator's will, a contemporaneous writing, or a written acknowledgement by the devisee, inter vivos gifts cannot be deemed to be advancements.

11. **Gifts: Intent.** A donor may express in the gift that the gift is an advancement.

Appeal from the District Court for Kimball County, JOHN D. KNAPP, Judge, on appeal thereto from the County Court for Kimball County, C.G. WALLACE, Judge. Judgment of District Court reversed, and cause remanded with directions.

Brian R. Cook, of O'Brien, Huenergardt & Cook, and David L. Wilson, of Burke & Wilson, for appellants.

John P. Weis and, on brief, Donn C. Raymond for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

This appeal arises from an order of the county court for Kimball County which denied the claims of the appellees (claimants) against the estate of their grandfather, Floyd J. Soule, Sr. The claimants appealed to the district court for Kimball County, which reversed the county court's order and granted the claims. Floyd J. Soule, Jr., and Billy G. Soule, being devisees and copersonal representatives of Soule's estate, appealed to the Nebraska Court of Appeals. We removed the case to our docket in order to manage the caseloads of the two courts.

The disputed claims relate to a series of gifts made by Soule's conservator prior to Soule's death. The conservator had made gifts to Soule's then living children, including the appellants, for the undisputed purpose of reducing the size of the estate in order to avoid federal estate taxes. The conservator was unaware of Soule's predeceased son, Glen Soule, and of Glen's children, i.e., the claimants, and they did not receive any gifts. The gifts to the living children were made with the approval of the county court and each of the conservator's applications for approval of the gifts attests that notice by mail was served upon only Soule's living children. After Soule's death, his estate was probated. Although Soule made no testamentary devises to the claimants,

a portion of his will failed. Thus, the claimants were entitled, by virtue of the laws of intestacy, to share the benefits of what their deceased father, had he lived, would have received. The claimants assert that their intestacy shares were reduced by the conservator's gifting program and argue that the gifts should be treated as advancements against testamentary devises to the living children. Our review is limited to a review for plain error due to the claimants' failure to file the required statement of errors in the district court. See Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992). Finding no basis for plain error, we reverse the district court's order which reversed the judgment of the county court and remand the cause with directions to affirm the county court's order denying the claimants' statements of claim.

BACKGROUND

On October 3, 1985, Floyd Soule, Sr., was placed under a conservatorship. The order placing Soule under the conservatorship is not part of the record before us. Soule was under the conservatorship until his death on November 30, 1991.

Prior to the conservatorship, Soule twice made gifts of $10,000 to each of his six living children, in 1982 and 1983. A seventh child, Glen Soule, had died on December 9, 1972. After the creation of the conservatorship, the conservator made annual applications to the county court for authority to continue the gifting. Gifts totaling $465,000 were approved. In some years, the gifts were made to the six living children, and in other years, said children's spouses were also named as donees. Each order approving the gifts stated that Soule was incapable of giving consent but that it was in his best interest that gifts be made in order to reduce the gross value of his estate and thereby diminish the burden of future tax consequences.

The claimants received no gifts. They are the five children of Glen Soule, who predeceased his father, Floyd Soule, Sr. The conservator testified that he was unaware of the existence of these grandchildren and heirs-at-law until after Floyd Soule, Sr.'s death. At the hearing in the county court regarding the probate of Soule's estate, the claimants offered as evidence the

conservator's annual applications for approval of the gifts and some other documents from the conservatorship proceeding. The certificate of service accompanying each of the annual applications recited that notice had been served by mail on each of Soule's six living children. The applications do not recite that any service by publication was made.

Prior to the conservatorship, Soule executed a last will and testament, dated March 6, 1979. The will made specific bequests to the living children of real estate and oil and gas interests. The will did not mention the claimants. The will purported to create a testamentary trust in benefit of Soule's wife, Ruby. Ruby predeceased Soule, and apparently, the county court held that the trust failed and that that portion of the estate passed by the laws of intestacy. No assignments of error have been stated regarding this ruling, and the parties have not made any record of the court's order.

By virtue of the laws of intestacy, the claimants were entitled to share in that portion of their grandfather's estate that their deceased father, had he lived, would have received. Neb. Rev. Stat. §§ 30-2302 and 30-2306 (Reissue 1989). The claimants filed claims against the estate in the county court and argued that the gifts made by the conservator prior to their grandfather's death reduced the amount of assets available for distribution to them as residuary devisees. Essentially, the claimants argue that if the $465,000 in gifts had not been made, they would have received an additional $13,285.71 each. That amount is reached by dividing the total amount of the gifts by each claimant's one thirty-fifth share of the residuary.

The appellants, as copersonal representatives of Soule's estate, disallowed the claims. Proceedings were had before the county court on August 21, 1992. The claimants argued that the $465,000 in gifting during the conservatorship should be considered as advancements to the living children. In their statements of claim, the claimants did not ask that the gifts be given back or that the orders allowing the gifts be declared void. The claimants did not object to any lack of notice afforded them of the conservatorship proceedings and gifts.

By its order of September 29, 1992, the county court held that the gifts made to the living children during the existence of

the conservatorship were true gifts and not in satisfaction of any devise. The county court denied the claimants' statements of claim.

The claimants appealed the county court's order denying their claims to the district court, but they failed to file a statement of errors in the district court as required by rule 52(I)(G). However, by its order of December 29, 1993, the district court reversed the county court's order. The district court held that the claimants were entitled to share in the residue of Soule's estate to the extent of a one thirty-fifth interest each and that that interest reached the $465,000 in gifts given the living children. The court held that the gifts should be considered as advancements and allowed the claims. In its order, the district court noted that the claimants had been entitled to notice in the conservatorship proceeding and that no notice of the applications for permission to make the gifts was given.

The copersonal representatives, individually and on behalf of the estate, appeal the order of the district court allowing the claimants' statements of claim.

ASSIGNMENTS OF ERROR

The appellants assert that the district court erred in not dismissing the appeal from the county court because no statement of errors was filed and there was no plain error upon the record, in finding that the doctrine of advancements applied to an estate which passed in partial intestacy, and in allowing the claimants' statements of claim against the estate.

STANDARD OF REVIEW

An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Hannan*, 246 Neb. 828, 523 N.W.2d 672 (1994); *In re Estate of Holt*, 246 Neb. 50, 516 N.W.2d 608 (1994); *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993). However, appellate review is limited to those errors specifically assigned in the appeal to the district court and again assigned as error in an appeal to a higher appellate court. Rule 52(I)(G); *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993); *State v. Gerstner*, 244 Neb. 508, 507 N.W.2d 490 (1993); *State v.*

Keller, 240 Neb. 566, 483 N.W.2d 126 (1992); *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990). Under rule 52(I)(G), an appellate court may at its discretion notice a plain error not assigned. *Lindsay Ins. Agency, supra.*

Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *Dike v. Dike*, 245 Neb. 231, 512 N.W.2d 363 (1994); *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993).

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Sylvis v. Walling, ante* p. 168, 532 N.W.2d 312 (1995); *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995); *Rust v. Buckler*, 247 Neb. 852, 530 N.W.2d 630 (1995).

ANALYSIS

In their appeal to the district court, the claimants failed to file a statement of errors. Rule 52(I)(G) provides in part:

> Within 10 days of filing a notice of appeal, the appellant shall file with the district court a statement of each error a party contends was made by the trial court. Each assignment of error shall be separately numbered and paragraphed. Consideration of the case will be limited to errors assigned and discussed. The district court may, at its option, notice a plain error not assigned.

The purpose of rule 52(I)(G) is to direct the attention of the reviewing court to precisely what error was allegedly committed by the lower court and to advise the nonappealing party of specific issues on appeal. *Lindsay Ins. Agency, supra.* Compliance with rule 52(I)(G) is not a prerequisite to district court or appellate court jurisdiction over an appeal of a decision rendered by the county court. *Lindsay Ins. Agency, supra.* Rule 52(I)(G) does limit appellate review to those errors specifically

assigned in the appeal to the district court and again assigned as error in an appeal to a higher appellate court. *Lindsay Ins. Agency, supra*; *Gerstner, supra*; *Keller, supra*; *Erlewine, supra*. However, under rule 52(I)(G), a district court may at its discretion, notice a plain error not assigned. *Lindsay Ins. Agency, supra*.

Here, the district court was not presented with any specific assignments of error. The notice of appeal merely states that the claimants intended to appeal the county court's judgment denying their claims and does not state any specific reason why such judgment was in error. There is no separate statement of errors.

Without any assignments of error, the district court's review was limited to a discretionary review of the record for plain error. The district court stated in its order that it had conducted its review for error on the record. Therefore, the district court applied the wrong scope of review.

When no statement of errors is filed by an appellant in the district court pursuant to rule 52(I)(G), the higher appellate court may at its discretion consider errors assigned in the appellate court, provided that the record shows that those errors were also assigned in the district court. *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993). Where no errors are specifically assigned in the district court, a higher appellate court may also, at its option, consider plain error not assigned. *Id.*; Neb. Rev. Stat. § 25-1919 (Cum. Supp. 1994); Neb. Ct. R. of Prac. 9D(1)d (rev. 1992). We must therefore limit our review in this case to a consideration of plain error by the county court.

GIFTS, ADVANCEMENTS, OR ADEMPTIONS?

We find no plain error in the county court's order disallowing the claimants' statements of claim. The county court held that the gifts made during the conservatorship were true gifts and not advancements in satisfaction of any devise in the will.

The doctrine of advancements or ademptions applies to wills and intestate estates in Nebraska. *In re Estate of McFayden*, 235 Neb. 214, 454 N.W.2d 676 (1990); Neb. Rev. Stat. §§ 30-2310 and 30-2350 (Reissue 1989). Section 30-2310 applies when a

person dies intestate as to all of his or her estate, and § 30-2350 applies to testamentary dispositions. Without reaching the thorny issue of which statute applies to this estate which passed in partial intestacy, we affirm the judgment of the county court for the reason that none of the gifts made by the conservator on behalf of Soule was accompanied by a contemporaneous writing declaring the gift to be an advancement as required by both §§ 30-2310 and 30-2350. Since our holding rests on the lack of a contemporaneous writing, we also need not address the issues surrounding the ability of a conservator to make advancements against, or to adeem, a testamentary devise.

Section 30-2310 states that an inter vivos transfer is to be "treated as an advancement against the [heir's] share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement."

Section 30-2350 states in part:

> Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part only if the will provides for deduction of the lifetime gift, or the testator declares in a writing contemporaneous with the gift that it is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in a writing contemporaneous with the gift that it is in satisfaction.

We have previously held that absent a clause in the testator's will, a contemporaneous writing, or a written acknowledgement by the devisee, inter vivos gifts cannot be deemed to be advancements under § 30-2350. *In re Estate of McFayden, supra*. Similarly, § 30-2310 requires a contemporaneous writing or a written acknowledgement in order to adeem an inter vivos gift to be an advancement.

Soule completed two series of gifts prior to being placed under a conservatorship without any contemporaneous writing that the gifts were to be treated as advancements. Soule's will is silent regarding advancements.

We question whether the court orders approving the gifts could suffice as contemporaneous writings because courts lack the power to make a will on behalf of a protected person in a

conservatorship proceeding. Neb. Rev. Stat. § 30-2637(3) (Reissue 1989). However, the court orders do not contain any directives that the gifts should be treated as advancements or ademptions, and therefore the orders do not meet the demand of either § 30-2310 or § 30-2350 for a contemporaneous writing.

A donor may express in the gift that the gift is an advancement. *In re Estate of McFayden, supra*. Therefore, as we did in *In re Estate of McFayden*, we examined the checks from the conservatorship estate to the living children. Each check bears the notation "gift," "annual gift," or "gift, no tax." None of the checks contains any notation to the effect that the transfer was intended to be an advancement or ademption.

We further note the district court's holding that the gifts made during the conservatorship were completed without notice to the claimants. In this appeal from a probate case, we are being asked to review actions taken in an earlier, separate conservatorship proceeding. In order to prove their claims against the probate estate, the claimants introduced into evidence selected applications and orders from the conservatorship estate regarding the gifts. These documents raise the question of whether the claimants were afforded adequate notice of the gifting. However, that question was not raised before the county judge who would have knowledge of both proceedings, and the estate was unable to respond to this issue in the record. The question was first raised by the district court in its review. Our review is confined by the theory of the case and by the lack of a complete record of the conservatorship proceedings.

For the foregoing reasons, we find no plain error in the county court's holding that the transfers from the conservatorship estate to the living children were gifts rather than advancements or ademptions.

CONCLUSION

The district court's order reversing the judgment of the county court is reversed, and the cause is remanded with directions to affirm the county court's order denying the claimants' statements of claim.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, C.J., dissents.

CRAIG HEARON, APPELLANT, V. TIM MAY ET AL., APPELLEES. DEBRA WARNING, APPELLANT, V. TIM MAY ET AL., APPELLEES.

540 N.W.2d 124

Filed December 1, 1995. Nos. S-94-187, S-94-188.

1. **Appeal and Error.** An appellate court has an obligation to reach conclusions on questions of law independent of the trial court's ruling.
2. **Summary Judgment.** Summary judgment is to be granted when there is no genuine issue of material fact and 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. **Negligence: Words and Phrases.** Ordinary negligence is doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances.
5. **Pleadings: Demurrer: Appeal and Error.** A litigant must stand on a pleading against which a demurrer has been sustained in order to preserve the right to appeal the decision on the particular demurrer.
6. **Negligence.** Inattention to the duty to exercise care in a situation which reasonably may be regarded as hazardous is evidence of negligence, notwithstanding the act or omission involved would not in all cases, or even ordinarily, be productive of injurious consequences.
7. **Actions: Torts: Negligence.** A participant in a game involving a contact sport is liable for injuries in a tort action only if his or her conduct is such that it is either willful or constitutes a reckless disregard for the safety of another participant. Such a participant is not liable for ordinary negligence.
8. **Negligence.** Instructors, teachers, and coaches are liable for injuries sustained by an instructee if such injuries are received by the instructee while the instructor, teacher, or coach engages in physical contact with the instructee and the instructee's injuries are the proximate result of the ordinary negligence of the instructor, teacher, or coach.
9. ____. Negligence must be measured against the particular set of facts and circumstances which are present in each case.
10. **Negligence: Words and Phrases.** Where lack of supervision by an instructor is relied upon to impose liability, the negligence cause of action is defined as doing something which an ordinary, prudent person would not have done under similar circumstances or failing to do something which an ordinary, prudent person would have done under similar circumstances.

Appeal from the District Court for Chase County: JOHN J. BATTERSHELL, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

James J. Paloucek, of Kelley, Scritsmier & Byrne, P.C., for appellants.

Stephen W. Kay, of Kay & Kay, for appellee May.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

Craig Hearon, a high school student wrestler, and his mother, Debra Warning, each filed a petition against Tim May, a wrestling referee, claiming that Hearon suffered spinal injuries as a direct and proximate result of (1) May's ordinary negligence and (2) May's reckless disregard for the safety of Hearon while May was instructing Hearon on a wrestling maneuver.

On May's motion, the district court for Chase County struck from each of the plaintiff's amended petitions the ordinary negligence cause of action. Also on May's motion, the district court entered summary judgment in favor of May on each amended petition and dismissed the petitions' remaining causes of action, which alleged reckless disregard for Hearon's safety. Hearon and Warning timely appealed from the trial court's holdings.

The evidential record reflects that at the time of Hearon's injuries, May was instructing Hearon on how to appropriately conduct a wrestling maneuver, the "fireman's carry."

We hold that ordinary negligence is a proper cause of action when negligent supervision or negligent instruction is involved in a sporting activity. Hearon and Warning, therefore, should not have been precluded from alleging in their amended petitions that May is liable for Hearon's injuries on the grounds of negligent supervision and negligent instruction.

We reverse the trial court's orders that struck from the petitions in these cases the causes of actions which alleged that May was negligent and the trial court's entries of summary judgment in favor of May.

ASSIGNMENTS OF ERROR

In substance, Hearon and Warning contend that the trial court erred in (1) sustaining May's demurrers, (2) sustaining May's

motions to strike, (3) granting May's motions for summary judgment, and (4) determining that Hearon and Warning are not entitled to a jury trial in their actions against May.

STANDARD OF REVIEW

An appellate court has an obligation to reach conclusions on questions of law independent of the trial court's ruling. *Lincoln Lumber Co. v. Fowler, ante* p. 221, 533 N.W.2d 898 (1995).

Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Callan v. Balka, ante* p. 469, 536 N.W.2d 47 (1995). 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. See *SID No. 57 v. City of Elkhorn, ante* p. 486, 536 N.W.2d 56 (1995).

FACTS

May, a Nebraska State Athletic Association certified high school wrestling referee, was a former two-time district champion high school student wrestler from Banner County who qualified for state high school wrestling meets for 4 years. May also played football for 2 years at the University of Wyoming.

The Dundy County High School athletic director hired May to referee a January 31, 1991, wrestling meet between Dundy County High School and Culbertson High School.

At the conclusion of the wrestling meet between the two high schools, May, with the approval of Dundy's team coach and the school athletic director, volunteered to instruct Dundy wrestlers on certain wrestling maneuvers. The Dundy coach called his Dundy wrestlers together after the meet and told them that May would demonstrate some moves to help the team. The instruction by May was not required, and some of the Dundy wrestlers chose to leave and not attend May's instruction.

The fireman's carry was among the maneuvers upon which May instructed the wrestlers.

In his deposition, Hearon described the fireman's carry as "shoot[ing] in on somebody like you're going to take them

down in a single-leg, you capture their arm and you more or less pull them off your shoulder with the use of their arm and your other arm onto the mat." According to Hearon, the fireman's carry is a takedown maneuver in which the opponent usually will fall on his hip or back.

May, in his deposition, described the fireman's carry as being initiated with a "head tie." The wrestler grabs an opponent's arm, ducks his own head underneath the opponent's "shoulder pit," and with one knee drops to the mat and to the middle of the opponent's legs, and with his hand under the opponent's crotch, the wrestler throws the opponent to the mat.

After May instructed the wrestlers in a group, the team coach told the wrestlers to separate into pairs and work on the maneuvers. Hearon practiced the maneuvers with May because an even number of high school wrestlers was not present. Hearon performed the fireman's carry on May more than once at near regular speed. The more that Hearon performed the maneuver on May, the more May resisted Hearon's attempted takedowns, which, according to Hearon, is normal in practicing a wrestling maneuver.

According to Hearon's deposition, as he was once again preparing to attempt the fireman's carry, May, without telling Hearon, began performing the fireman's carry on Hearon and performed it more than once. May stated in his deposition that he did inform Hearon that he would be performing the fireman's carry on Hearon. The two then alternated in performing the fireman's carry with resistance, as if they were in a meet. At all times during the drill, May's intention was not to engage in wrestling, but to instruct Hearon and demonstrate to him the proper way to perform selected wrestling maneuvers.

During the drill, May, at approximately 75 percent full speed, executed the fireman's carry on Hearon. The petitions allege that, instead of landing on his hip or his back, Hearon landed on his head, and as a result, Hearon received a fracture and displacement of his cervical spine.

Hearon and Warning filed petitions against May, Dundy County Public Schools, the coach, and the athletic director. As to May, the petitions alleged that May was negligent in wrestling with Hearon. May filed a demurrer to each petition. The trial

court sustained the demurrers on the grounds that an allegation of reckless disregard for Hearon's safety was required to state a cause of action and that an allegation of ordinary negligence was not sufficient. Ordinary negligence is doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances. *Kappenman v. Heule*, 241 Neb. 54, 486 N.W.2d 27 (1992).

Hearon and Warning did not stand on their pleadings, but, rather, filed amended petitions against May, Dundy County Public Schools, the coach, and the athletic director. Each petition stated that the claim made upon Dundy County Public Schools was filed in compliance with the Nebraska Political Subdivisions Tort Claims Act. No such claim was made against May.

The first cause of action in each amended petition alleged negligent supervision on the part of all defendants, including May. The second cause of action in each amended petition alleged negligent instruction on the part of all defendants, including May. The third cause of action in each amended petition alleged that all defendants, including May, acted with reckless disregard for Hearon's safety in their supervision of Hearon. The fourth cause of action in each amended petition alleged that all defendants, including May, acted with reckless disregard for Hearon's safety in their instruction of Hearon.

May filed motions to strike the first two causes of action in each of the amended petitions, which alleged that May was guilty of ordinary negligence, because such allegations were contrary to the previous court orders sustaining his demurrers. The trial court sustained May's motions to strike the first two causes of action as they applied to him in each of the amended petitions.

In a progression order, the trial court consolidated the cases for trial. Because the cases involved a political subdivision, the court ordered that they would be tried to the court rather than to a jury. Hearon and Warning objected to that holding. They contended they were entitled to a jury trial as to May because he was not protected by the Political Subdivisions Tort Claims Act.

In each case, May moved for summary judgment and asked that the amended petitions be dismissed. Among the exhibits offered by May in support of his summary judgment motions were Hearon's and Warning's responses to requests for admissions, in which they each admitted that May was not acting with reckless disregard for Hearon's safety. They also admitted that they had no facts or evidence establishing that May acted with reckless disregard for Hearon's safety. The trial court sustained May's motions for summary judgment.

ANALYSIS

We initially note that the sustained demurrers, motions to strike, and motions for summary judgment from which Hearon and Warning appeal were filed by May alone. The other defendants did not take part in those motions and have been silent in these appeals.

DEMURRERS

Hearon and Warning contend that the trial court erred in sustaining May's demurrers. However, Hearon and Warning did not stand on their original petitions, but, rather, filed amended petitions. A litigant must stand on a pleading against which a demurrer has been sustained in order to preserve the right to appeal the decision on the particular demurrer. See *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994). Therefore, we do not address Hearon's and Warning's first assignments of error.

MOTIONS TO STRIKE

Hearon and Warning contend that the trial court erred in sustaining May's motions to strike the causes of action which alleged negligent supervision and negligent instruction on the part of May.

The trial court granted the motions to strike on the ground that a claim of ordinary negligence does not properly state a cause of action for injuries resulting from physical contact sports.

In arguing that the trial court erred in striking the negligent supervision and negligent instruction causes of action, Hearon and Warning rely upon *Brahatcek v. Millard School District*, 202 Neb. 86, 273 N.W.2d 680 (1979), a wrongful death action

in which a ninth grade student died as a result of being accidentally struck in the skull by a golf club during a physical education class. In a bench trial, the *Brahatcek* trial court entered judgment in favor of the plaintiff. We affirmed the trial court and held that inattention to the duty to exercise care in a situation which reasonably may be regarded as hazardous is evidence of negligence, notwithstanding the act or omission involved would not in all cases, or even ordinarily, be productive of injurious consequences. *Id.*

In *Ohnstad v. Omaha Public Sch. Dist. No. 1*, 232 Neb. 788, 442 N.W.2d 859 (1989), we also applied an ordinary negligence cause of action in a sports injury taking place during an organized high school sporting event. In *Ohnstad*, a 17-year-old high school student died from injuries sustained in a pole-vaulting accident while participating at the 1983 Metro Conference track meet. The administrator of the decedent's estate brought an action under the Political Subdivisions Tort Claims Act alleging negligent supervision and instruction. The trial court found for the defendant on the ground that the decedent's own actions were the proximate cause of the injuries. Upon review of the record, we affirmed the trial court and held that sufficient evidence supported the court's findings. *Id.*

In the cases at bar, the trial court based its holdings on *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990). Dotzler sued Tuttle for injuries arising out of a collision between the two during a "pickup" basketball game. The trial court sustained Tuttle's demurrer as to Dotzler's cause of action for negligence and the jury returned a verdict in favor of Tuttle on the cause of action involving an allegation of recklessness. We defined the issue on appeal as whether an individual participating in a contact sport has a cause of action against another participant because of injuries sustained as a result of ordinary negligence on the part of that other participant. We held that a participant in a game involving a contact sport is liable for injuries in a tort action only if his or her conduct is such that it is either willful or constitutes a reckless disregard for the safety of another participant. We also held such a participant is not liable for ordinary negligence.

In so holding, the *Dotzler* opinion relied upon the policy

rationale that vigorous and active participation in sporting events should not be chilled by the threat of litigation, and that fear of civil liability stemming from negligent acts occurring in an athletic event could curtail the proper fervor with which the game should be played and discourage individual participation.

As a result, in the cases at bar, whether an appropriate cause of action is alleged depends upon whether May was instructing or supervising Hearon at the time of Hearon's injuries or whether May and Hearon were participants in a contact sport.

Although May was not the team coach, a Dundy high school teacher, or an official instructor, he did, after the wrestling meet, assume the role of instructor as to Hearon. May volunteered to instruct the high school wrestlers, and at the time Hearon received his injuries, May considered himself to be instructing Hearon on how to perform the fireman's carry. Hearon's high school coach and athletic director also viewed the post-wrestling-meet session as a time of instruction and practice led by a volunteer, May.

Hearon stated in his deposition that, as May increased his resistance to Hearon's attempted maneuvers, the drill simulated an actual wrestling match. Hearon also stated that increased resistance to maneuvers and continual practice of a maneuver are the routine forms of organized practice and coaching.

In the cases at bar, the record does not reflect that May and Hearon were participants in a contact sport at the time of Hearon's injury. The record reflects that Hearon was injured while May was instructing him on how to effectively participate in a contact sport. The rule in *Dotzler* does not apply in Hearon's case because the *Dotzler* facts do not concern an instructor injuring a student during instruction.

We hold that instructors, teachers, and coaches are liable for injuries sustained by an instructee if such injuries are received by the instructee while the instructor, teacher, or coach engages in physical contact with the instructee and the instructee's injuries are the proximate result of the ordinary negligence of the instructor, teacher, or coach.

As a matter of law, Hearon and Warning may plead causes of action against May that allege negligent supervision and negligent instruction by May due to his actions as an alleged

volunteer wrestling instructor. Negligence must be measured against the particular set of facts and circumstances which are present in each case. *Center State Bank v. Dana, Larson, Roubal & Assoc.*, 226 Neb. 408, 411 N.W.2d 635 (1987). According to our holding in *Brahatcek v. Millard School District*, 202 Neb. 86, 273 N.W.2d 680 (1979), where lack of supervision by an instructor is relied upon to impose liability, the negligence cause of action is defined as doing something which an ordinary, prudent person would not have done under similar circumstances or failing to do something which an ordinary, prudent person would have done under similar circumstances. *Id.*

Motions for Summary Judgment

Hearon and Warning also contend that the trial court erred in granting May's motions for summary judgment. As a result of the trial court's striking the causes of action alleging ordinary negligence by May, the motions for summary judgment were in reference only to the two causes of action alleging reckless disregard by May for the safety of Hearon.

The record reflects that Hearon and Warning both admitted that May did not act with reckless disregard for Hearon's safety and that the record is absent of any evidence or inference establishing recklessness on the part of May. As a result, the trial court did not err in finding that there was no genuine issue of material fact as to whether May was liable for acting with reckless disregard for Hearon's safety.

Jury Trial

Nothing is alleged in any of the pleadings of Hearon, Warning, or May to indicate that at the time Hearon received his injuries, May was covered under the Political Subdivisions Tort Claims Act. At oral argument in this court, May conceded to Hearon's and Warning's assignments that the trial court erred in determining that Hearon and Warning were not entitled to a jury trial in their actions against May. Therefore, we do not need to further discuss this undisputed assignment of error.

CONCLUSION

Hearon, a high school student wrestler, was injured during an

instructional practice session following a wrestling meet. The proper standard of care for negligent supervision or negligent instruction of an organized sports activity is whether the defendant acted as a reasonably careful person in a similar circumstance. Therefore, we reverse the district court's order sustaining May's motions to strike all causes of action alleging ordinary negligence.

We affirm the trial court's entries of summary judgment in May's favor regarding Hearon's and Warning's causes of action, alleging that May was liable to them as a result of May's alleged reckless disregard for Hearon's safety.

We remand Hearon's and Warning's causes to the district court for further proceedings regarding their causes of action against May that allege negligent supervision and negligent instruction on his part.

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

WHITE, C.J., concurs.

IN RE ESTATE OF MILDRED MORSE, DECEASED.
BETTY HUNTER, APPELLANT, V. DANIEL V. MORSE, PERSONAL REPRESENTATIVE OF THE ESTATE OF MILDRED MORSE, DECEASED, APPELLEE.

540 N.W.2d 131

Filed December 1, 1995. No. S-94-677.

1. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
2. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be

noted by an appellate court on its own motion.

3. ____. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.

Appeal from the District Court for Dakota County, MAURICE REDMOND, Judge, on appeal thereto from the County Court for Dakota County, RODNEY R. SMITH, Judge. Judgment of District Court affirmed.

Kenneth W. Pickens for appellant.

James E. Walker for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Mildred Morse died on January 26, 1989. Morse's four stepchildren were listed in her will as beneficiaries. Betty Hunter, one of the stepchildren, had issued a $15,000 promissory note to Morse in 1981. Morse's personal representative offset the amount of the note from Hunter's distributive share.

The county court held that the personal representative properly retained the $15,000, and the district court affirmed. Hunter appeals, asserting the district court committed plain error in failing to apply Neb. Rev. Stat. § 30-24,101 (Reissue 1989). We removed the appeal to this court under our authority to regulate the caseloads of the appellate courts in this state.

SCOPE OF REVIEW

Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991). Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion. *Long v. Hacker, supra*.

FACTS

Morse died on January 26, 1989. Her four stepchildren were listed as beneficiaries in her will, which was admitted to probate on February 9, 1989. Hunter had issued a promissory note in the amount of $15,000 to Morse on December 11, 1981. Although the note was due on December 11, 1984, Morse never made a demand on the note. However, after Morse's death, the note was listed on the inventory of the estate filed September 20, 1989. As a result, Morse's personal representative offset $15,000 from Hunter's share of the estate.

The petition for complete settlement was filed by Morse's personal representative on June 10, 1993. On July 8, Hunter filed a resistance to the proposed schedule of distribution. A hearing was held in the county court on July 12. On September 2, the county court found that the personal representative had properly retained $15,000 from Hunter's distributive share. The district court affirmed because no statement of errors and issues on appeal had been filed, and the court found no plain error on the record.

ASSIGNMENT OF ERROR

Hunter asserts that the district court erred in failing to find plain error on the record.

ANALYSIS

Concisely stated, Hunter's argument is that the promissory note is barred by the statute of limitations and, therefore, should not be offset against her share of Morse's estate. According to Hunter, the district court committed plain error in not allowing her to assert this defense under § 30-24,101.

Hunter failed to make any assignments of error in her appeal to the district court. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Dike v. Dike*, 245 Neb. 231, 512 N.W.2d 363 (1994). Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial

process. *Long v. Hacker, supra*; *Katskee v. Nevada Bob's Golf of Neb., supra*.

Here, Hunter asks this court to find plain error on an issue that was raised at trial. Hunter raised the statute of limitations defense, and it was rejected by the trial court. Plain error is error plainly evident from the record and not complained of at trial. *Long v. Hacker, supra*. The statute of limitations issue was complained of at trial; therefore, plain error does not exist.

CONCLUSION

Because we do not find plain error, the judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF ALEX T., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. KIMBERLY T. AND ERNEST T., APPELLEES, AND DONALD F. AND SHEILA M. EBBERS, INTERVENORS-APPELLEES.
IN RE INTEREST OF KILE P., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. KIMBERLY T., APPELLEE, AND DONALD F. AND SHEILA M. EBBERS, INTERVENORS-APPELLEES.
IN RE INTEREST OF KRYSTAL P., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. KIMBERLY T. AND JOHN P., APPELLEES, AND DONALD F. AND SHEILA M. EBBERS, INTERVENORS-APPELLEES.

540 N.W.2d 310

Filed December 1, 1995. Nos. S-95-077, S-95-082, S-95-083.

1. **Jurisdiction: Appeal and Error.** Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the power, but it is the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does

not involve a factual dispute is a matter of law; therefore, an appellate court reaches a conclusion independent from that of the trial court.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the County Court for Gage County, STEVEN BRUCE TIMM, Judge. Judgment of Court of Appeals affirmed, and cause remanded with directions.

Don Stenberg, Attorney General, Royce N. Harper, and James L. Hatheway, Special Assistant Attorney General, for appellant.

Jerry L. Shelton, Deputy Gage County Attorney.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

The Nebraska Department of Social Services (Department) petitions this court for further review of the Nebraska Court of Appeals decision which dismissed these consolidated appeals for lack of jurisdiction. Krystal P., Kile P., and Alex T. were adjudicated as children lacking proper parental care under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). In its order of January 9, 1995, the juvenile court disapproved the Department's case plan for the three children and implemented its own plan. The Department appealed the order directly to the Court of Appeals without requesting review by a juvenile review panel as provided under Neb. Rev. Stat. §§ 43-287.01 to 43-287.06 (Reissue 1993 & Cum. Supp. 1994). The Court of Appeals summarily dismissed the appeals for lack of jurisdiction, and we granted further review.

SCOPE OF REVIEW

Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the power, but it is the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it. *Jones v. State, ante* p. 158, 532 N.W.2d 636 (1995).

A jurisdictional question that does not involve a factual dispute is a matter of law; therefore, an appellate court reaches a conclusion independent from that of the trial court. *Id.*

FACTS

This opinion involves three appeals which were consolidated by the Court of Appeals on April 27, 1995. Kimberly T. is the mother of Krystal, Kile, and Alex. Krystal's father is John P., Alex's father is Ernest T., and the father of Kile is unknown. Each child has been adjudicated under § 43-247(3)(a) and placed in the custody of the Department. Relinquishments and consents to adoption were signed by Kimberly regarding Krystal and Kile and by John regarding Krystal.

On July 5, 1994, the juvenile court determined that it did not have jurisdiction to determine the validity of the relinquishments and consents. Petitions for adoption of Krystal and Kile were filed by Donald F. and Sheila M. Ebbers in Gage County Court on or about July 14. The Department subsequently intervened to challenge the validity of the parents' relinquishments and consents.

On November 8, 1994, the Gage County Court found that the relinquishments and consents were valid without the consent of the Department or the juvenile court and that there was no authority to support the Department's claim that its consent was required for the adoptions to go forward. The Department appealed the validity of the relinquishments and consents to the Gage County District Court, which affirmed the county court and ordered the cases remanded to the county court for further adoption-related activities. The Department appealed to the Court of Appeals, and we removed that case to our docket. See *In re Adoption of Krystal P. & Kile P., post* p. 907, 540 N.W.2d 312 (1995).

In the present case, the Department appeals the January 9, 1995, order of the county court for Gage County, sitting as a juvenile court. The order stated that by early 1993, all three children had been placed in foster care. Upon a hearing on the Ebberses' motion to change the custody from foster care to the Ebberses, the court found no evidence that the Ebberses were unfit as custodians or prospective adoptive parents. The court noted that the Department's opposition was based upon the Department's belief that its consent was a prerequisite for any adoption proceedings and upon an opinion that the foster parents were "better" adoptive parents than the Ebberses.

The juvenile court found by a preponderance of the evidence that the Department's plan for the children was contrary to the best interests of the children and disapproved the Department's plan. The court set forth a plan pursuant to Neb. Rev. Stat. § 43-285 (Reissue 1993) with the goal being adoption of the children by either the Ebberses or the foster parents.

The Department appealed directly to the Court of Appeals, which issued an order to show cause why the cases should not be dismissed for lack of jurisdiction. In response to this order, the Department asserted that the juvenile review panel did not have authority to deal with evidentiary and procedural errors committed by the trial court because the panel's jurisdiction was limited to approving or modifying the case plan. The Court of Appeals subsequently dismissed the appeals for lack of jurisdiction, stating that the Department must first appeal to the juvenile review panel.

ASSIGNMENTS OF ERROR

The Department asserts that the Court of Appeals erred in (1) ruling that it did not have jurisdiction to hear the appeals, (2) not ruling that the juvenile review panel had limited jurisdiction, and (3) not ruling that the juvenile court made numerous evidentiary errors which the juvenile review panel did not have authority to rule upon because of its limited jurisdiction.

ANALYSIS

The Department assigns a number of evidentiary errors in its petition for further review. We do not reach these issues, as we address only the jurisdiction of the juvenile review panel.

In *In re Interest of M.J.B.*, 242 Neb. 671, 496 N.W.2d 495 (1993), the county court, sitting as a juvenile court, directed the juvenile's father to undergo therapy and ordered the Department of Social Services to pay for the therapy. The department disagreed with the order and sought review by the district court. The issues were whether the order the department appealed to the district court fell within the statutory scheme of providing for expedited review of certain juvenile dispositions by a juvenile review panel found in §§ 43-287.01 through 43-287.06 and whether such expedited appeal was the sole avenue of review.

Expedited review to the juvenile review panel occurs when a court orders the implementation of a plan for the care and placement of the juvenile different than the plan prepared by the Department and the Department believes that the court-ordered plan is not in the best interests of the juvenile. The contested dispositional plans are removed from the appellate process for purposes of expediting review.

We held in *In re Interest of M.J.B.* that if such conditions exist, the expedited appeal to the juvenile review panel is the sole avenue of review available to the Department. In the case at bar, the juvenile court disapproved of the Department's plan and implemented a different plan. The Department did not believe that the court's plan was in the best interests of the juveniles. Therefore, under our holding in *In re Interest of M.J.B.*, the expedited review to the juvenile review panel is the sole avenue of review available to the Department. Accordingly, the Court of Appeals properly dismissed the appeals for lack of jurisdiction.

The judgment of the Court of Appeals is affirmed, and the causes are remanded to the juvenile review panel for proceedings consistent with this opinion.

AFFIRMED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. WALTER M. CALINGER, RESPONDENT.

539 N.W.2d 846

Filed December 1, 1995. No. S-95-218.

Original action. Judgment of suspension.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Formal charges were filed by the Disciplinary Review Board of the Nebraska State Bar Association against Walter M. Calinger. The charges alleged that Calinger continuously neglected a legal matter entrusted to him by his client involving a workers' compensation case. As a result of Calinger's actions, the workers' compensation petition for benefits was dismissed.

The charges asserted that Calinger's actions were a violation of his oath of office as an attorney licensed to practice law in the State of Nebraska, see Neb. Rev. Stat. § 7-104 (Reissue 1991), and were a violation of the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102; Canon 6, DR 6-101; and Canon 7, DR 7-101 and DR 7-106.

This court appointed a referee, who set the matter for hearing on July 21, 1995. Calinger did not appear personally or by counsel. Evidence was adduced, and the hearing was continued until August 15, 1995, at 9 a.m. at the office of the referee to ensure that personal service had been made upon Calinger. At the continuation of the hearing, personal service had been obtained, and Calinger had been advised of the August 15 hearing. Further evidence was then adduced, and the hearing concluded. Calinger failed to appear for the hearing in person or through counsel, and the case was submitted on the testimony and evidence offered at the hearing.

The referee found that the evidence showed clearly and convincingly that Calinger was in violation of DR 1-102, DR 6-101, DR 7-101, and DR 7-106. In his report, the referee recommended that this court impose upon Calinger a 1-year suspension from the practice of law.

We accept the report of the referee and the recommendation of a 1-year suspension. Calinger is hereby suspended from the practice of law in the State of Nebraska for a period of 1 year, effective immediately. Calinger is further ordered to reimburse the Nebraska State Bar Association for the costs expended in this proceeding, including the fee and costs submitted by the referee.

JUDGMENT OF SUSPENSION.

FAHRNBRUCH, J., not participating.

IN RE INTEREST OF KRYSTAL P., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. KIMBERLY T. AND JOHN P., APPELLEES, AND DONALD F. AND SHEILA M. EBBERS, INTERVENORS-APPELLEES.
IN RE INTEREST OF KILE P., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. KIMBERLY T., APPELLEE, AND DONALD F. AND SHEILA M. EBBERS, INTERVENORS-APPELLEES.
IN RE INTEREST OF ALEX T., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. KIMBERLY T. AND ERNEST T., APPELLEES, AND DONALD F. AND SHEILA M. EBBERS, INTERVENORS-APPELLEES.

540 N.W.2d 316

Filed December 1, 1995. Nos. S-95-456, S-95-457, S-95-458.

1. **Jurisdiction: Appeal and Error.** Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the power, but it is the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is a matter of law; therefore, an appellate court reaches a conclusion independent from that of the trial court.

Appeal from the Juvenile Review Panel, GRATEN D. BEAVERS, DANIEL J. BECKWITH, and ALAN L. BRODBECK, Judges, on appeal thereto from the County Court for Gage County, STEVEN BRUCE TIMM, Judge. Judgment of Review Panel reversed, and cause remanded.

Don Stenberg, Attorney General, Royce N. Harper, and James L. Hatheway, Special Assistant Attorney General, for appellant.

Jerry L. Shelton, Deputy Gage County Attorney.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

This opinion involves three consolidated appeals. Krystal P., Kile P., and Alex T. were adjudicated as children lacking proper parental care under Neb. Rev. Stat. § 43-247(3)(a) (Reissue

1993). The dispositional order of the juvenile court was different than the proposed disposition by the Nebraska Department of Social Services (Department). The Department appealed this decision to a juvenile review panel after it had already appealed to the Nebraska Court of Appeals. The juvenile review panel dismissed for lack of jurisdiction because the appeals were pending in the Court of Appeals. The Department appealed the dismissal of the review panel, and we removed the appeals to our docket.

SCOPE OF REVIEW

Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the power, but it is the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it. *Jones v. State, ante* p. 158, 532 N.W.2d 636 (1995).

A jurisdictional question that does not involve a factual dispute is a matter of law; therefore, an appellate court reaches a conclusion independent from that of the trial court. *Id.*

FACTS

The facts of these appeals are set forth in *In re Interest of Alex T. et al., ante* p. 899, 540 N.W.2d 310 (1995). We repeat only such facts as are necessary for our disposition of this matter. On January 9, 1995, the juvenile court disapproved the Department's case plan, which called for reunification of the children with their mother. According to the court, the Department's plan failed to consider that the parents had possibly relinquished their parental rights and that, therefore, the plan was not in the best interests of the children. The court implemented its own plan, which allowed the children to remain in the Department's custody and to continue to reside with the foster parents. The court's plan included counseling to determine whether the proposed adoptive parents were fit for such adoption, and the plan ultimately called for adoption of the children by either the proposed adoptive parents or the foster parents.

On January 19, 1995, the Department appealed directly to the Court of Appeals from the juvenile court's order of January 9. The Department subsequently filed an identical appeal to the

juvenile review panel. The Court of Appeals summarily dismissed the January 19 appeal for lack of jurisdiction, explaining that the Department had to first file an appeal to the juvenile review panel. We affirmed the Court of Appeals' dismissal in *In re Interest of Alex T. et al., supra.*

ANALYSIS

In the present case, the juvenile review panel held that it did not have jurisdiction because the cases had been appealed to the Court of Appeals. This determination resulted in a stalemate, in which the Court of Appeals declined jurisdiction in three appeals and the juvenile review panel declined jurisdiction in three appeals. For the reasons set forth in our opinion in *In re Interest of Alex T. et al., supra*, we reverse the decision of the juvenile review panel and remand the causes to the juvenile review panel for further disposition.

REVERSED AND REMANDED.

IN RE ADOPTION OF KRYSTAL P. AND KILE P.
DONALD F. AND SHEILA M. EBBERS, APPELLEES, V. KIMBERLY T. AND JOHN P., APPELLEES, AND STATE OF NEBRASKA, INTERVENOR-APPELLANT.

540 N.W.2d 312

Filed December 1, 1995. No. S-95-462.

1. **Jurisdiction: Appeal and Error.** Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the power, but it is the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it.
2. **Jurisdiction.** Lack of subject matter jurisdiction may be raised sua sponte by a court if necessary.
3. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.
4. **Final Orders.** In order for a decree to qualify as "final," it must dispose of the whole merits of the case and leave nothing for further consideration of the court.

5. **Final Orders: Appeal and Error.** Whether an order is final and appealable does not depend upon whether that order completely disposes of the action. An order affecting a substantial right made during a special proceeding is a final and appealable order.

Appeal from the District Court for Gage County, ORVILLE L. COADY, Judge, on appeal thereto from the County Court for Gage County, STEVEN BRUCE TIMM, Judge. Appeal dismissed.

Don Stenberg, Attorney General, Royce N. Harper, and James L. Hatheway, Special Assistant Attorney General, for intervenor-appellant.

Gary G. Thompson for appellees Ebbers.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

This is an appeal from the order of the district court for Gage County affirming the county court's ruling that the relinquishments and consents to adoption executed by Kimberly T. and John P. were valid and that no written consent by the Nebraska Department of Social Services (Department), the legal guardian of the children, was necessary prior to the filing of petitions for adoption.

SCOPE OF REVIEW

Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the power, but it is the duty of the appellate court to determine whether such appellate court has jurisdiction over the matter before it. *Jones v. State, ante* p. 158, 532 N.W.2d 636 (1995). Lack of subject matter jurisdiction may be raised sua sponte by a court if necessary. *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994).

In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995).

FACTS

This appeal involves two juveniles: Krystal P. and Kile P. On September 18, 1992, Krystal was placed in the temporary custody of the Department. On October 16, her biological

mother, Kimberly, admitted the allegations stated in the amended petition, namely, that by no fault of her own, she lacked the ability to give proper support to Krystal, and Krystal was adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). Krystal's biological father, John, did not contest the admission. At that time, legal custody of Krystal was placed with the Department, while physical custody remained with Kimberly. On March 29, 1993, the Department was given custody for the purpose of suitable foster placement.

On January 22, 1993, Kimberly admitted the allegations of a similar petition relating to Kile, and he was adjudicated under § 43-247(3)(a). Kile's biological father is unknown, and no person has claimed paternity of record. A dispositional order was entered on January 22, in which Kile was placed in the legal custody of the Department and the physical custody of Kimberly. On March 29, there was a review of the disposition, and the Department was given custody for the purpose of suitable foster placement.

The following facts apply to both juveniles: On May 3, 1994, Donald F. and Sheila M. Ebbers appeared at a dispositional hearing and filed a motion to intervene in the juvenile court proceedings for the purpose of adopting the children. The matter was taken under advisement. On June 10, the juvenile court again reviewed the disposition and adopted a goal of reunifying Krystal and John, with legal custody remaining with the Department. With regard to Kile, the juvenile court adopted a goal of long-term foster care or adoption.

On July 5, 1994, the juvenile court issued an order stating that on December 20, 1993, Kimberly and John had executed relinquishments authorizing the private adoption of Krystal by the Ebberses and that Kimberly had executed a relinquishment authorizing the private adoption of Kile by the Ebberses also. The juvenile court determined that it did not have authority or jurisdiction to determine the validity of the parental relinquishments and consents to adoption. The juvenile court determined that the Ebberses would be required to file an adoption proceeding in the county court. The Ebberses were allowed to intervene conditioned upon their filing adoption petitions.

The Ebberses filed their petitions for adoption of Krystal and Kile in the Gage County Court on or about July 14, 1994. Attached to the petitions was the Department's home study of the Ebberses as well as the relinquishments and consents to adoption completed by Kimberly and John. On September 28, 1994, the Department filed a petition for intervention, alleging that the relinquishments and consents to adoption were invalid without the consent of the Department and asserting that various juvenile code and adoption statutes established that the Department, as legal custodian of the children, must consent to any proposed adoption of the children before an adoption proceeding may go forward. The Department also claimed the juvenile court had to give its permission for the adoption proceeding to go forward.

On November 8, 1994, the Gage County Court found that the relinquishments and consents to adoption were valid without the consent of either the Department or the juvenile court and that there was no authority to support the Department's claim that its consent was required for the adoption to go forward. The Department appealed to the Gage County District Court. The district court affirmed the county court and ordered the case remanded to the county court for a hearing in accordance with Neb. Rev. Stat. § 43-109 (Reissue 1993) and other necessary adoption-related activities. The Department appealed to the Nebraska Court of Appeals, and we removed this case to our docket.

ASSIGNMENTS OF ERROR

The Department assigns the following errors to the district court: (1) The court erred in not ruling that the consent of the juvenile court was necessary; (2) the court erred in not ruling that the consent of the Department, as legal custodian of Krystal and Kile, was necessary; (3) the court erred in not ruling that the parental relinquishments were invalid; and (4) the court erred in not ruling that the consents to adoption were invalid.

ANALYSIS

Whether a question is raised by the parties concerning jurisdiction of a lower court or tribunal, it is not only within the power, but it is the duty of the appellate court to determine

whether such appellate court has jurisdiction over the matter before it. *Jones v. State, ante* p. 158, 532 N.W.2d 636 (1995). Lack of subject matter jurisdiction may be raised sua sponte by a court if necessary. *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994).

We must first determine whether the order finding that the relinquishments and consents to adoption were valid was a final, appealable order. In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995).

Neb. Rev. Stat. § 25-1902 (Reissue 1989) defines a final order as: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon summary application in an action after judgment . . . ." In construing § 25-1902, we have held that in order for a decree to qualify as "final," it must dispose of the whole merits of the case and leave nothing for further consideration of the court. *Standard Fed. Sav. Bank v. State Farm, ante* p. 552, 537 N.W.2d 333 (1995); *Klein v. Klein*, 230 Neb. 385, 431 N.W.2d 646 (1988).

In *Jarrett v. Eichler*, 244 Neb. 310, 313, 506 N.W.2d 682, 685 (1993), we stated: "Whether an order is final and appealable does not depend upon whether that order completely disposes of the action. . . . [A]n order affecting a substantial right made during a special proceeding is a final and appealable order." We noted that the phrase "special proceeding" means every civil remedy which is not encompassed in chapter 25 of the Nebraska Revised Statutes. However, to be final and appealable, the order must affect a substantial right.

In *Klein*, the court dissolved the marriage and awarded custody of the daughter to the father. The father subsequently remarried and filed an application seeking consent for adoption and alleging that the mother had abandoned the daughter for more than 6 months and that the adoption would be in the daughter's best interests. The consent granted by the district court did nothing more than permit the county court, as the tribunal having exclusive original jurisdiction over adoption, to

entertain such proceedings. The question was whether such consent was a final, appealable order. We held that the granting of consent to the adoption by the district court was not a final, appealable order and dismissed the appeal.

In the present case, the validity of the parental relinquishments and consents to adoption is only one of the matters which must be determined in an adoption proceeding. The county court's order regarding the validity of the relinquishments and consents to adoption is not a final order. Since the district court lacked jurisdiction because the order was not a final, appealable order, this court also lacks jurisdiction to hear the matter on appeal. This court only has jurisdiction to hear appeals from final orders. See Neb. Rev. Stat. § 25-1911 (Cum. Supp. 1994). Accordingly, this appeal must be dismissed.

APPEAL DISMISSED.

IN RE ADOPTION OF KASSANDRA B. AND NICHOLAS B. TIMOTHY L. SAVAGE AND KAREN M. SAVAGE, APPELLANTS, V. MARTIN GOMEZ, INTERVENOR-APPELLEE.

540 N.W.2d 554

Filed December 8, 1995. No. S-94-101.

1. **Jurisdiction.** Statutory authority to exercise subject matter jurisdiction may be raised sua sponte by a court.
2. **Adoption: Statutes.** The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed.
3. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
4. **Adoption: Pleadings.** Neb. Rev. Stat. § 43-102 (Reissue 1988) demands that certain consents or substitute consents be filed with the adoption petition.
5. **Adoption: Parent and Child.** Neb. Rev. Stat. § 43-104(3) (Reissue 1993) provides that consent to an adoption is required from both parents if living, subject to certain exceptions.

6. ____: ____. When a biological parent's consent is not required by Neb. Rev. Stat. § 43-104(3) (Reissue 1993), the prospective adoptive parents must obtain substitute consent as specified by Neb. Rev. Stat. § 43-105 (Reissue 1993).
7. **Statutes: Legislature: Intent.** A court must 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 and, if possible, discover the Legislature's intent from the language of the statute itself.
8. **Adoption: Courts: Jurisdiction.** Without requisite consents, a county court lacks authority, or jurisdiction, to entertain an adoption proceeding.
9. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction so as to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
10. **Judgments: Jurisdiction: Collateral Attack.** 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 raised at any time in any proceeding.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and MUES, Judges, on appeal thereto from the District Court for Cass County, RANDALL L. REHMEIER, Judge, on appeal thereto from the County Court for Cass County, WILLIAM B. ZASTERA, Judge. Remanded with directions to dismiss.

Herbert J. Elworth and Roger K. Johnson, of Casey, Elworth & Johnson, for appellants.

Catherine Mahern, of Creighton Legal Clinic, for intervenor-appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Martin Gomez, the father of Kassandra B. and Nicholas B., children born out of wedlock, contests their adoption by appellants, Timothy L. Savage and Karen M. Savage. The birth mother, Anita Bechtold, had given custody of the two children to an adoption agency, K.E.S.I.L., for the purpose of adoption. Bechtold falsely told K.E.S.I.L. that she did not know the identity of the children's father(s). K.E.S.I.L. placed the children in the Savages' home, and the Savages eventually filed an adoption petition in the county court for Cass County. Gomez discovered the pending adoptions, entered his

opposition, and sought custody of the children. After a hearing, the county court terminated Gomez' and Bechtold's parental rights and placed custody of the children in K.E.S.I.L. for placement with a suitable adoptive family. No adoption decree was either entered or denied. The district court for Cass County reversed the county court's order terminating Gomez' rights. The Court of Appeals affirmed the district court and granted Gomez immediate custody of the children because Bechtold had relinquished her parental rights. We granted further review. Our review of the record reveals that the county court was without statutory authority to exercise subject matter jurisdiction so as to entertain the adoption proceedings in which parental rights were terminated. A judgment entered by a court which lacks the authority to exercise subject matter jurisdiction is void. We therefore vacate the orders of the county court terminating parental rights and placing custody in K.E.S.I.L. and remand the cause to the Court of Appeals with directions to remand to the district court for further remand to the county court to dismiss.

BACKGROUND

Gomez and Bechtold met when they were teenagers. They began dating, and on July 23, 1982, they had a child, Jamie. Although they never married, Gomez and Bechtold began living together in 1984. The couple had two more children, Kassandra, born May 4, 1986, and Nicholas, born July 17, 1989. Gomez was not identified as the father on any of the children's birth certificates, but the parties have stipulated that he is the biological father.

In or about 1986, Gomez left Bechtold and the then two children for about 6 months and moved to another state. During that time, he provided no support for his children and did not contact them or their mother. However, Gomez and Bechtold reunited in December 1987.

During the time that Gomez and Bechtold lived together, both worked at various jobs with some periods of unemployment. Gomez partially supported Bechtold and the children with his wages, unemployment income, and a workers' compensation settlement. Bechtold attended cosmetology school

for 14 months and began a career in hairstyling in 1989.

Gomez and Bechtold separated on August 10, 1990, after Bechtold asked Gomez to leave. Gomez maintained some contact with his children but provided little financial support. During 1990, Gomez gave Bechtold about $400 to $500 and earned approximately $7,500. Gomez talked with his children once or twice a week by phone and took them for occasional excursions and visits.

Gomez has a history of alcohol abuse and has been arrested several times for driving while under the influence and for disorderly conduct. He has admitted to smoking marijuana in the past.

Bechtold testified that during the summer of 1991, she was having a difficult time financially. Bechtold did not think she could take care of the children by herself, and she concluded that she could not rely on Gomez for any financial support. Bechtold decided to place the two younger children for adoption.

Bechtold contacted an adoption agency in California and learned that she needed Gomez' consent before the children could be placed for adoption. Bechtold discussed adoption with Gomez, but he refused to give his consent.

In October 1991, Bechtold contacted the K.E.S.I.L. adoption agency. Knowing she needed Gomez' consent, Bechtold lied to K.E.S.I.L. and stated that she did not know the identity of the children's father(s). Bechtold placed Kassandra and Nicholas in K.E.S.I.L.'s custody on October 19. On November 2, Bechtold signed relinquishment forms for each child.

On the same day that Bechtold signed the relinquishment forms, Kassandra and Nicholas were placed with appellants, the Savages. The Savages signed a "Child Acceptance Agreement," in which they acknowledged that K.E.S.I.L. had advised them that "until finalization in Nebraska Courts, this adoptive placement is one they term 'legal risk' [sic] because the birth fathers of the children have not been named, identified on the child's birth records or signed a relinquishment of parental rights." K.E.S.I.L. was paid $7,500 by the Savages.

Gomez learned on November 11, 1991, that the two children had been placed for adoption, when he telephoned Bechtold to

discuss the children's attendance at his upcoming wedding. Bechtold told Gomez that she had placed the children for adoption but refused to give him any further information. Gomez asked a friend of his mother, an attorney, for advice. At the attorney's suggestion, Gomez filed two "Notice of Intent to Claim Paternity" forms with the Department of Social Services (DSS) on November 12, 1991. It was not until July 1992 that an employee of K.E.S.I.L. informed the Savages of the existence of Gomez and his paternity claims.

On October 20, 1992, the Savages filed a petition for adoption in the county court for Cass County. In their petition, the Savages stated that Bechtold had relinquished the children to the care, custody, and control of K.E.S.I.L. As required by Neb. Rev. Stat. § 43-102 (Reissue 1988), the Savages attached to the petition consents from K.E.S.I.L. and the mother. Their petition further alleged that a notice of intent to claim paternity was filed with DSS by Gomez claiming paternal rights to the children. Their petition further alleged that the claim of paternity should not be recognized by the court pursuant to the provisions of Neb. Rev. Stat. § 43-104.02 (Reissue 1993) for the reason that such claim is barred by not having been filed within 5 days after the birth of each of the children.

By order of the county court, Gomez received notice of the Savages' adoption petition. Gomez filed a motion in opposition to the adoption and a request for custody citing Neb. Rev. Stat. § 43-104.06 (Reissue 1993). On July 20 and 21, 1993, the county court conducted a hearing regarding the adoption petitions and Gomez' opposition.

By its order dated August 23, 1993, the county court held Bechtold's parental rights had been terminated by reason of her relinquishments. The county court, referring to Neb. Rev. Stat. § 43-292(2), (3), and (4) (Reissue 1993), of the Nebraska Juvenile Code, concluded Gomez was not a fit parent and terminated Gomez' parental rights. The county court placed custody of the children with K.E.S.I.L. for suitable placement with an adoptive family.

Gomez appealed to the district court for Cass County. The district court held that the county court was without jurisdiction to consider termination of Gomez' parental rights under the

juvenile code. The district court reversed the holdings of the county court and remanded the matter for further proceedings.

The Savages appealed to the Nebraska Court of Appeals. *In re Adoption of Kassandra B. & Nicholas B.*, 3 Neb. App. 180, 524 N.W.2d 821 (1994). That court also concluded that the county court was without jurisdiction to terminate Gomez' parental rights under the juvenile code. Further, the Court of Appeals held that no adoption could be decreed by the county court because none of the provisions found in Neb. Rev. Stat. § 43-104 (Reissue 1993) that obviate the need to obtain parental consent for adoption were met. However, the Court of Appeals held that the district court erred in its mandate to the county court. Rather than remanding for further proceedings, the Court of Appeals held that the law clearly entitled Gomez, who was not an unfit parent, to the immediate custody of his children. We granted the Savages' petition for further review.

During the pendency of this action, Kassandra and Nicholas have remained in the care and custody of the Savages, apparently under an arrangement with K.E.S.I.L.

ASSIGNMENTS OF ERROR

The Savages assert that the Court of Appeals erred (1) in rejecting the factual finding of the county court that Gomez was unfit; (2) in holding that §§ 43-104.02 through 43-104.06 create jurisdiction to terminate parental rights in adoption cases for only those unwed fathers who file their notices of paternity with DSS within the prescribed 5 days of the birth of the child; (3) in refusing to apply §§ 43-104.02 through 43-104.06 to Gomez' request for custody when Gomez himself sought relief under those statutes; and (4) in ordering that the children be immediately restored to Gomez, thus denying the children the protection of Neb. Rev. Stat. § 43-111.01 (Reissue 1993), applicable when an adoption is denied.

Gomez challenges the constitutionality of § 43-111.01 when applied to a father who has established a parental bond with his children, because Gomez asserts that the statute ignores the parental preference doctrine.

STANDARD OF REVIEW

Statutory authority to exercise subject matter jurisdiction may

be raised sua sponte by a court. *Jones v. State, ante* p. 158, 532 N.W.2d 636 (1995); *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994); *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994).

ANALYSIS

In the biblical tale of King Solomon, when two women argued over a baby, Solomon ordered the child cut in two. Solomon knew that the woman who begged for the baby's life was the true mother and gave her the baby. "When all Israel heard about the decision the king had rendered, they respected the king because they saw that the wisdom of God was in him to administer justice." 1 Kings 3:28. Solomon's decision was not constrained by statutes and precedent. In Nebraska, the matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed. *Kellie v. Lutheran Family & Social Service*, 208 Neb. 767, 305 N.W.2d 874 (1981); *In re Petition of Ritchie*, 155 Neb. 824, 53 N.W.2d 753 (1952).

Our analysis is controlled by the adoption statutes codified at chapter 43, article 1, of the Nebraska Revised Statutes. We note that these statutes have been substantively changed by 1995 Neb. Laws L.B. 712, but the changes are not applicable to this case. We hold that the adoption petition failed to comply with adoption statutes and therefore the county court lacked authority to exercise its subject matter jurisdiction over the proceeding.

In summary, our analysis begins with the premise that consent of a biological parent to the termination of his or her parental rights is the foundation of our adoption statutes. Section 43-104(3) provides that no adoption shall be decreed unless the adoption petition is accompanied by the consent of both parents, if living, unless the need for parental consent is rendered unnecessary by certain exceptions. Section 43-102 mandates that when an adoption petition is filed, all consents required by § 43-104 must be attached to the petition. Neb. Rev. Stat. § 43-105 (Reissue 1993) states that when parental consent cannot be given as provided in § 43-104(3), substitute consent shall be given by the guardian or guardian ad litem of the child. The Savages' petition to adopt the children was not accompanied

by Gomez' consent or a substitute consent executed by the guardian ad litem. The lack of these consents is a jurisdictional defect which precluded the county court's power to exercise its authority over the adoption proceeding.

At a hearing on January 28, 1993, regarding Gomez' motion in opposition of adoption and request for custody, Gomez challenged the Savages' petition for the reasons that the required consents from DSS were lacking. There is no record regarding the outcome of this challenge. However, parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994); *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994); *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994).

Section 43-102 demands that certain consents or substitute consents be filed with the adoption petition.

> [A]ny person . . . desiring to adopt a minor child . . . shall file, in the county court . . . a petition for adoption, signed and sworn to by the person or persons desiring to adopt, together with the consent or consents required by section 43-104 . . . and the certificates required by sections 43-104.02 to 43-104.06 or the documents required by section 43-104.07.

Section 43-104(3) provides that consent to an adoption is required from

> both parents if living . . . of a child born in lawful wedlock, or, subject to sections 43-104.02 to 43-104.06, the mother of a child born out of wedlock, except that consent shall not be required of any parent who (a) has relinquished the child for adoption by a written instrument, (b) has abandoned the child for at least six months . . . (c) has been deprived of his or her parental rights to such child by the order of any court of competent jurisdiction, or (d) is incapable of consenting.

When a biological parent's consent is not required by § 43-104(3), the prospective adoptive parents must obtain substitute consent. Section 43-105 states that

> when consent cannot be given as provided in subdivision (3) of section 43-104, consent shall be given by the guardian or guardian ad litem of such minor child appointed by a court, which consent shall be authorized by the court having jurisdiction of such guardian or guardian ad litem.

The Savages filed their petition to adopt the children in the county court on October 20, 1992. The relinquishment documents signed by Bechtold were attached to the petition as exhibits "A" and "B" and were incorporated by reference. The Savages' petition stated that the relinquishment documents contained authority for K.E.S.I.L. to authorize the adoption. Also attached to the petition were two consents to the adoptions executed by K.E.S.I.L. No consents from Gomez or substitute consents were attached to the Savages' adoption petition.

A court must 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 and, if possible, discover the Legislature's intent from the language of the statute itself. *In re Interest of Powers*, 242 Neb. 19, 493 N.W.2d 166 (1992). With the plain language of §§ 43-102, 43-105, and 43-104.04 before us, we must hold that the Savages' failure to file Gomez' consents or substitute consents with their adoption petition is a procedural defect that is jurisdictional in nature. This result is also indicated by prior decisional law.

In *Klein v. Klein*, 230 Neb. 385, 431 Neb. 646 (1988), a custodial father filed an application in a dissolution action, seeking a district court's consent to the adoption of his child by his new wife for the reason that the birth mother had abandoned the child. The district court's consent to the adoption was required under § 43-104(2) because it had jurisdiction over the child by virtue of the divorce proceedings. The birth mother appealed from the order of the district court granting its consent to the adoption, and the issue was raised regarding whether her appeal was from a final or an interlocutory order.

In *Klein*, we stated that the district court's order granting consent to the adoption permitted the county court to entertain the adoption proceedings. In *Smith v. Smith*, 242 Neb. 812, 497

N.W.2d 44 (1993), we again stated that a district court's consent to an adoption is needed under § 43-104(2) and that the lack of the district court's consent prevents the county court from taking jurisdiction over the case. Without requisite consents, a county court lacks authority, or jurisdiction, to entertain an adoption proceeding. This conclusion is consistent with our analysis in *Hiatt v. Menendez*, 157 Neb. 914, 62 N.W.2d 123 (1954). In *Hiatt*, we stated that an irregularity and a failure of compliance with the statutory requirements of a proper petition for adoption may defeat the jurisdiction of the county court. See, also, *Decoste v. City of Wahoo, ante* p. 463, 534 N.W.2d 760 (1995) (holding that statutory prerequisites must be met before court exercises its subject matter jurisdiction).

Section 43-104 states that no adoption can be decreed unless the petition is accompanied by consents or relinquishments which indicate that parental rights have already been extinguished. The fact that the statute is phrased in the past tense indicates that the requisite consents should be obtained prior to filing the petition.

It may be argued that Gomez' consent to the adoptions was not needed because the children were born out of wedlock and he failed to timely claim paternity under the provisions of §§ 43-104.02 through 43-104.06. In essence, those sections provide that a father of a child born out of wedlock may prevent an adoption from proceeding with the mother's sole consent only if he files a notice of intent to claim paternity within 5 days of the child's birth. In fact, the Savages' adoption petition stated that

> a notice of intent to claim paternity has been filed with the Nebraska Department of Social Services by a Martin Gomez claiming paternal rights to the minor children herein involved. The claim of paternity should not be recognized by the Court pursuant to the provisions of Section 43-104.02 for the reason that such claim is barred by not having been filed within five (5) days after the birth of each of the children, the claimant having at all times full knowledge of the birthdays of each of said children.

We have previously held that the 5-day filing requirement is

not applicable to a father whose child is no longer a newborn, who has already established strong ties, and who has acknowledged and supported the child. *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987). We need not, indeed cannot, decide whether Gomez is such a father because we hold that substitute consent must have been obtained even if Gomez was subject to the provisions of §§ 43-104.02 through 43-104.06.

The allegations in the Savages' petition that Gomez' consent was not required because he had not filed notice of intent to claim paternity within 5 days of his children's births are questionable substitutes for the statutory requirement that an adoption petition be filed with the requisite consents. Although it is true that an unwed father's consent is not needed if he fails to claim paternity under § 43-104.02, § 43-104.04 states that

> the Department of Social Services shall supply, a certificate that no notice of intent to claim paternity has been filed with the department and the filing of such certificate pursuant to section 43-102 shall eliminate the need or necessity of a consent or relinquishment for adoption by the natural father of such child.

No such certificate was filed with the Savages' petition. Therefore, the county court also lacked jurisdiction for this reason.

The consent filing requirements imposed by § 43-102 are not mere procedural matters which can be easily disregarded or waived. Children are not legally free for adoption unless both biological parents consent or one of the statutory exceptions to the need for their consent has been met. As a practical matter, there is little sense in filing a petition to adopt a child unless there is good reason to believe that the adoption can proceed. Section 43-102 ensures that prospective adoptive parents gather the necessary consents before filing their petition.

CONCLUSION

The county court lacked statutory authority to exercise subject matter jurisdiction to entertain this proceeding because Gomez' consent or its substitute was lacking.

When a lower court lacks the authority to exercise its subject

matter jurisdiction so as to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995); *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

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 raised at any time in any proceeding. *Bradley v. Hopkins*, 246 Neb. 646, 522 N.W.2d 394 (1994); *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993).

Our disposition of this case makes it unnecessary to address the issue of the validity of Bechtold's relinquishments, the standing of the Savages, the authority of the county court to terminate parental rights in adoption proceedings, and the parties' assignments of error.

We vacate the orders terminating parental rights and placing custody in K.E.S.I.L. The cause is remanded to the Court of Appeals with directions to remand to the district court for further remand to the county court for dismissal.

REMANDED WITH DIRECTIONS TO DISMISS.

CONNOLLY, J., dissenting.

ANALYSIS OF MAJORITY OPINION

LACK OF CONSENT

The majority holds that the lack of Gomez' consent to the adoption, in accordance with § 43-104, constituted a lack of jurisdiction by the county court. The majority therefore holds that the judgment was void. Section 43-104(3) specifies who must consent to an adoption. The classes from whom consent must be received are three: "both parents if living, the surviving parent of a child born in lawful wedlock, *or*, subject to sections 43-104.02 to 43-104.06, the mother of a child born out of wedlock . . . ." (Emphasis supplied.) § 43-104(3). If the Legislature intended that biological fathers of children born out of wedlock must give consent to adoption, then the statute could simply state that consent must be given by both parents if living. Section 43-104(3) does clearly provide an alternative, however,

and directs the reader to §§ 43-104.02 through 43-104.06. Substitute consent as provided in § 43-105 is not applicable in this case.

In its holding, the majority refuses to consider §§ 43-104.02 through 43-104.06 as controlling in this case. After a careful reading of § 43-104(3), one must look to §§ 43-104.02 through 43-104.06 when consent is lacking from the unwed biological father.

Section 43-104.02 provides in pertinent part:

> (1) Relinquishment or consent for the purpose of adoption given only by a mother of a child born out of wedlock pursuant to section 43-104 shall be sufficient to place the child for adoption and the rights of any alleged father shall not be recognized thereafter in any court unless the person claiming to be the father of the child has filed with the Department of Social Services . . . within five days after the birth of such child, a notice of intent to claim paternity.

In the instant case, Gomez did not file a notice of intent to claim paternity within 5 days of the births of Kassandra and Nicholas. However, we held in *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987), that § 43-104.02 was unconstitutional as applied to the facts therein. The unwed father in that case shared a familial relationship with his children. We held:

> [T]he 5-day filing requirement for unwed fathers [is] a legitimate means of attaining a worthy end, the rapid placement of newborns in families that could commit to raising them. However, the 5-day requirement secures no such result in cases such as this one, where the child is no longer a newborn and has already established strong ties with a father who has acknowledged and supported him. The effect of the requirement is to allow a mother to singlehandedly sever a relationship between father and child, no matter what the quality of that relationship is.

225 Neb. at 768-69, 408 N.W.2d at 278. Therefore, § 43-104.06 applies in the instant case, and consent, in conclusion, was not fatal to the jurisdiction of the county court.

LACK OF DSS CERTIFICATE

The majority also argues that because Gomez did not timely file under § 43-104.02, the Savages were required to obtain a certificate from DSS stating that the biological father did not file a notice of intent to claim paternity. The problem with this analysis is that it incorrectly assumes Gomez was subject to the 5-day filing requirement in § 43-104.02(1). Section 43-104.04 states:

> *If a notice of paternity is not filed within five days*, the mother of a child born out of wedlock or an agent specifically designated in writing by the mother may request, and the Department of Social Services shall supply, a certificate that no notice of intent to claim paternity has been filed with the department . . . .

(Emphasis supplied.)

Gomez was not required to file a notice of intent to claim paternity within 5 days of the children's respective births because he had formed a familial relationship, however superficial, with the children. Because Gomez was not required to timely file notice under § 43-104.02, it makes no sense to dismiss the instant action based on § 43-104.04, which directed Bechtold to file a certificate from the DSS stating that Gomez had not complied with § 43-104.02. The requirements of § 43-104.06(2), not § 43-104.04, are applicable to this case.

ANALYSIS OF COURT OF APPEALS' DECISION

The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *In re Application of City of Grand Island*, 247 Neb. 446, 527 N.W.2d 864 (1995); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993). If a statute is susceptible to more than one reasonable construction, the reviewing court uses the construction that will achieve the statute's purpose and preserve the statute's validity. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). In my opinion, the Court of Appeals' reading of §§ 43-104.02 through 43-104.06 did not accomplish the

statutes' purpose. The legislative purpose of §§ 43-104.02 through 43-104.06 is best preserved by reading the word "claimant" in those statutes as referring to biological fathers of children born out of wedlock who have a familial relationship to the children, not just those biological fathers of children born out of wedlock who satisfy the 5-day filing requirement of § 43-104.02. The more expansive reading of the statute preserves the Legislature's goal of providing a framework for an adoption proceeding after an unwed mother relinquishes her parental rights. See *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448, *appeal dismissed* 479 U.S. 805, 107 S. Ct. 49, 93 L. Ed. 2d 610 (1986).

The Court of Appeals, in deciding that § 43-104.06 did not apply, noted that this statute was entitled "Paternity claim; *request for custody by claimant*" (emphasis supplied) and that the language therein expressly referred to "the claimant." Because §§ 43-104.02 through 43-104.06 were enacted collectively as part of 1975 Neb. Laws, L.B. 224, the Court of Appeals analyzed those statutory provisions together and held that a "claimant" is "one who is without a familial relationship" with a child. *In re Adoption of Kassandra B. & Nicholas B.*, 3 Neb. App. 180, 191, 524 N.W.2d 821, 829 (1994). Simply put, the Court of Appeals held that § 43-104.06 applied to only an alleged father who filed a notice of intent to claim paternity within the first 5 days after the child's birth, as required by § 43-104.02. Because Gomez did not timely file his notice of intent, the Court of Appeals held that he was not a "claimant" and that § 43-104.06 could not be used to terminate his parental rights.

In construing a statute, the court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 523 N.W.2d 352 (1994); *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994). In §§ 43-104.02 through 43-104.06, the Legislature developed a procedure through which the biological father of a child born

out of wedlock could protect his rights. A method to ensure that the father's rights would be addressed is to file a notice of intent to claim paternity within 5 days after the birth of said child. Because Gomez shared a familial relationship with his children, our holding in *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987), made the 5-day notice inapplicable to Gomez. In Gomez' case, the familial relationship can be considered in lieu of the 5-day notice requirement. The familial relationship is an alternative to the 5-day rule in protecting the unwed biological father's rights. The familial relationship accomplishes no more than that, however, and the Court of Appeals was incorrect in holding that the child should be automatically awarded to the biological father.

This court, quoting from *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983), stated:

> "[T]he mere existence of a biological link does not merit equivalent constitutional protection." The Court recognized the importance of familial bonds, stressing that "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' [citation omitted] his interest in personal contact with his child acquires substantial protection . . . ."

In re Application of S.R.S. and M.B.S., 225 Neb. at 768, 408 N.W.2d at 278.

Because Gomez had a familial relationship, it was essential that his rights be preserved as well they were. What the constitution ensured Gomez was that he would get his day in court. How else could a court determine whether or not Gomez demonstrated the full commitment to the responsibilities of parenthood. Section 43-104.06, then, is the applicable statute to follow in this case, and, indeed, this is the statute invoked by Gomez.

ANALYSIS UNDER § 43-104.06

The county court was correct in its decision to decide the case by applying § 43-104.06, which reads:

> (1) If the claimant seeks to oppose any proposed

> relinquishment of a child by the mother and requests custody of the child, the court shall inquire into the fitness of the claimant, his ability to properly care for the child, and whether the best interests of the child will be served by granting custody to the claimant. Only upon the appointment of a guardian ad litem for the child, and a finding that the claimant is a fit person, is able to properly care for the child, and that the child's best interests will be served by granting custody to the claimant, shall custody be granted to the claimant.
>
> (2) . . . upon relinquishment by the mother to a child placement agency licensed by the State of Nebraska, or upon a finding that the child's best interests would not be served by granting custody to the claimant, together with the recommendation by the guardian ad litem, and a finding that termination of the rights of the mother and the father is in the best interests of the child, the court shall terminate the rights of the mother and father and confer such rights upon the licensed child placement agency to whom the relinquishment has been given.

Section 43-104.06 and the other adoption statutes do not provide any framework or guidelines for determining parental fitness and the best interests of the child. The county court referred to the guidelines provided in Neb. Rev. Stat. § 43-292 (Reissue 1993) of the juvenile code and to case law arising out of the juvenile code to conduct its analysis under § 43-104.06. The Court of Appeals determined that the county court did not have jurisdiction to terminate Gomez' parental rights under the juvenile code.

The flaw in the Court of Appeals' reasoning is that the county court did not invoke the juvenile code in terminating Gomez' parental rights. Rather, the county court analyzed the case under the adoption statutes, and § 43-403.06(2), in particular. The Legislature instructed in § 43-104.06 that when the unwed biological father of a child challenged a proposed adoption, the court should inquire into the fitness of the claimant, his ability to properly care for the child, and whether the best interests of the child will be served by granting custody to the claimant. However, the Legislature failed to provide

guidelines under which that analysis should be conducted. The county court properly looked to the case law and similar statutory provisions for guidance in deciding what criteria should be applied to make the determinations required by § 43-104.06.

GOMEZ INVOKED § 43-104.06

The county court also properly applied § 43-104.06 in the case at bar because all the parties to this action invoked the provisions of the statute. The essential character of an action and relief sought, whether legal or equitable, is determinable from its main object, as disclosed by the pleadings. *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994). Neither party timely raised the issue of the unconstitutionality of § 43-104.06 in the lower courts. Gomez also did not file and serve separate written notice pursuant to Neb. Ct. R. of Prac. 9E (rev. 1992) with the Clerk of the Supreme Court that he was presenting a constitutional question. A litigant who invokes the provisions of a statute may not challenge its validity. *State ex rel. Sileven v. Spire*, 243 Neb. 451, 500 N.W.2d 179 (1993). In their petition to adopt Kassandra and Nicholas, the Savages invoked the adoption statutes. Likewise, by filing his notice of intent to claim paternity, Gomez invoked the adoption statutes. The record reflects that Gomez was well aware that by invoking § 43-104.06 he risked his parental rights' being terminated. Neither party may now complain of the effect of the adoption statutes.

COUNTY COURT'S DECISION

The county court determined that Gomez was unfit to properly care for Kassandra and Nicholas and that it would be in the best interests of the children to award custody to K.E.S.I.L., thereby approving the Savages' petition for adoption.

We review appeals in adoption proceedings for errors appearing on the record in the county court. Neb. Rev. Stat. § 25-2733 (Reissue 1989). See, also, *In re Guardianship of T.C.W.*, 235 Neb. 716, 457 N.W.2d 282 (1990). 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. *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995); *Dolan v. Svitak*, 247 Neb. 410, 527 N.W.2d 621 (1995); *Crawford v. Department of Motor Vehicles*, 246 Neb. 319, 518 N.W.2d 148 (1994).

As noted previously, the county court properly looked to § 43-292 in the juvenile code for guidance in determining whether Gomez was an unfit parent for the purposes of § 43-104.06. Consistent with § 43-292 and § 43-104.06, the county court could have terminated the biological father's parental rights under § 43-104.06 if there was clear and convincing evidence that the children's best interests would not be served by granting him custody. The relevant criteria listed in § 43-292 include: (1) the biological father has abandoned the children for 6 months or more immediately prior to the petition for adoption; (2) the biological father substantially and continuously or repeatedly neglected the children and refused to give the children necessary parental care and protection; (3) the biological father, being financially able, willfully neglected to provide the children with the necessary subsistence, education, or other care necessary for the children's health, morals, or welfare; (4) the biological father is unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is found to be seriously detrimental to the health, morals, or well-being of the children; or (5) the biological father is 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. The county court held that the first and fifth criteria were not applicable to Gomez.

Determination of Unfitness

The county court, in holding that there was clear and convincing evidence that the children's best interests would not be served by placing them with Gomez, stated:

> The evidence shows a pattern on the part of [Gomez] of taking no responsibility for the children or only taking responsibility when it suited him or under his terms

> emotionally and financially. . . .
>
> The evidence shows a clear pattern of substance abuse, both legal and illegal, which [Gomez] has not addressed in a manner to satisfy this Court of his good intentions to refrain from the use of intoxicants or illegal substances.

At trial, Gomez admitted that he did not pay any of the financial costs for the births of the three children he fathered with Bechtold. Gomez testified that from the time he and Bechtold separated in August 1990 until he learned of Bechtold's relinquishment in November 1991, he provided only approximately $500 in financial support and visited with the children approximately once a month. The record reflects that Gomez earned between $4,500 and $7,500 in 1991. Additionally, Gomez admitted that when he and Bechtold separated for approximately 4 months sometime after Kassandra's birth but prior to Nicholas' birth, he went to Kansas, provided no financial support, and never visited his children.

Gomez attempted to refute this evidence of neglect by testifying that he provided the children with clothing, toys, food, and school supplies when they visited him. Gomez testified that he took the children on family trips to the park and the zoo. He also testified that he provided the children with emotional support by telling the children they could always talk to him. Gomez stated that he did not give more money to Bechtold because he did not trust her.

Gomez admitted that he smoked marijuana in the past, but claimed that he had not done so since 1987. However, his oldest daughter testified that as recently as July 1993, she observed marijuana in Gomez' residence and saw Gomez smoking marijuana.

Gomez also admitted that he had a problem with alcohol, though he had never sought any help for his drinking problem. Gomez thought he would be able to handle the problem without assistance. In January 1992, Gomez was twice arrested and pled guilty to two charges of driving while under the influence. Previously, in 1988 or 1989, Gomez was convicted of felony criminal mischief for stealing a car stereo and served a 30-day prison sentence. On another occasion, Gomez was ticketed after

trying to kick out a door at the Omaha police station while under the influence of alcohol.

As noted above, our inquiry in the instant appeal is whether the county court's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. In summary, Gomez admitted to a problem with alcohol abuse and testified that he still uses alcohol. The record reflects that Gomez has at least four criminal convictions, including one felony conviction for which he served jail time and two convictions of driving while under the influence. Gomez has consistently failed to provide Kassandra and Nicholas with more than de minimis amounts of financial and emotional support. I would hold that the county court properly found Gomez unfit.

Best Interests of Children

Having found Gomez unfit, the county court next addressed whether it would be in the best interests of the children to be placed with the Savages. The county court held:

> The Court notes the professional opinions offered to the Court agreed on one prevailing issue: stability is a major concern in determining the best interests of these children.
>
> The evidence clearly and unequivocally shows that until their relinquishment these children had no stability in their lives, being moved from place to place regularly; the claimant entering and leaving the home; lack of support, both financial and emotional, by the claimant; the mother of these children struggling to maintain some semblance of stability with her limited resources.
>
> Since the relinquishment, these children have had a stable and nurturing environment, both emotionally and financially.

The county court determined that it would be in the best interests of the children to grant the Savages' petition for adoption and to place Kassandra and Nicholas with the Savages. I agree. There is abundant evidence in the record to support the county court's decision allowing the adoption.

Gerrard, J., joins in this dissent.

CONAGRA, INC., DOING BUSINESS AS PEAVEY COMPANY, APPELLEE, V. BARTLETT PARTNERSHIP, APPELLANT.

540 N.W.2d 333

Filed December 8, 1995. No. S-94-175.

1. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; the party against whom the motion is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Directed Verdict: Evidence.** In order to sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion from the evidence.
3. **Statutes: Appeal and Error.** The interpretation of statutes presents questions of law, in connection with which an appellate court has the obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Contracts: Intent.** A contract which is written in clear and unambiguous language is not subject to interpretation or construction; rather, the intent of the parties must be determined from the contents of the contract and the contract enforced according to its terms.
5. **Verdicts: Juries: Appeal and Error.** A verdict is not to be set aside on appeal 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.
6. **Damages: Verdicts: Evidence: Appeal and Error.** In awarding damages, the factfinder is not required to accept a party's evidence of damages at face value, even though that evidence is not contradicted by the evidence adduced by the party against whom the judgment is to be entered; neither is it necessary that an appellate court be able to discern the exact computations by which a verdict is reached.
7. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

James J. McNally for appellant.

Jeffrey H. Jacobsen and Timothy M. Welsh, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and GERRARD, JJ.

CAPORALE, J.

I. INTRODUCTION

In this breach of contract action, the district court, pursuant to verdict, entered judgment in favor of the plaintiff-appellee, ConAgra, Inc., doing business as Peavey Company, and against the defendant-appellant, Bartlett Partnership. The partnership thereupon appealed to the Nebraska Court of Appeals, asserting, in summary, that the district court erred in (1) overruling the partnership's motion for a directed verdict made at the close of all the evidence, (2) instructing the jury, and (3) entering judgment on a verdict not supported by the evidence. In order to regulate the caseloads of the Court of Appeals and this court, we, on our own motion, removed the matter to this court. We now affirm the judgment of the district court.

II. FACTS

ConAgra, through its grain trading division, Peavey, operates grain elevators in various Nebraska locations and a grain merchandising office in Kearney, Nebraska. During 1992, ConAgra bought and sold in excess of 500,000,000 bushels of corn.

The partnership conducts a farming operation and consists of Roger Race, the managing partner and an experienced farmer, and three other farmers. In the summer of 1992, the partnership had approximately 2,800 acres planted in corn near Bartlett, Nebraska. In previous years, this acreage had yielded approximately 130 bushels per acre. Based on this, Race testified that he expected the total yield for 1992 to be approximately 360,000 bushels.

The land farmed by the partnership was in the Sandhills and consisted of marginal soil. Because of the soil, more water, fertilizer, and care than normal were required to secure a good crop. In 1992, the partnership undertook an extensive manure-spreading operation to improve the soil. To keep costs down, the partnership started a practice of hauling corn to ConAgra's elevator in Grand Island and then on the way back hauling manure from Hastings to the land the partnership farmed. Race testified that this unusual arrangement prompted the partnership's interest in selling its corn to ConAgra, a fact known to ConAgra.

On or about June 10, 1992, the partnership entered into a series of four contracts for the sale by the partnership and purchase by ConAgra of 300,000 bushels of corn. The first contract called for the delivery of 100,000 bushels of corn sometime in December 1992; the second for the delivery of 70,000 bushels of corn in January 1993; the third for the delivery of 65,000 bushels of corn in February 1993; and the fourth for the delivery of 65,000 bushels of corn in March 1993.

Each contract left the price to be determined by the partnership at 20 cents below the daily price of corn on the Chicago Board of Trade. The partnership had the right, up until the time of delivery, to pick the day on which the corn would be priced.

On August 13, 1992, the partnership's crop was severely damaged by a hailstorm. Race called ConAgra on August 17 or 18 to report the hail damage and talked with the plant manager in Grand Island, stating:

> "I'm calling to notify you of a very severe hail." . . . "We have got a lot of fields that are 90 to 100 percent gone."
>
> . . . .
>
> . . . "I do not — I do not know my exact salvage value," but . . . "We will be appraising the situation; as soon as we know where they are, I will call you and we will price the salvage value."

Race reported that the plant manager was sympathetic and told him, " 'Do not worry about it; we'll work something out.' "

About a month later, on September 23, 1992, Race called the plant manager and informed him that the salvage value would be close to 70,000 bushels, but to be on the safe side, he would like to lock in, or price out, 60,000 bushels. Race testified that at this time, he did not understand that there may have been some damages to pay if the partnership could not fulfill its contracts.

Later, on November 10, 1992, ConAgra placed a conference call to Race in an attempt to negotiate a settlement of the corn contracts. The plant manager and its grain merchandiser discussed various settlement terms with Race, but the parties were unable to reach an agreement.

After Race discussed the situation with his partners, the partnership decided that it would "try and buy a little corn, to start to fill these contracts," and the partnership eventually purchased 60,000 bushels of "wet" corn to dry in its facilities and deliver to ConAgra. Although it had priced out a total of 130,000 bushels of corn, the partnership delivered only 108,503.04 bushels, 100,000 bushels in fulfillment of the first contract and the remainder on the second contract. This left the partnership 61,496.96 bushels short of the corn it had priced out on the second contract and 130,000 bushels short of the corn it had contracted to sell in the third and fourth contracts.

On February 5, 1993, the plant manager called Race and told him that the remaining unpriced bushels would need to be priced out by February 20, 1993. The plant manager placed another call to Race on February 17 in an attempt to negotiate a settlement and scheduled a meeting for that purpose. Although the meeting took place, the parties were again unable to reach agreement.

On February 18, 1993, ConAgra bought corn on the market to cover the partnership's unfilled obligations under the contracts at a claimed total loss of $11,689.88. The verdict was for $5,803.51.

III. ANALYSIS

1. Directed Verdict

In asserting the district court erred by overruling its motion for a directed verdict, the partnership urges that as the basic assumption of the contracts was that the corn to be delivered was to be grown on the partnership's land, the destruction of the crop by a hailstorm excused the partnership's performance.

(a) Scopes of Review

We begin our analysis of this issue by recalling that in reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. The party against whom the motion is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every

inference which can reasonably be deduced from the evidence. In order to sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion from the evidence. See, *Melcher v. Bank of Madison, ante* p. 793, 539 N.W.2d 837 (1995); *Hoeft v. Five Points Bank, ante* p. 772, 539 N.W.2d 637 (1995); *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995). However, to the extent the interpretation of statutes is involved, the questions presented are matters of law in connection with which an appellate court has the obligation to reach an independent conclusion irrespective of the decision made by the court below. See *Smith v. State, ante* p. 360, 535 N.W.2d 694 (1995).

(b) Application of Law to Facts

In urging that its performance was excused, the partnership relies on Neb. U.C.C. §§ 2-613 and 2-615 (Reissue 1992). Section 2-613 governs casualty to identified goods and provides in relevant part:

> Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer . . . then
>
> (a) if the loss is total the contract is avoided; and
>
> (b) if the loss is partial . . . the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance . . . or the deficiency in quantity but without further right against the seller.

Section 2-615 governs excuse by failure of presupposed conditions and reads in relevant part:

> (a) Delay in delivery or nondelivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made . . . .

Comment 9 thereto illustrates an operation of § 2-615 thusly:

> The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods [2-613] or this section [2-615], and he or she may be excused, when there is a failure of a specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract.

But before we reach those provisions of Nebraska's Uniform Commercial Code, we must determine whether the partnership is correct in asserting that the contracts in question contemplated that the corn to be delivered was to be grown on the partnership's land.

In making that determination, we are bound by the longstanding principle of Nebraska contract law that a contract which is written in clear and unambiguous language is not subject to interpretation or construction; rather, the intent of the parties must be determined from the contents of the contract and the contract enforced according to its terms. *New Light Co. v. Wells Fargo Alarm Servs.*, 247 Neb. 57, 525 N.W.2d 25 (1994); *Rains v. Becton, Dickinson & Co.*, 246 Neb. 746, 523 N.W.2d 506 (1994); *Drain v. Board of Ed. of Frontier Cty.*, 244 Neb. 551, 508 N.W.2d 255 (1993); *Husen v. Husen*, 241 Neb. 10, 487 N.W.2d 269 (1992); *Elson v. Pool*, 235 Neb. 469, 455 N.W.2d 783 (1990); *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989); *Smith v. United States Fidelity & Guaranty Co.*, 142 Neb. 321, 6 N.W.2d 81 (1942); *Farmers Ed. and Coop. Union v. Farmers Ed. and Coop. State Union*, 133 Neb. 397, 275 N.W. 464 (1937).

The three contracts at issue are identical standardized form contracts which on their face state that the partnership will deliver a given number of bushels of corn to ConAgra within specified timeframes. On the back of each contract, it was provided that the "[partnership] warrants to [ConAgra] that all grain sold and delivered hereunder will be of good, sound, dry and merchantable quality" and that "[the grain] will have been grown in the Continental United States." Except for provisions which pertain to the quality of the grain to be delivered, there were no other conditions or specifications as to the grain

included in the contracts. The contracts also contained an integration clause which provided that the "[c]ontract is intended by the parties as a final expression of their agreement and is intended also as a complete and exclusive statement of the terms and conditions of their agreement."

The contracts did not identify the corn in any way other than by kind and amount. Nor did the contracts make any reference to corn grown or to be grown by the partnership on any identified acreage. The only limitation the contracts placed on the source of the corn was that it be grown in the continental United States.

The only conclusion that can be drawn from the language of the contracts is that they contemplated that the partnership could fulfill its contractual obligations by acquiring corn from any place or source so long as the corn was of merchantable quality and had been grown within the continental United States. Thus, it cannot be said the contracts at issue are ambiguous. They therefore are not subject to interpretation or construction and must be enforced according to their terms.

The legal reality is that as the corn was fungible and not identified with particularity, neither § 2-613 nor § 2-615 is applicable to this case. See, *Bunge Corporation v. Recker*, 519 F.2d 449 (8th Cir. 1975) (where contract did not identify beans other than by kind and amount, destruction of portion of farmer's crop by weather did not constitute act of God which would excuse performance); *Ralston Purina Company v. McNabb*, 381 F. Supp. 181 (W.D. Tenn. 1974) (in absence of showing contract was to sell crop from specified land, defense of impossibility due to bad weather and flooding unavailable); *Wickliffe Farms, Inc. v. Owensboro Grain Co.*, 684 S.W.2d 17 (Ky. App. 1984) (statutory defense of impossibility not available to seller contracting for delivery of white corn despite draught which struck seller's farm, since contract merely called for delivery of 35,000 bushels of white corn without specifying where such corn was to be grown); *Colley v. Bi-State, Inc.*, 21 Wash. App. 769, 586 P.2d 908 (1978) (failure of wheat farmer to deliver grain not excused under U.C.C. §§ 2-613 or 2-615, as contract did not require farmer to grow grain himself or at particular location); *Semo Grain Co. v. Oliver Farms, Inc.*, 530

S.W.2d 256 (Mo. App. 1975) (where contract made no reference to soybeans grown by seller, seller could have fulfilled obligation to deliver soybeans to buyer by acquiring beans from any place or source).

(c) Resolution

Accordingly, the district court did not err by overruling the partnership's motion for directed verdict.

2. Instructions to Jury

The partnership next contends that the district court's instructions did not properly advise the jury as to the circumstances under which the law excuses performance of a contract.

In essence, the partnership's arguments in regard to the instructions merge to claim that the district court should have instructed in accordance with the contents of §§ 2-613 and 2-615, as the partnership sought. However, as we have seen, these provisions of the code have no application.

Accordingly, the district court did not err in its instructions to the jury.

3. Support of Verdict by Evidence

The partnership rests its claim that the evidence does not support the verdict on the fact that the amount of the verdict is less than the amount ConAgra asserted it was damaged.

(a) Scope of Review

A verdict is not to be set aside on appeal 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. *Melcher v. Bank of Madison, ante* p. 793, 539 N.W.2d 837 (1995); *Hoeft v. Five Points Bank, ante* p. 772, 539 N.W.2d 637 (1995); *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995).

(b) Application of Law to Facts

The evidence establishes that to make up for the corn the partnership failed to deliver, ConAgra purchased corn on the open market at various prices.

The partnership's present position in this regard ignores one

of its primary contentions at trial, i.e., that ConAgra should have covered the contracts at an earlier date when its losses would have been lower. This, coupled with the fact that there was a good deal of evidence showing that corn prices varied widely between the time the partnership contracted and the time ConAgra moved to cover the partnership's breach, shows that the jury's verdict bore a reasonable relationship to the elements of the damages proved.

It is well established that in awarding damages, the fact finder is not required to accept a party's evidence of damages at face value, even though that evidence is not contradicted by evidence adduced by the party against whom the judgment is to be entered. Neither is it necessary that an appellate court be able to discern the exact computations by which a verdict is reached. *Union Ins. Co. v. Bailey*, 234 Neb. 257, 450 N.W.2d 661 (1990). The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994).

(c) Resolution

Accordingly, it cannot be said that the evidence does not support the verdict. It therefore follows that the district court did not err in entering judgment in accordance with the verdict.

IV. JUDGMENT

Since the record supports none of the assignments of error, the judgment of the district court must be, and hereby is, affirmed.

AFFIRMED.

CONNOLLY, J., not participating.

JENNIFER LARSON, BY AND THROUGH HER FATHER AND NEXT FRIEND, DAVID LARSON, APPELLANT, V. HOMETOWN COMMUNICATIONS, INC., AND HOMETOWN OPERATIONS, INC., DOING BUSINESS AS THE FREMONT TRIBUNE, AND MARYLAND CASUALTY INSURANCE COMPANY, APPELLEES.

540 N.W.2d 339

Filed December 8, 1995. No. S-94-183.

1. **Workers' Compensation: Appeal and Error.** 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 do not support the order or award.
2. ____: ____. The workers' compensation review panel may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law.
3. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
4. ____: ____. The single judge of the compensation court is the factfinding trial court, and the review panel performs the first level of appellate review.
5. **Judgments: Appeal and Error.** If there is sufficient competent evidence to support the findings of fact and such findings are not clearly wrong, the appellate court then determines whether the findings of fact support the judgment made by the trial court.
6. **Employer and Employee: Master and Servant: Independent Contractor.** Ordinarily, the parties' status as an employee or an independent contractor is a question of fact. However, where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law.
7. **Employer and Employee: Independent Contractor.** In determining whether or not a worker is an employee, as distinguished from an independent contractor, there is no single test by which the determination may be made. Such a determination must be made from all the facts in the case.
8. **Independent Contractor.** The common-law test for independent contractors includes many factors which are to be considered and weighed in making the determination, no one of which may be conclusive.
9. **Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
10. **Employer and Employee: Independent Contractor.** There are 10 factors which

are considered in determining whether a person is an employee or an independent contractor: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.

11. **Employer and Employee: Independent Contractor: Contracts.** Generally, control, or the right of control, is the chief criterion in determining whether someone acts as an independent contractor. However, even the employer of an independent contractor may, without changing the status, exercise such control as is necessary to assure performance of the contract in accordance with its terms.
12. **Agency: Parties.** Whether an agency exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship.
13. **Independent Contractor: Contracts.** If there exists a written contract that labels a worker as an independent contractor, it must, of course, be considered and may be of prime importance. However, a writing which merely denominates the relationship may not be used to conceal the true arrangement.
14. **Workers' Compensation: Contracts.** Every person in the service of an employer who is engaged in any trade, occupation, business, or profession as described in Neb. Rev. Stat. § 48-106 (Reissue 1993) under any contract of hire, expressed or implied, oral or written, including aliens and also including minors, who for the purpose of making election of remedies under the Nebraska Workers' Compensation Act shall have the same power of contracting and electing as adult employees.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and MUES, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed.

Robert T. Cannella, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., and Stephen L. Gerdes for appellant.

Joseph W. Grant, of Gaines, Mullen, Pansing & Hogan, and Walter E. Zink II, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

L. Michael Zinser, of Zinser & Domina, and Kenneth C. Stephan, of Knudsen, Berkheimer, Richardson & Endacott, for

amici curiae Nebraska Press Association, Nebraska Daily Publishers Association, Midwest Circulation Management Association, and Lincoln Journal Star.

Margaret C. Hershiser, of Koley, Jessen, Daubman & Rupiper, P.C., for amicus curiae Omaha World-Herald.

CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

I. INTRODUCTION

Jennifer Larson sustained severe and permanent injuries while delivering newspapers. A trial judge of the Workers' Compensation Court found that Larson was an employee of the newspaper company and awarded workers' compensation benefits. A three-judge workers' compensation review panel reversed the findings of the trial judge. The Nebraska Court of Appeals reversed the decision of the review panel. Hometown Communications, Inc., and Hometown Operations, Inc., doing business as the Fremont Tribune, and Maryland Casualty Insurance Company (the defendants) filed a petition for further review, which we granted.

II. SCOPE OF REVIEW

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 do not support the order or award. Neb. Rev. Stat. § 48-185 (Reissue 1993).

The workers' compensation review panel may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law. Neb. Rev. Stat. § 48-179 (Reissue 1993).

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. *Shade v. Ayars & Ayars, Inc.*, 247 Neb. 94, 525 N.W.2d 32 (1994).

III. FACTS

Hometown Communications, Inc., and Hometown Operations, Inc., publish and distribute the Fremont Tribune in Fremont, Nebraska. The Tribune is published 6 days per week. The Tribune instructs its carriers to deliver the newspapers by 5 p.m. on weekdays and before 7 a.m. on Saturdays and holidays. The carriers are charged 23.12 cents per paper, and they charge each customer $7 for 24 daily papers. In February 1991, the Tribune's circulation was 11,810 newspapers, of which 9,688 were home subscribers. Sixty-four percent of these subscribers received their papers via a carrier.

1. Independent Carrier Agreement

In July 1989, Valerie Brauner entered into an "Independent Carrier Agreement" with the Tribune. The agreement provided in part:

> WHEREAS, the Company is the publisher of the Fremont Tribune, and the Carrier desires to engage in the independant [sic] business of purchasing the Company's newspapers and selling and distributing same,. the parties therefore mutually agree as follows:
>
> 1. The Company agrees to furnish the Carrier with a delivery schedule, and the Carrier agrees to deliver complete newspapers to all points on such schedule.
>
> 2. The Company agrees to sell, and the Carrier agrees to purchase sufficient quantities of newspapers to cover the delivery schedule, together with such additional quantities of newspapers as the Carrier may require in conducting his independent business of selling and delivering the Company's newspapers.
>
> 3. The Carrier agrees to pay the Company the balance due for all newspapers supplied or delivered to the Carrier by the Eighth day of each billing period (a billing period is four weeks) at the then prevailing wholesale rates for such newspapers. The Company, upon 7 days notice, may change rates in accordance with a general increase or decrease of said wholesale rates.

4. It is understood that the carrier is free to engage in other business activities, but he agrees that the Company's newspapers will be delivered in a timely manner in accordance with said delivery schedule. The Carrier agrees that he will insert no foreign matter into such newspapers without the prior consent of the Company.

5. The Company and the Carrier agree that either party may terminate this Agreement upon twenty-four (24) days written notice, or such shorter time as may be mutually agreed upon.

The Tribune supplies several items to assist the carriers in their route duties: a "Carrier Hand Book," a "Vacation Handbook for Your Substitute," a collections receipt card, and a collection calendar. The collections receipt card is used to keep track of which customers have paid during each collection period. The collection calendar instructs carriers regarding when the collections are to be done, when they are not to be done, and when the carriers' payments to the Tribune are due.

2. "Carrier Hand Book"

The "Carrier Hand Book" is a multipage pamphlet which is given to and reviewed in detail with each new carrier by a Tribune district manager prior to the carrier's first delivery. Although the handbook states that the carrier is "not an employee of the Tribune but an Independent Contract Merchant," it lists the following job guidelines:

The Tribune guarantees its customers home delivery of their paper before 5 p.m. on weekdays and 7 a.m. on Saturdays and holidays. If a customer is missed and notifies the Tribune, a call will be made to the carrier to deliver the paper. The newspapers are to be banded and placed on each customer's porch. If a customer has a special place for the paper, the carrier is to deliver the paper to that place every day. The carrier is to deliver the route alone and use plastic bags when it rains.

On Tuesdays, the carriers are required to deliver "shoppers" (advertisements) to nonsubscribers on their routes. The carriers are paid on a piecemeal basis for these deliveries. Occasionally, the carriers are required to place inserts into their papers. Each carrier is instructed regarding what to do when a person

subscribes to the Tribune and when a customer stops the subscription. Upon receiving a "stop notice," the carrier is to find out why the customer has stopped the subscription. The carrier is instructed to stop delivering the papers if the carrier notices papers piling up for more than 3 days. If a carrier is going on vacation, the carrier is instructed to find a friend to take care of the route and to call the office with the substitute's name, address, and phone number so that the Tribune will know who is in charge while the carrier is gone.

The carriers are instructed on how to collect. They are told to always look their best, be neat and clean, and greet customers with a smile. When approaching a customer, the carriers are to introduce themselves and explain that they are from the Tribune. Suggestions are given for collecting as follows: Never collect without your book or bag, have a regular collection schedule, never take friends, call customers by name, have pocket money to make change, thank customers when they pay, go straight home when finished collecting, never carry large amounts of money, and never collect while delivering. The carriers may start collecting at the beginning of each pay period and are given a collection calendar which shows when to collect and when to pay their bills. The carriers are instructed to always collect at the proper time, arrange their collection cards in the order of delivery, and have one collection card for every household to which they deliver.

Items purchased by a carrier through the office are charged to the carrier's next pay period bill. The carrier may order supplies by phone, and the Tribune places the needed supplies on the bundle the next day. Supplies available include rubberbands, plastic bags, carrier bags, collection cards, introduction pads, and collection pads. The carrier is offered an accident insurance policy, which if purchased is billed on the next statement. Every carrier is required to maintain a savings account balance to cover bills owed to the Tribune. The total balance of the savings account is returned to the carrier with interest when the carrier gives up the route and all bills are paid in full.

Bonuses are offered for each new customer, and the carriers are encouraged to deliver free newspapers to potential customers

on the route and to show promotional fliers to prospects. Carriers are instructed on sales tips, are encouraged to obtain new customers for the Tribune, and are awarded cash and prizes for doing so.

3. "VACATION HANDBOOK FOR YOUR SUBSTITUTE"

The Tribune provides each carrier with a "Vacation Handbook for Your Substitute," which instructs substitute carriers on the basics of newspaper delivery. The handbook states: "Any time while you're on vacation it is very important that a well trained substitute properly manages your route." Each carrier is instructed to review the entire vacation handbook with his or her substitute step by step and to follow a checklist which includes the following steps:

> (1) Let your District Advisor or the Circulation Dept. know when you will be on vacation and who your substitute will be.
>
> (2) Supply him with 2 neat, accurate and up-to-date route lists and mail a third route list to your District Advisor.
>
> (3) Request and use the vacation time forms. . . . Collect and pay your bill in advance.
>
> (4) Don't leave your sub out on a limb! Explain where to pick up papers and the following:
>
> **A.** Route Number
>
> **B.** Draw (Amount of papers)
>
> **C.** Inserts
>
> (5) **MAIL**
>
> — Explain the following:
>
> **A.** Starts and Stops
>
> **B.** Delivery Errors — Misses and Memos
>
> **C.** Vacation Paks
>
> Instruct him to read and save all the mail for you till you return.
>
> (6) Explain how to report starts and stops every day. Go over sample on Page 6.
>
> (7) How to report shortages immediately.
>
> (8) He should understand that good delivery service is insurance against loss in profits for you.

(9) **DON'T GET HUNG UP:**

Review every phase of this booklet with your substitute so he understands what he is expected to do.

Take him with you at least 3 days while you're delivering your route.

Make sure your sub's parents know he will be subbing for you and for how long.

4. BRAUNER'S AGREEMENT WITH LARSON

Brauner was having trouble completing her route in a timely manner on Tuesdays and Wednesdays because of Girl Scout and church activities, and was tired of having sole responsibility for the route. She and Larson discussed dividing the delivery schedule, and the girls' mothers worked out a schedule in which each girl would deliver half of the route on Tuesdays and Wednesdays, and each would deliver the entire route on the remaining days every other week. Brauner retained the duty of collecting each month and retained the rights to the savings account that was automatically withheld out of the girls' earnings at a rate of $10 per month by the Tribune as a deposit against future indebtedness which the Tribune carriers might incur. The girls divided the profits evenly.

Larson did not sign a carrier agreement with the Tribune, but on August 27, 1990, the Tribune was notified by letter of the girls' delivery arrangement. The girls delivered a flier to the Tribune and to each customer on the route explaining the new delivery arrangement. The Tribune did not object to Larson's participation in the route, and Brauner's mother testified that Kathy Brown, a district manager for the Tribune, once asked how dividing the route between the two girls was working out.

On February 22, 1991, Larson was struck by an automobile while delivering Tribune newspapers on her bicycle. She sustained traumatic brain injuries and is now in a persistent vegetative state. Demand was made upon the Tribune for workers' compensation insurance coverage. The Tribune denied coverage on the basis that Larson was an independent contractor, not an employee.

David Larson brought this action to recover workers' compensation benefits as Larson's father and next friend. The

trial to a single judge of the Workers' Compensation Court was bifurcated in order to first determine whether Larson was an employee of the Tribune and, if the defendants were liable, her average weekly wage. The trial judge found that Larson was an employee of the Tribune and was thereby entitled to workers' compensation coverage. The final award was entered on June 28, 1993. The workers' compensation review panel reversed the award, finding as a matter of law that the trial judge erred in determining that Brauner and Larson were employees of the Tribune, and the petition was dismissed. Larson appealed to the Court of Appeals, which reversed the judgment of the review panel and reinstated the trial judge's award. The defendants have petitioned for further review of the Court of Appeals' decision.

IV. ASSIGNMENTS OF ERROR

The defendants assign the following errors in their petition for further review: The Court of Appeals erred (1) in failing to follow *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991), *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984), and *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979); (2) in reversing the workers' compensation review panel, which had found as a matter of law that Larson was acting as an independent contractor, when the findings of the review panel have the force and effect of a jury verdict under § 48-185; (3) by adopting a "substitute employee doctrine" when *Stephens* dictates that the use of a substitute is indicative of independent contractor status and by ignoring the statutory requirement that a worker seeking workers' compensation benefits be acting under "a contract for hire" at the time of injury; and (4) by concluding that the conduct of the parties was inconsistent with the contract terms designating the carriers to be independent contractors.

V. ANALYSIS

1. Scope of Review

We first address the scope of review following a decision by a single judge of the Workers' Compensation Court. Section 48-185 provides in part:

The judgment made by the compensation court after

> review shall have the same force and effect as a jury verdict in a civil case. 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 do not support the order or award.

Section 48-179 provides:

> No new evidence may be introduced at such review hearing. The review panel may write an opinion, but need not do so, and may make its decision by a brief summary order. The compensation court may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law.

We must determine which judgment is entitled to the force and effect of a jury verdict, that of the trial judge or that of the three-judge review panel. The defendants contend that the findings of the review panel have the force and effect of a jury verdict. We disagree. We conclude that "the single judge of the compensation court is the factfinding trial court and the review panel is performing the first level of appellate review." See *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 712, 513 N.W.2d 361, 367 (1994).

In the case at bar, we review the findings of fact by the trial judge relating to certain factors which the court used to determine whether Brauner was an independent contractor or an employee. The findings of fact made by the judge in the original workers' compensation hearing have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995). Appellate review is controlled by §§ 48-179 and 48-185. Under § 48-179, the workers' compensation review panel may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law.

Under § 48-185, a judgment, order, or award 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 do not support the order or award.

We adopt the Court of Appeals' reasoning in *Larson v. Hometown Communications, Inc.*, 3 Neb. App. 367, 526 N.W.2d 691 (1995), that the review panel is limited to reversing or modifying only on the grounds set forth in § 48-179. Further appellate review is based upon the grounds set forth in § 48-185. Therefore, we review the findings of the trial court in this case to determine whether there is sufficient competent evidence in the record to warrant the making of the award and whether the findings of fact by the compensation court support the award. See § 48-185(3) and (4).

If there is sufficient competent evidence to support the findings of fact, the appellate court then determines whether such findings of fact support the judgment or award made by the trial court. In *Hemmerling v. Happy Cab Co., supra*, we stated that ordinarily the parties' status as an employee or an independent contractor is a question of fact. "However, where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law." *Id.* at 925, 530 N.W.2d at 920.

2. Employee or Independent Contractor: 10-Factor Analysis

In determining whether or not a worker is an employee, as distinguished from an independent contractor, there is no single test by which the determination may be made. Such a determination must be made from all the facts in the case. *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991). In *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983), we cited the Restatement (Second) of Agency § 220 (1958), which lists 10 factors to be considered in determining whether a person is an employee or

an independent contractor. We stated that the common-law test for independent contractors included many factors which were to be considered and weighed in making the determination, no one of which may be conclusive. Subsequently, in *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984), we applied these 10 factors to reach a legal conclusion that the party was an independent contractor rather than an agent. In *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993), we set forth the factors and stated that although control or right of control is the chief factor, no one factor is conclusive.

In the instant case, the review panel found that the trial judge incorrectly applied the facts to show control by the Tribune and found that "the facts applied by the trial [c]ourt to the alleged employment factors in the Restatement go only to assuring an ultimate result and did not subject the plaintiff to the will or control of the defendant to bring about an employee-employer status." The review panel found as a matter of law that Brauner and Larson were at most independent contractors. The review panel found no employer-employee relationship between Brauner and Larson because there was no evidence of a contract of employment or hire.

In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Wiese v. Becton-Dickinson Co.*, 239 Neb. 1033, 480 N.W.2d 156 (1992). The 10 factors which are considered in determining whether a person is an employee or an independent contractor are:

> "(1) the extent of control which, by the agreement, the employer may exercise over the details of the work, (2) whether the one employed is engaged in a distinct occupation or business, (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision, (4) the skill required in the particular

> occupation, (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work, (6) the length of time for which the one employed is engaged, (7) the method of payment, whether by the time or by the job, (8) whether the work is part of the regular business of the employer, (9) whether the parties believe they are creating an agency relationship, and (10) whether the employer is or is not in business."

Hemmerling v. Happy Cab Co., 247 Neb. 919, 929, 530 N.W.2d 916, 922 (1995).

(a) Control

In *Eden v. Spaulding*, 218 Neb. at 804, 359 N.W.2d at 762, quoting *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983), we stated: " 'Generally, control, or the right of control, is the chief criterion in determining whether someone acts as an independent contractor.' " "However, even the employer of an independent contractor may, without changing the status, exercise such control as is necessary to assure performance of the contract in accordance with its terms." *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 20, 286 N.W.2d 420, 425 (1979).

Although the carrier handbook referred to the carriers as "Independent Contract Merchants" and the Tribune maintained that the carriers were merely subscribers of the newspaper, it was undisputed that the Tribune maintained control of the routes, the delivery times, and the cost of the paper to the carriers and the customers. The carriers were required to place advertising inserts in the newspapers before delivery and to deliver the newspapers wherever the customers wanted them placed. The Tribune accepted complaints and gave directions to the carriers on complaint forms. The carriers were told when to collect.

The district managers reviewed the handbook with new carriers prior to their first deliveries. The handbook contained numerous instructions regarding the manner of performance of a carrier's work. The carriers were instructed how to bundle the papers, to deliver their routes alone, to never collect without the

carrier's book, to never take friends, to have money for change, and to never collect while delivering. The carriers were given guidelines regarding substitute carriers. The carriers were instructed to take their substitute on the route for at least 3 days and to review with the substitute step-by-step guidelines provided in the handbook.

The Tribune argued that any control it exercised was necessary to assure performance of the contract in accordance with its terms. The Tribune maintained that the carriers are the subscribers of the newspaper and that as independent contractors, the carriers sell the papers to the customers on the routes assigned to them.

As to Brauner and Larson, the trial judge found that the Tribune retained and, in fact, exercised control in every important respect. Giving the benefit of all reasonable inferences to Larson, we find there is sufficient competent evidence to sustain the trial judge's finding that the Tribune exercised control of its carriers in a manner that was greater than necessary to merely assure the delivery of newspapers to the customers.

(b) Distinct Business

The next factor is whether Brauner was engaged in a distinct business and whether she offered a similar service for other businesses or persons. It was undisputed that both Brauner and Larson were not engaged in any business operation other than their duties as carriers of the Tribune. The trial judge found that Brauner and Larson had no other sources of income. The Tribune conceded that carriers were an integral part of its system of delivering newspapers. The trial judge found that the carriers were employed to further the newspaper business, not to perform some function in which the carrier was a specialist. There is sufficient competent evidence to support this finding.

(c) Whether in Locality, Work Is Ordinarily Done Under Direction of Employer, or by Specialist Without Supervision

The Tribune contended that it did not exert a large amount of supervision over the carriers. District manager Brown testified that the only thing she demanded was that the carriers deliver the papers and pay their bills on time. Virginia Dunlap, the

district manager who had originally signed Brauner, stated that as a general matter, she did not monitor the carriers' routes. If the papers were delivered on time and the bill was paid on time, she had very little contact with the carriers.

The inference from such managers' testimony is that the lack of supervision was not a formal characteristic of the newspaper-carrier relationship, but was rather a function of the quality of the carrier. Dunlap stated: "The better [the] carrier, the less contact you normally had with them. The more problems you had, obviously, the more contact you had with them." The Tribune had a formal structure of managers and district "advisors," whose primary responsibility was to supervise the carriers. The carriers received notice whenever there were complaints from the customers about the carriers' performance. Brown stated she would contact the carrier when a customer filed a complaint with the newspaper.

The district sales manager for out-of-town routes supervised over 70 paper carriers. Clarice Waite, a Tribune manager, testified that if a carrier mistakenly skipped a customer, the district advisor would call the carrier and instruct the carrier to deliver the paper that evening. If a customer had a complaint, the manager would fill out a complaint form and would contact the carrier regarding how to satisfy the customer. The trial judge found that the carriers were under the comprehensive supervision of the Tribune. We find there was sufficient competent evidence to support the trial judge's determination of this factor.

(d) Skill Required by Occupation

The less skill required by a job, the greater the indication that the worker is an employee and not an independent contractor. See *Employers Ins. of Wausau v. Greater Omaha Trans. Co.*, 208 Neb. 276, 303 N.W.2d 282 (1981). The trial judge found there was no skill required to be a newspaper carrier and noted that the Tribune's carrier advertisement characterized the job requirements as follows: "HEY KIDS! . . . If you're 10 years or older . . . WE NEED YOU!!" The trial judge's finding on this factor is supported by sufficient competent evidence.

(e) Whether Worker or Employer Supplies Instrumentalities, Tools, and Place of Work for Work to Be Performed

The Tribune initially supplied the carriers' routes, assigned customers to the routes on an ongoing basis, and supplied most of the basic tools that the carrier used. Included among the tools were collection books, collection cards, and vacation handbooks for substitute carriers. Rubberbands and other items were also furnished to the carrier at cost. In addition, the Tribune supplied the carriers with inserts and "shoppers." The Tribune paid the carrier for such delivery. Between 25 and 53 percent of the customers paid the Tribune directly, and the Tribune did not charge the carriers for this collection. The trial judge found that the Tribune supplied the workplace, the instrumentalities, and the tools to carry out the job of being a carrier. There is sufficient competent evidence to support the trial judge's finding.

(f) Length of Time for Which Person Is Engaged

Although the "Independent Carrier Agreement" stated that the agreement could be terminated by either party upon 24 days' notice, in practice, the Tribune terminated carriers without the specified notice. Such termination was based on the unsatisfactory delivery of papers by a carrier. The trial judge found that because Larson was employed to carry newspapers on a continuous basis, not for a particular terminable job, this factor weighed in Larson's favor. We find there was sufficient competent evidence to support the trial judge's determination.

(g) Method of Payment: by Time or by Job

The trial judge found that the paper carriers were compensated in part by retaining the difference between the price at which the papers were charged to the carriers and the fixed price paid by the subscribers. The Tribune set the price to the carrier and effectively controlled the subscription price. The carriers were paid 5 cents per piece—a "shopper carrier credit"—for the advertising inserts that the carriers were required to deliver. The trial judge found that Brauner and Larson were essentially paid on a piece rate measured by the difference between the prices of each paper delivered and by the piece rates paid for delivery of the "shoppers." Relying upon

Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 896, 11 N.W.2d 810, 812 (1943), the trial judge concluded that "payment of wages on a piece or quantity basis is not inconsistent with the status of an employee." The trial judge's finding is supported by sufficient competent evidence.

(h) Whether or Not Work Is Regular Part of Business of Employer

It was undisputed that the carriers' delivery of newspapers to customers was a significant part of the Tribune's business. The Tribune regarded carrier deliveries as being made by the Tribune itself. An ad published by the Tribune on August 23, 1990, stated:

> Thank You To Our Subscribers[.] We Delivered 283,452 Newspapers During July, 1990. We Received 246 Service Errors[.] Thank you for subscribing, and a special "Thank You" for calling when you were unsatisfied with our service. We're glad that you want us in your home. To Subscribe, or if your service is unsatisfactory, give us a call . . . .

James Holland, the Tribune's publisher, stated that the carriers were an integral part of the Tribune's business. Sixty-four percent of the Tribune's papers were delivered by carriers such as Larson and Brauner. The carrier handbook instructs the carriers to announce at collection that they are "from the Fremont Tribune." There was sufficient competent evidence to support the trial judge's finding that the delivery of the newspapers was a part of the regular business of the Tribune.

(i) Whether or Not Parties Believe They Are Creating Relation of Master and Servant

This factor was disputed at trial. The Tribune submitted evidence to show that it was the newspaper industry's standard to consider newspaper carriers to be independent contractors. The contract between the Tribune and Brauner characterized Brauner as an independent carrier.

Brauner testified that she thought of herself as an employee of the Tribune. Brauner felt that if she received a complaint from the Tribune, she had better fix the problem. She felt that

if she did not deliver the route according to the expectations set forth in the carrier handbook, she would be fired or have the route taken away.

Whether an agency exists depends on the facts underlying the relationship of the parties irrespective of the words or terminology used by the parties to characterize or describe their relationship. *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993); *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 458 N.W.2d 443 (1990). In *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 927, 530 N.W.2d 916, 921 (1995), we stated: " 'If there exists a written contract [that labels the worker as an independent contractor], it must, of course, be considered and may be of prime importance. . . . However, a writing which merely denominates the relationship may not be used to conceal the true arrangement.' " The trial judge found: "It is beyond sophistry and closer to outright dishonesty to characterize a 10-year[-]old party to a contract as a 'little merchant' and thus an independent contractor." We find that the words used in the "Independent Carrier Agreement" to characterize the relationship did not control the determination of whether the carriers were independent contractors. There was sufficient competent evidence to support the trial judge's determination that the contract terms did not control the issue of whether the carriers were independent contractors.

(j) Whether Employer Is or Is Not in Business

The evidence clearly indicates the Tribune was in business. Also, the trial judge correctly pointed out that failure to withhold taxes from the carriers did not indicate either employee or independent contractor status. State and federal laws exempt the normal withholding of income and Social Security taxes from the earnings of newspaper carriers under the age of 18. See, I.R.C. §§ 3401(a)(10) and 3121(b)(14) (1988); Neb. Rev. Stat. § 77-2753 (Cum. Supp. 1994).

3. Previous Holdings

We next examine our decisions in *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991), *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984), and *Stephens v.*

Celeryvale Transport, Inc., 205 Neb. 12, 286 N.W.2d 420 (1979), and consider the Tribune's assertion that the Court of Appeals failed to follow these cases.

Pre-Fab Transit Company (Pre-Fab) was a national trucking concern which received orders from customers to transport goods and then assigned these orders to truckers with whom Pre-Fab had contracted for transportation. Anthony owned his truck and trailer. The contract under which the parties operated provided: " 'It is the intention of the parties to this contract that Contractor shall be and remain an independent Contractor . . . .' " *Anthony v. Pre-Fab Transit Co.*, 239 Neb. at 405, 476 N.W.2d at 561. Anthony was required to use his own equipment in performing the contract. His compensation was 75 percent of the revenue received by Pre-Fab on each haul he made. He was paid only for hauling the loads, not while driving an empty truck. On his income tax forms, Anthony indicated he was self-employed; he paid his own taxes; and he took his own business deductions. Anthony was required to insure against liability arising from the use of his equipment. He had the right to hire employees, but the contract specifically provided that any such employees would be his. Pre-Fab did not have authority over the selection of Anthony's routes or the determination of whether Anthony would accept a particular assignment. Based upon these and other facts, we found nothing in the manner of performance that was inconsistent with the independent contractor relationship described in the contract.

In *Eden*, the plaintiff sought to recover damages for injuries received when his car collided with a truck driven by defendant Spaulding and owned by defendant Fundum. Spaulding was on his way to pick up newspapers in Omaha and transport the newspapers to Norfolk. We expressly pointed out that " 'the common-law test for independent contractor includes many factors which are to be considered and weighed in making the determination, no one of which may be conclusive.' " *Eden v. Spaulding*, 218 Neb. at 804, 359 N.W.2d at 761 (quoting *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983)). Applying the 10 factors from the Restatement (Second) of Agency § 220 (1958) to the facts in *Eden*, we found as a matter of law that Fundum was an

independent contractor. The control exercisable by the newspaper was minimal. It could only suggest when Fundum should pick up the newspapers. The newspaper had no control over the drivers of the trucks and did not dictate the truck route, and there were no intimations in the record which suggested a right of control on the part of the newspaper. At the time, Fundum also had other contracts with the post office, and he did not rely solely on the newspaper for income.

Clearly, Fundum was engaged in a distinct trucking operation. Hauling for the newspaper was not his only business. The job was not supervised by the newspaper, and there were no fixed routes or regulations regarding carrying passengers or other baggage. Fundum supplied all his own equipment, and on the night of the accident, he paid for a substitute truck to haul the newspapers. Fundum had his own employees, and the paper made no deductions for Social Security or withholdings for income tax from the payments made to Fundum.

In *Stephens*, we determined as a matter of law that Stephens was an independent contractor. There was a clear inference that a master-servant relationship did not exist. The manner in which the agreement between the parties was carried out was not in any way inconsistent with Stephens' status as an independent contractor under the terms of the agreement.

A determination regarding whether a worker is an employee, as distinguished from an independent contractor, must be made from all the facts in the case. *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991). In the case at bar, the trial judge's findings have established the existence of 10 factors that create the inference of an employer-employee relationship. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id. Anthony*, *Eden*, and *Stephens* are factually dissimilar to the present case, and they do not control our decision. The trial judge's factual determination regarding the 10 factors and the inferences therefrom is supported by sufficient competent evidence and is not clearly wrong.

4. Lack of Contract

In the case at bar, the remaining issue is whether Larson can

be an employee of the Tribune without formally contracting with the Tribune. The letter and flier stated that Brauner would be sharing her route with Larson and set forth the delivery schedule. The trial judge determined that Larson was a substitute employee of Brauner who therefore became an employee under the Workers' Compensation Act because the Tribune knew of and acquiesced in Larson's working as a substitute. The trial judge found that the Tribune had actual knowledge that Larson was assisting Brauner on a regular basis with Brauner's paper route and that the Tribune encouraged its carriers to engage substitutes to help with their routes and provided handbooks to the carriers for use in training substitutes.

Brauner testified that the Tribune had notified her of a few customer complaints about Larson. Brauner's mother testified that she had had a conversation with district manager Brown, in which Brown had inquired as to how the sharing of the route with Larson was going. The girls continued this arrangement for almost 6 months, and the Tribune never objected to this arrangement.

In addition, the Tribune encouraged carriers to find and train substitutes to help the carriers complete their routes, and the Tribune maintained a list of substitutes who were available to assist the carriers in their deliveries. The carrier handbook encouraged each carrier to seek out someone who could fill in as a substitute when the carrier was on vacation or if the carrier could not deliver the papers for another reason. The "Vacation Handbook for Your Substitute" instructed substitute carriers on the basics of newspaper delivery and stated: "Any time while you're on vacation it is very important that a well trained substitute properly manages your route."

Brown testified that in her initial meeting with each new carrier, she discussed the substitute process. Brown instructed the carriers to inform the Tribune who the substitute would be so she could contact the substitute if a problem arose. Encouraging the use of substitutes was important to the district managers because if for some reason the papers were not delivered, the district managers would be required to deliver the papers themselves.

The review panel, while noting that the trial judge made a finding of fact that the Tribune had actual knowledge that Larson was assisting Brauner in her paper route, concluded that the Tribune had knowledge only that an independent contractor may have had someone helping to deliver the papers and that Brauner and Larson were at most independent contractors. The review panel concluded there existed no contract of employment or hire between the defendants and Larson. We disagree with that conclusion.

Neb. Rev. Stat. § 48-115(2) (Reissue 1988) provides:

> Every person in the service of an employer who is engaged in any trade, occupation, business, or profession as described in section 48-106 under any contract of hire, expressed or implied, oral or written, including aliens and also including minors, who for the purpose of making election of remedies under the Nebraska Workers' Compensation Act shall have the same power of contracting and electing as adult employees.

This section recognizes that a contract for hire may be expressed or implied, including a contract with minors. "A person working as a substitute for another may be an employee under a workmen's compensation act, at least where the employer knows of, and acquiesces in, the substitution . . . ." 99 C.J.S. *Workmen's Compensation* § 74 at 298 (1958).

In *Bobik v. Indus. Comm.*, 146 Ohio St. 187, 64 N.E.2d 829 (1946), the Ohio Supreme Court recognized that it was a well-settled rule of law that if a master expressly or impliedly assents to an arrangement whereby a person is procured by an employee to act as his substitute, the substitute occupies the position of an employee of the master. In *Veit v. Courier Post Newspaper*, 154 N.J. Super. 572, 382 A.2d 62 (1977), the court held that where the newspaper clothed the newsboy with authority to engage a substitute, which occurred routinely in the course of its business, and had at least implied notice of the substitution, an implied contract of employment arose between the substitute and the newspaper for purposes of workers' compensation.

We apply the reasoning of the Ohio and New Jersey courts to the case at bar. The trial judge found that the Tribune was

advised of the fact that Brauner would be sharing her route with Larson. This relationship continued without objection for almost 6 months. The Tribune expressly granted its carriers the authority to engage substitutes, which occurred routinely in the course of its business. Therefore, under the facts of this case, Larson occupied the same position with the Tribune as did Brauner. We find that an implied agreement existed between the Tribune and Larson and that Larson would have the same status with regard to the delivery of newspapers for the Tribune as did Brauner.

VI. CONCLUSION

We conclude that the findings of fact as to the existence of the 10 factors and the inferences from such factors establish as a matter of law that an employer–employee relationship existed between the Tribune, as employer, and Brauner and Larson, as employees. Under the facts of this case, Larson is covered under the Nebraska Workers' Compensation Act. The judgment of the Court of Appeals, reinstating the award of the trial judge, is affirmed.

On March 17, 1995, the Court of Appeals awarded $15,000 to the plaintiff as attorney fees pursuant to Neb. Rev. Stat. § 48–125 (Reissue 1993). We granted further review pending our decision in the above matter. The order regarding attorney fees is affirmed.

AFFIRMED.

WHITE, C.J., and LANPHIER, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. GREGORY T. NEUJAHR, APPELLANT.

540 N.W.2d 566

Filed December 8, 1995. No. S-94-663.

1. **Trial: Rules of Evidence: Hearsay: Words and Phrases.** Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Evid. R. 801(3).
2. **Rules of Evidence: Hearsay.** 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. Neb. Evid. R. 802.
3. ____: ____. A statement is not hearsay if the statement is offered against a party and is his or her own statement, in either his or her individual or representative capacity. Neb. Evid. R. 801(4)(b)(i).
4. **Hearsay.** An oral admission by a party can be shown only by the testimony of a person who heard it; a witness who did not hear the admission cannot testify as to what a person who did hear the admission told him or her about it.
5. **Rules of Evidence: Hearsay.** When an out-of-court statement relates the content of another out-of-court statement, there must be an independent hearsay exception for each statement.
6. **Criminal Law: Trial: Evidence: Appeal and Error.** The erroneous admission of evidence in a criminal trial is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt.
7. **Trial: Juries: Evidence: Appeal and Error.** In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant.
8. **Trial: Evidence: Appeal and Error.** The erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and if other relevant evidence, properly admitted, supports the finding by the trier of fact.
9. **Trial: Motions to Strike: Appeal and Error.** The failure to make a timely objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony.
10. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
11. **Controlled Substances: Intent.** One possesses a controlled substance when one knows of the nature or character of the substance and of its presence and has dominion or control over it.
12. **Jury Instructions.** 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.

13. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if taken as a whole they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
14. **Jury Instructions.** As a general rule, in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.
15. **Courts: Juries.** A court can, in the exercise of its discretion, refuse to reply to questions from the jury regarding the applicable law.
16. **Supreme Court: Courts: Appeal and Error.** The Nebraska Supreme Court, upon granting further review which results in the reversal of a decision of the Nebraska Court of Appeals, may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and MUES, Judges, on appeal thereto from the District Court for York County, BRYCE BARTU, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Bruce E. Stephens for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

We have granted the State's petition for further review pursuant to Neb. Rev. Stat. § 24-1107 (Cum. Supp. 1994). The State appeals the Court of Appeals' decision reversing and remanding for new trial the conviction by jury of Gregory T. Neujahr for knowingly or intentionally possessing a controlled substance in violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1992). The Court of Appeals found the trial court erred in not properly instructing the jury regarding Neujahr's claim that he did not know the pills in his pocket were a controlled substance and in admitting certain hearsay testimony. *State v. Neujahr*, 95 NCA No. 20, case No. A-94-663 (not designated for permanent publication). For the reasons cited below, we reverse the decision of the Court of Appeals and remand the cause to that court with direction that it reinstate the jury's verdict.

STATE'S ASSIGNMENTS OF ERROR ON FURTHER REVIEW

The State alleges the Court of Appeals erred in finding that the trial court erroneously (1) admitted into evidence certain inadmissible hearsay and (2) instructed the jury regarding Neujahr's claim that he did not know the pills in his pocket were a controlled substance.

BACKGROUND

On August 24, 1993, at approximately 11:50 p.m., Deputy Alan Kosmicki of the York County Sheriff's Department was dispatched to Pam Johnson's residence in Gresham, Nebraska. Upon arrival, Deputy Kosmicki discovered that Gregory T. Neujahr, an acquaintance of Johnson's, was creating a disturbance at the residence. As a result, Deputy Kosmicki arrested Neujahr for trespassing and disturbing the peace and took him to jail in York, Nebraska. While Neujahr was being booked into jail, his pants pockets were emptied, and six pills, along with the fragments of another, were found in a cellophane wrapper. Laboratory tests established that three of the pills were clorazepate, a tranquilizer described as a Schedule IV drug pursuant to Neb. Rev. Stat. § 28-405 (Cum. Supp. 1992).

At trial, Neujahr admitted that he had the pills on his person. His defense was that he did not know what the pills were. He testified that Audrey Jean Nisula, an acquaintance of both Neujahr and Johnson, accidentally dropped the pills in his vehicle and that he picked them up, placed them in a cellophane cigarette wrapper, and put them in his pocket to prevent a child from obtaining them.

However, Nisula testified that she never had her prescription pill bottle in Neujahr's vehicle; that Neujahr came over to her house prior to being arrested, asking for a shot of whiskey; that he sat at her kitchen table drinking whiskey for approximately 45 minutes; that her clorazepate was on the same table during this time period; and that while he was sitting at the table, she was cleaning house and was, for part of the time, in a different room of the house.

The jury found Neujahr guilty of knowingly or intentionally possessing a controlled substance. The Court of Appeals

reversed Neujahr's conviction, finding that the trial court erred in not properly instructing the jury regarding Neujahr's claim that he did not know the pills in his pocket were a controlled substance and in admitting certain hearsay testimony. The State petitions for further review.

ANALYSIS

HEARSAY

The State first contends the Court of Appeals erred in finding that the trial court erroneously admitted into evidence certain inadmissible hearsay. During the trial, Nisula was called as a witness by the defense. During cross-examination by the State, Nisula was asked if she had a conversation with Johnson regarding Neujahr. Defense counsel timely objected to the question on the basis of hearsay, and the court overruled the objection. Nisula then testified that "[s]he [Johnson] informed me that Greg [Neujahr] was in jail and that he had called [Johnson] and asked her to ask me if I would come into court and state that I had dropped my medication in his truck." The Court of Appeals found this statement to be hearsay and concluded that the trial court erred in admitting it into evidence.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Neb. Evid. R. 801(3). "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." Neb. Evid. R. 802. We find that Nisula's testimony about what both Johnson and Neujahr said raises multiple hearsay concerns.

"A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . his own statement, in either his individual or representative capacity." Rule 801(4)(b)(i). An oral admission by a party can be shown only by the testimony of a person who heard it; a witness who did not hear the admission cannot testify as to what a person who did hear the admission told him or her about it. See *State v. Evans*, 169 N.W.2d 200 (Iowa 1969), citing with approval 31A C.J.S. *Evidence* § 193 i. at 546. Thus, rule 801(4)(b)(i) is inapplicable because Nisula did not personally hear Neujahr make the

statement in question to Johnson. As a result, Nisula's testimony about what Johnson stated that Neujahr said is multiple hearsay if offered to prove the truth of the matter asserted.

The State argues that Nisula's testimony was not hearsay because it was not offered to prove the truth of the matter asserted, but to show that Neujahr made a request through Johnson for Nisula to perjure herself. The State correctly argues that it did not offer the statements to prove that Nisula dropped her pills in Neujahr's vehicle. However, Nisula's testimony also asserted that Neujahr attempted to have Johnson obtain false testimony. Thus, the truth of what Johnson told Nisula is a matter the State was trying to prove through Nisula's testimony. For that reason, Nisula's testimony is inadmissible hearsay unless one of the evidentiary rules exempts it.

When an out-of-court statement relates the content of another out-of-court statement, there must be an independent hearsay exception for each statement. Neb. Evid. R. 805. See *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334, (1992). We find none of the evidentiary exceptions to hearsay applicable to either Neujahr's or Johnson's out-of-court statements. As a result, it was error for the trial court to admit Nisula's inadmissible hearsay testimony into evidence.

HARMLESS ERROR

The erroneous admission of evidence in a criminal trial is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt. *State v. Lee*, 247 Neb. 83, 525 N.W.2d 179 (1994); *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). In determining whether error in admitting evidence was harmless, an appellate court bases its decision on the entire record in determining whether the evidence materially influenced the jury in a verdict adverse to the defendant. *State v. Lee, supra*. The erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and if other relevant evidence, properly admitted, supports the finding by the trier of fact. *Id.*; *State v. Fahlk, supra*.

In the instant case, before Nisula's hearsay testimony was adduced by the State on cross-examination, she was asked and

answered the following question by defense counsel on direct examination:

> Q Did you ever indicate to Pam Johnson that you would come to the courthouse and to my office to get this matter cleared up?
>
> A Pam [Johnson] asked me if I would. And — Pam — How it started out, Pam asked me if I would come into court and lie and say that I dropped my prescription in Greg's [Neujahr's] truck.

Once again, Nisula's testimony about Johnson's out-of-court statement was inadmissible hearsay. However, defense counsel did not move to strike Nisula's answer. "The failure to make a timely objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony." *State v. Archbold*, 217 Neb. 345, 352, 350 N.W.2d 500, 505 (1984). See, also, Neb. Evid. R. 103.

Furthermore, Nisula also testified on cross-examination that on one occasion while she and her sons were playing cards, Neujahr himself appeared at the residence and asked her if she "would come into court and say that [she] had dropped [her] prescription in his truck." Nisula further testified that Neujahr told her he would make it worth her while by trying to raise $500 in exchange for her testimony. These statements made by Neujahr, directly to Nisula, were offered against him at trial and thus were not hearsay. See rule 801(4)(b)(i).

Thus, clearly the jury was aware through admissible testimony, or testimony to which there was no timely objection, that both Johnson and Neujahr had asked Nisula to testify that she dropped her prescription pills in Neujahr's vehicle. This relevant evidence, properly admitted, supports the finding by the trier of fact that Neujahr knowingly possessed a controlled substance. Therefore, the hearsay testimony that was improperly admitted was merely cumulative and could not have prejudiced Neujahr by materially influencing the jury in its verdict. As a result, we find the trial court's erroneous admission of this hearsay testimony harmless beyond a reasonable doubt.

Jury Instructions

The State next contends the Court of Appeals erred in finding

that the trial court did not properly instruct the jury regarding Neujahr's claim that he did not know the pills in his pocket were a controlled substance. The trial court instructed the jury in pertinent part as follows:

> INSTRUCTION NO. 4
>
> The material elements which the State must prove beyond a reasonable doubt in order to convict the defendant of the offense charged in the Information are:
>
> 1. That the defendant, Gregory T. Neujahr;
> 2. Possessed clorazepate, a controlled substance;
> 3. That he did so knowingly or intentionally;
> 4. That he did so in York County, Nebraska; and
> 5. That he did so on or about August 25, 1993.
>
> If you decide that the State proved each element beyond a reasonable doubt then you must find the defendant guilty. Otherwise, you must find the defendant not guilty.
>
> . . . .
>
> INSTRUCTION NO. 5
>
> "Possession" of clorazepate means either knowingly having it on one's person or knowing of the object's presence and having control over the object.
>
> . . . .
>
> INSTRUCTION NO. 6
>
> The law of Nebraska provides that it shall be unlawful for any person knowingly or intentionally to possess a controlled substance.
>
> Clorazepate is a controlled substance as classified by Nebraska law.
>
> The term intentionally means willfully or purposely and not accidentally or involuntarily.
>
> The term knowingly refers to an act done with awareness that it will cause such a result.

Neujahr requested the following instruction be given to the jury: "You are hereby instructed that before you can find the defendant guilty of knowingly and intentionally possessing a controlled substance you must find that he knew that the drug in his possession was a controlled substance to-wit: clorazepate and that his possession was not inadvertent." Neujahr also tendered to the trial court a proposed instruction defining the term "knowingly" as "1) having knowledge; 2) shrewd; clever;

3) implying shrewed [sic] or secret understanding" and the term "intentionally" as "1) a determination to act in a specified way; 2) done purposely." The trial court refused to give these instructions.

During its deliberations, the jury asked the court the following question: "Did [Neujahr] have to know it was a controlled substance?" The court answered this question by further instructing the jury as follows: "You're instructed to reread instructions 4, 5, and 6 and continue with your deliberations."

On appeal, Neujahr argued the trial court erred in failing to define the terms "knowingly" and "intentionally" and in failing to further explain or define the law after inquiry by the jury. Neujahr maintained it was prejudicial error for the trial court to refuse his instructions. The Court of Appeals held the trial court did not properly instruct the jury regarding Neujahr's claim that he did not know the pills in his pocket were a controlled substance. The Court of Appeals reasoned that under the trial court's instructions, "Neujahr could be guilty if he knowingly had possession of the pills without realizing that they were clorazepate." *State v. Neujahr*, 95 NCA No. 20 at 50, case No. A-94-663 (not designated for permanent publication).

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Derry, ante* p. 260, 534 N.W.2d 302 (1995); *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

First, Neujahr's tendered instruction was not a correct statement of the law. The substance of his tendered instruction was that the jury must find that he knew the pills in his possession were clorazepate. However, this court has repeatedly held that "[o]ne possesses a controlled substance when one knows of the nature or character of the substance and of its presence and has dominion or control over it." *State v. DeGroat*, 244 Neb. 764, 768, 508 N.W.2d 861, 865 (1993); *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991); *State*

v. Williams, 211 Neb. 650, 319 N.W.2d 748 (1982). Thus, the State must prove that Neujahr knew the pills he possessed were a controlled substance, not that he knew the pills were clorazepate.

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. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992). 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 a reversal. *State v. Lowe, ante* p. 215, 533 N.W.2d 99 (1995); *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995); *State v. Myers, supra.*

The instructions given, taken as a whole, adequately advised the jury that, in order to convict, the law required Neujahr to know that the substance he possessed was a controlled substance.

Instruction No. 6 states that "[t]he law of Nebraska provides that it shall be unlawful for any person knowingly or intentionally to possess a controlled substance." This instruction is substantively identical to the possession of a controlled substance statute, § 28-416(3), under which Neujahr was charged. That statute states in pertinent part, "[A] person knowingly or intentionally possessing a controlled substance . . . shall be guilty of a Class IV felony." In *State v. Friend*, 230 Neb. 765, 773, 433 N.W.2d 512, 517 (1988), this court held, "As a general rule, in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute." In that case, we found the trial court properly "instructed the jury on the elements of the crime, including the statutorily defined words, 'knowingly or intentionally' possessed a controlled substance." *Id.*

Furthermore, instruction No. 6 states that the term "knowingly" refers to an act done with awareness that it will cause such a result. Thus, the instruction requires the State to prove that Neujahr's act was done with awareness that it would cause him to possess a controlled substance. In other words, the instruction requires the jury to find that Neujahr was aware that

it was a controlled substance he possessed, in order to render a guilty verdict.

Moreover, instruction No. 5 states, " 'Possession' of clorazepate means either knowingly having it on one's person or knowing of the object's presence and having control over the object." "[I]t," "object's," and "object," refer to clorazepate, a controlled substance. Stated another way, the instruction reads that possession of a controlled substance means either knowingly having a controlled substance on one's person or knowing of the presence of the controlled substance and having control over the controlled substance.

Thus, the gist of Neujahr's requested instructions was covered in the instructions given which, taken as a whole, correctly stated the law, were not misleading, and adequately covered the issues supported by the evidence. As a result, Neujahr was not prejudiced by the trial court's refusal to give his requested instructions.

Neujahr further argues that the trial court erred when it refused to offer a further instruction after the jury posed the question, "Did he have to know it was a controlled substance?" A court can, in the exercise of its discretion, refuse to reply to questions from the jury regarding the applicable law. See *Griffith v. State*, 157 Neb. 448, 59 N.W.2d 701 (1953). This court stated in *Savary v. State*, 62 Neb. 166, 87 N.W. 34 (1901):

> When a point arising in a criminal trial has been covered in an instruction to the jury, it is not error to refer to such instruction as answering an inquiry submitted by the jury during their deliberations, in place of giving another instruction on the same point, although another instruction might properly have been given.

(Syllabus of the court.)

In the instant case, the trial court referred the jury to the instructions which were pertinent to its question. Because the question raised by the jury was adequately covered by the instructions given, the trial court did not abuse its discretion by referring the jury to the instructions.

Prosecutorial Misconduct

After the clorazepate pills were removed from Neujahr's

pocket during the booking procedure following his arrest, Deputy Kosmicki asked Neujahr what the tablets were. Deputy Kosmicki recorded in his police report that Neujahr's response was that "they were his Advil." During discovery, Neujahr made a request of the State to turn over any statements made by Neujahr. No order was included in the record. However, it would appear from the bill of exceptions that Neujahr's request for discovery was granted. The scope of discovery is controlled by Neb. Rev. Stat. § 29-1912 (Reissue 1989). That section provides in pertinent part:

> (1) When a defendant is charged with a felony . . . he or she may request the court where the case is to be tried, at any time after the filing of the indictment, information, or complaint to order the prosecuting attorney to permit the defendant to inspect and copy or photograph:
>
> (a) The defendant's statement, if any. For purposes of this subdivision statement shall mean a written statement made by the defendant and signed or otherwise adopted or approved by him or her, or a stenographic, mechanical, electrical, or *other recording*, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the defendant to an agent of the prosecution, state, or political subdivision thereof, and *recorded contemporaneously* with the making of such oral statement.

(Emphasis supplied.)

In its answer to discovery, just a few days before trial, the State said it was not in possession of a "statement" made by Neujahr, as that term is defined by § 29-1912. At trial, the State used Neujahr's oral statement that "they were his Advil" against him. On appeal, Neujahr alleged that the State's failure to comply with discovery constituted prosecutorial misconduct which required a vacation of the verdict. With respect to this assigned error, the Court of Appeals found that it simply did not have a sufficient amount of information in the record to fully consider the issue. The Court of Appeals went on to state that "[i]f the case did not have to be retried, the matter would cause us great concern. However, since the case must be retried, we decline to address this issue due to the lack of an adequate

record." *State v. Neujahr*, 95 NCA No. 20 at 41, case No. A-94-663 (not designated for permanent publication).

The Nebraska Supreme Court, upon granting further review which results in the reversal of a decision of the Nebraska Court of Appeals, may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach. *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994). We deem it appropriate to consider this assigned error.

We also are concerned that Neujahr's request for discovery was not complied with by the State until a few days before trial. The discovery process is not a game of "hide the ball," and discovery orders must be completed in a timely manner. However, given the state of the record, we are unable to determine when the State was to comply and whether sanctions should have been issued.

Assuming, for the sake of argument without deciding, that Deputy Kosmicki's act of including Neujahr's statement in the police report was a contemporaneous recording of a statement for purposes of § 29-1912, we conclude the State's failure to turn over this statement during discovery did not prejudice Neujahr.

In order for the State to convict Neujahr for possession of a controlled substance, it must prove two elements: (1) Neujahr knowingly possessed a substance, and (2) he knew of the nature or character of the substance, i.e., he knew it was a controlled substance. Neujahr's statement that "they were his Advil" does nothing to establish that he knew the nature or character of the substance he possessed. Thus, the State's failure to turn over this statement during discovery could not have prejudiced Neujahr so far as the second element of the offense is concerned.

However, it is true that this statement tended to show that Neujahr knew he was in possession of a substance. Thus, the State's failure to comply with discovery had the potential to prejudice Neujahr so far as the first element of the offense is concerned. However, Neujahr himself testified that Nisula accidentally dropped the pills in his vehicle and that he picked them up, placed them in a cellophane cigarette wrapper, and put them in his pocket to prevent a child from obtaining them.

Thus, Neujahr admitted that he knew he possessed the pills. Because Neujahr's statement related only to an element of the offense that Neujahr admitted, the State's failure to turn the statement over to Neujahr during discovery did not rise to the level of prejudicial error.

CONCLUSION

We find that the hearsay testimony admitted into evidence was harmless error, that the trial court properly instructed the jury, and that the State's failure to comply with discovery did not prejudice Neujahr. Accordingly, we reverse the Court of Appeals' decision and remand the cause to that court with direction that it reinstate the jury's verdict.

REVERSED AND REMANDED WITH DIRECTION.

FRANKIE D. WHITE, APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLANTS.

540 N.W.2d 354

Filed December 8, 1995. No. S-95-293.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be affirmed, or it may be reversed, vacated, or modified for errors appearing on the record, or the case may be remanded for further proceedings.
2. **Administrative Law: Final Orders: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Evidence: Presumptions: Appeal and Error.** Unless there is affirmative evidence to the contrary, a reviewing court will presume that an agency has duly considered all the evidence before it.
4. **Statutes: Legislature: Intent: Appeal and Error.** In settling upon the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute

considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.

5. **Statutes: Legislature: Presumptions: Judicial Construction.** In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Supreme Court construing and applying that legislation.
6. **Employer and Employee: Polygraph Tests: Public Policy.** Neb. Rev. Stat. § 81-1932 (Reissue 1994) clearly sets forth a public policy of Nebraska prohibiting the use of a polygraph examination by an employer to deny employment.
7. **Criminal Law: Polygraph Tests: Judicial Construction.** Neb. Rev. Stat. § 81-1932 (Reissue 1994) is a criminal statute and must be narrowly construed.
8. **Statutes: Judicial Construction.** Statutory exceptions must be strictly construed.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Don Stenberg, Attorney General, and Charles E. Lowe for appellant.

James D. McFarland, of Burns & Associates, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

The State appeals an order of the Lancaster County District Court reversing a Nebraska State Personnel Board decision under the Administrative Procedure Act, specifically, Neb. Rev. Stat. §§ 84-917 and 84-918 (Reissue 1994). The State Personnel Board had held that Frankie D. White, a corrections unit caseworker at the Nebraska State Penitentiary's medium security unit, was properly fired for refusing to take a polygraph examination. The district court held that White should not have been dismissed for failure to take a polygraph examination ordered by the director of the Department of Correctional Services (DCS). State law, specifically, Neb. Rev. Stat. § 81-1932 (Reissue 1994), outlaws mandatory polygraph tests in employment situations, but an exception is made for those involved in public law enforcement. The district court held that White was not a public law enforcement officer because that term had been defined to exclude employees of DCS. The State

appealed and petitioned to bypass the Nebraska Court of Appeals on the grounds that a constitutional question was at issue. The petition to bypass the Court of Appeals was granted.

BACKGROUND

White was a unit caseworker at the medium security unit. The warden of the state penitentiary stated that White's duties included conducting searches of at least three bunk areas per shift, conducting four random security checks each hour, maintaining security and discipline, conducting "pat" searches of inmates, conducting inmate counts, and conducting "shakedowns" of various areas in the unit. White was also required to write incident reports on inmate behavior and to use force in potential escape situations.

When asked about his duties, White stated:

> My duties as a caseworker were to observe — generally observe inmates' activities. I maintained a caseload of 10 inmates in which we devised programs to help those inmates of returning to society. We helped inmates get in the program, such as Alcoholics Anonymous, Drugs Anonymous, Narcotics Anonymous. We helped inmates get in the halfway houses. I also supervised inmates in their work details, the cleaning of the bathrooms, the living area, the day rooms. I did conduct shakedowns which is a search of an inmate or an inmate's property.

The record further showed that White's duties did not include the power of arrest, reading people their *Miranda* rights, or conducting criminal investigations. White was also never given any "public law enforcement" training.

In 1993, two inmates alleged that White brought marijuana into the unit and showed it to them. The unit administration investigated, and the two prisoners took and passed polygraph exams. White was then asked to take a polygraph exam. White refused. The unit administration asked for and received a directive from the director of DCS ordering White to submit to the polygraph exam. White still refused.

Disciplinary charges were initiated for White's refusing the polygraph exam. White was then fired. White filed a grievance with a hearing officer of the State Personnel Board. The hearing

officer recommended that the dismissal of White be upheld. The State Personnel Board agreed.

Pursuant to the Administrative Procedure Act, specifically, § 84-917, White appealed to the Lancaster County District Court. The court conducted a de novo review. The court found that the exception in § 81-1932 permitting employers to require employees to submit to polygraph examinations if their employment "involves public law enforcement" did not apply to White as a unit caseworker. The district court held that because White could not be forced to submit to the test, DCS had no authority to terminate his employment for his refusal to take the exam. The district court ordered White reinstated with backpay and benefits.

ASSIGNMENTS OF ERROR

DCS assigned as errors the following:

1. The District Court erred in reversing the decision of the State Personnel Board and ordering Appellee reinstated to employment by DCS with backpay and benefits.

2. The District Court erred in determining that employees of DCS generally and unit caseworkers, such as Appellee, specifically are not involved in public law enforcement within the meaning of § 81-1932 so as to be subject to directives from their employer to take polygraph examinations.

3. The District Court erred in determining that there was no just cause for the imposition of employee discipline upon Appellee.

4. The District Court erred by not holding that the exception for employment "involv[ing] public law enforcement" in Neb. Rev. Stat. § 81-1932 (1994), on its face and as applied to Appellee, was not violative of the constitutional "right to privacy."

STANDARD OF REVIEW

In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be affirmed, or it may be reversed, vacated, or modified for errors appearing on the record, or the

case may be remanded for further proceedings. *Garcia v. Nebraska Dept. of Motor Vehicles, ante* p. 251, 533 N.W.2d 911 (1995); *Twiss v. Trautwein*, 247 Neb. 535, 529 N.W.2d 24 (1995); *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995).

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. *Rose Equip., Inc. v. Ford Motor Co., ante* p. 344, 535 N.W.2d 404 (1995); *George Rose & Sons v. Nebraska Dept. of Revenue, ante* p. 92, 532 N.W.2d 18 (1995); *Wagoner v. Central Platte Nat. Resources Dist., supra.*

Unless there is affirmative evidence to the contrary, a reviewing court will presume that an agency has duly considered all the evidence before it. *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994).

ANALYSIS

The issue is whether an employee such as White can lawfully be required to take a polygraph test. Section 81-1932 prohibits termination for refusal to take a polygraph test. An exception is made, however, for those employees involved in public law enforcement. Does White's current employment as a unit caseworker involve public law enforcement within the statutory definition?

In settling upon the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *George Rose & Sons v. Nebraska Dept. of Revenue, supra*; *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995); *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994).

In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did

so with full knowledge of the preexisting legislation and the decisions of the Supreme Court construing and applying that legislation. *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994); *School Dist. No. 17 and Westside Comm. Schools v. State*, 210 Neb. 762, 316 N.W.2d 767 (1982).

Three sections of chapter 81 deal with law enforcement personnel: Neb. Rev. Stat. §§ 81-1401(3)(b), 81-1932, and 81-1373(1)(f) and (g) (Reissue 1994).

Section 81-1932, enacted in 1980 and never amended, does not in itself define what type of employment involves "public law enforcement"; however, two other sections in chapter 81 do define "law enforcement." Section 81-1932, the subject of this opinion, provides in part: "No employer or prospective employer may require as a condition of employment or as a condition for continued employment that a person submit to a truth and deception examination *unless such employment involves public law enforcement*." (Emphasis supplied.)

This court has previously recognized that § 81-1932 clearly sets forth a public policy of Nebraska prohibiting the use of a polygraph examination by an employer to deny employment. See *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987). This same public policy applies to the continuation of employment, due to the plain language of the statute. This court has also held that § 81-1932 is a criminal statute and must be narrowly construed. *Collins v. Baker's Supermarkets*, 223 Neb. 365, 389 N.W.2d 774 (1986).

Section 81-1932 creates an exception for those involved in public law enforcement. Statutory exceptions must be strictly construed. *State ex rel. Halloran v. Hawes*, 203 Neb. 405, 279 N.W.2d 96 (1979). In *Halloran*, this court stated:

> It is a general rule of statutory construction that a proviso which operates to limit the application of the provisions of a statute general in terms should be strictly construed and held to include no case not clearly within the purpose, letter, or express terms of the proviso.

203 Neb. at 411, 279 N.W.2d at 100.

The Legislature has nowhere defined DCS employees as involved in public law enforcement.

Section 81-1932 does not modify the preexisting definition of

law enforcement officers in § 81-1401(3)(b). Section 81-1401(3)(b) was originally enacted in 1969 and was amended to substantially its present-day form in 1980. It is part of the statutes which established the Nebraska Law Enforcement Training Center to train and certify law enforcement officers in this state. Section 81-1401(3)(b) states: "*Law enforcement officer shall not include employees of the Department of Correctional Services*, probation officers under the Nebraska Probation System or appointed under section . . . , parole officers appointed by the Parole Administrator, or employees of the Department of Revenue under section . . . ." (Emphasis supplied.)

In his current job, therefore, White is excluded by legislative statute from law enforcement training and certification.

Section 81-1373(1)(f) and (g), enacted in 1987 and not subsequently amended, a part of the State Employees Collective Bargaining Act, defines in relevant part:

> (f) Protective Service, which unit is composed of institutional security personnel, *including correctional officers*, building security guards, and similar classes;
>
> (g) *Law Enforcement, which unit is composed of employees holding powers of arrest,* including Nebraska State Patrol officers and sergeants, game wardens, fire marshal personnel, and similar classes. Sergeants, investigators, and patrol officers employed by the Nebraska State Patrol as authorized in section 81-2004 shall be presumed to have a community of interest with each other and shall be included in this bargaining unit notwithstanding any other provision of law which may allow for the contrary.

(Emphasis supplied.)

It is clear from these two separate definitions that the Legislature reiterated the definition of § 81-1401(3)(b): Law enforcement officers are those with the power of arrest. Pursuant to statutory definition, White did not hold the power of arrest and was therefore excluded from the definition of law enforcement officer. The additional qualification in § 81-1932 that the law enforcement be "public," if anything, also helps White's position.

The State is requesting that we read into § 81-1932 a definition contrary to that which the Legislature has used on two other occasions. While the definitions of law enforcement used in § 81-1401(3)(b) and § 81-1373(1)(f) and (g) are not binding when we construe § 81-1932, they certainly are persuasive. It must be presumed under our rules of statutory construction that the Legislature was aware of the definition of law enforcement officer in § 81-1401(3)(b) when it enacted § 81-1932 and that the Legislature continued the omission of DCS employees from the definition of law enforcement officer when it enacted § 81-1373(1)(f) and (g).

Under well-established rules of statutory construction, a caseworker at the medium security unit is not involved in public law enforcement within the definition of the exception in § 81-1932.

We therefore affirm the district court's finding that White in his current employment is not involved in law enforcement so as to be subject to the exclusion created by § 81-1932.

CONCLUSION

We find that the decision of the district court conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. There being no error on the record, the order of the district court is hereby affirmed.

AFFIRMED.

BAKER'S SUPERMARKETS, INC., APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF AGRICULTURE, ET AL., APPELLEES.

540 N.W.2d 574

Filed December 15, 1995. No. S-94-152.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, the reviewing court has an obligation to reach its conclusion regarding

questions of law independent from the conclusion reached by the trial court.

2. **Administrative Law: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency.
3. **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.
4. **Criminal Law: Statutes.** A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence.
5. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
6. **Statutes: Legislature: Intent.** When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
7. **Statutes: Legislature.** The Legislature may lawfully adopt by reference an existing law or regulation of another jurisdiction; when a regulation is adopted by reference, the effect is the same as if the regulation had been written into the adopting statute.
8. **Actions: Declaratory Judgments: Statutes.** The Uniform Declaratory Judgments Act provides that any person whose rights are affected by a statute may have determined any question of construction or validity under the statute and obtain a declaration of rights.
9. **Actions: Declaratory Judgments: Immunity: Waiver.** An action for declaratory judgment against the state may not be had without the state's consent, because the Uniform Declaratory Judgments Act does not operate as a waiver of the state's sovereign immunity.
10. **Actions: Declaratory Judgments: Public Officers and Employees: Immunity.** A declaratory judgment action against a state officer or agent which seeks to restrain state officials from performing affirmative acts is not a suit against the state and is not prohibited by principles governing sovereign immunity.
11. **Statutes: Words and Phrases.** The word "or," when used properly, is disjunctive, and "and" is conjunctive, but the words are so frequently interchanged that in construing a civil statute, "or" may be read as "and" where a strict reading would lead to an absurd or unreasonable result and defeat the intent of the statute.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Thomas J. Culhane and Gary L. Hoffman, of Erickson & Sederstrom, P.C., for appellant.

Christian F. Shubert and Mark Galvin, Special Assistant Attorneys General, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

Baker's Supermarkets, Inc. (Baker's), filed a petition for declaratory and injunctive relief regarding the interpretation by the Nebraska Department of Agriculture (Department) of § 1.1.2 of the Uniform Regulation for the Method of Sale of Commodities, which was adopted in Nebraska pursuant to Neb. Rev. Stat. § 89-186(1)(b) (Cum. Supp. 1992). The Department's interpretation of § 1.1.2, which provides in part that strawberries "shall be . . . sold by weight, or by volume" is that Baker's cannot sell strawberries by weight and by volume in the same store at the same time. The Lancaster County District Court dismissed the petition, and Baker's timely filed this appeal. Under the authority granted to us by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1994) to regulate the caseloads of the appellate courts of this state, we removed the appeal to our docket. We affirm the decision of the district court.

BACKGROUND

In the spring of 1992, Baker's, an Omaha metropolitan grocery store chain, decided to sell strawberries by both weight and prepackaged volumes. Ron Anderson, Baker's director of produce marketing, testified that the decision to sell the berries by weight and by prepackaged volumes (which did not disclose weight and price per pound) was made after he reviewed several produce marketing publications. Those publications indicated that some consumers prefer the convenience of prepackaged berries, while others prefer to hand-select berries and purchase them by weight. This marketing decision raised questions at the Department regarding the ability of consumers to readily compare the cost of berries sold by the two marketing methods.

Baker's is subject to the statutory provisions of the Weights and Measures Act, codified at Neb. Rev. Stat. § 89-182.01 et seq. (Cum. Supp. 1992), which governs the use and inspection of weighing devices and regulates the sale of commodities. As part of the Weights and Measures Act, the Legislature incorporated by reference the provisions of the Uniform Regulation for the Method of Sale of Commodities published in

National Institute of Standards and Technology Handbook 130 (Handbook 130) as it existed on June 30, 1992. See § 89-186. Section 1.1.2 applies to the sale of berries and small fruits. Section 1.1.2 provides:

> **Methods of Sale.** — Berries and small fruits shall be offered and exposed for sale and sold by weight, or by volume. If sold by volume, they must be:
>
> **(1)** in measure containers that are either open or else covered by uncolored transparent lids or other wrappings that do not obscure the contents, and
>
> **(2)** have capacities per . . . subsection 1.1.2.(2)(b). When selling berries and small fruits by volume in measure containers, whether or not covered, the measure containers themselves shall not be packages for labeling purposes.
>
> . . . .
>
> **(b)** Inch-Pound Capacities - 1/2 dry pint, 1 dry pint, or 1 dry quart.

Some definitions are required. The term "method of sale" as applied to a commodity defines acceptable measurements and expressions of the quantity sold or offered for sale (e.g., weight, volume, area, count, et cetera). In addition, the term "method of sale" can include labeling or other requirements.

Section 1.1.2 provides that berries may be sold by weight, or by volume. The quantity of a commodity sold by weight is measured at the time of sale on a scale. The quantity of a commodity sold by volume is measured in containers, e.g., pint, quart, et cetera. Section 1.1.2 prescribes that the quantity of strawberries sold by volume be ascertained by the use of one-half dry pint, dry pint, and dry quart measure containers.

Section 1.1.2 states that the measure containers used to package strawberries for sale by volume are not packages for labeling purposes. The import of this is that strawberries sold by volume in containers by dry measure are not subject to the federal Fair Packaging and Labeling Act. Thus, no labels giving information such as content and weight are required on a prepackaged pint or quart of strawberries.

When Anderson made the decision to sell strawberries at Baker's both by weight and by volume, he was cognizant of

§ 1.1.2. Anderson interpreted § 1.1.2 to permit Baker's to sell strawberries by weight, by volume, or by both methods of sale. Therefore, Baker's sold strawberries in dry measure containers priced per container, and bulk strawberries priced per pound. The prepackaged containers were not labeled, and Baker's did not provide any information regarding their per-pound price.

In July 1992, an inspector for the Department's division of weights and measures visited a Baker's store and left an inspection report notifying the supermarket that it could not sell strawberries by weight and by prepackaged volume at the same time. The inspection report stated that sales by volume or weight are allowable methods of sale, but berries could not be sold by both methods at the same time and in the same place.

On July 31, 1992, Steven A. Malone, the director of the division of weights and measures, sent a letter to Anderson. The letter informed Anderson that the Department interpreted § 1.1.2 to provide that strawberries can be sold "by weight *or* by volume." Malone underscored the word "or" to give it emphasis. Malone informed Anderson that the use of the word "or" meant that one of the two choices must be selected and that if § 1.1.2 had intended to allow both choices, then the word "and" would have been used. In his letter, Malone referred Anderson to § 2.32 of Handbook 130. A copy of that section is not part of the portion of the handbook in the record before us. However, the letter stated that § 2.32 recognizes the difficulty faced by consumers when more than one method of sale was employed in the same outlet for the same product, and provides that incomparable methods of sale (weight and measure) for the same product in the same outlet should be minimized. Additionally, Malone referred Anderson to § 89-192 of the Weights and Measures Act, which provides that "commodities not in liquid form shall be sold only by weight, by measure, or by count, so long as the method of sale provides the ability for cost comparison and accurate quantity information."

Baker's disagreed with the Department's interpretation of § 1.1.2. When the strawberry season began in 1993, Baker's again offered strawberries for sale in each of its stores by weight and by volume. Department inspectors again notified Baker's that the supermarket chain was in violation of the Department's

interpretation of § 1.1.2. Baker's refused to stop selling strawberries by both methods at the same time, and the Department issued "stop sale" orders.

The Weights and Measures Act includes enforcement provisions. See §§ 89-196.01, 89-197, and 89-198. Ultimately, any person who violates any provision of the Weights and Measures Act or a final order of the Department which has been sustained by a court of law shall be guilty of a Class III misdemeanor. § 89-1,101.

On April 9, 1993, Baker's filed an amended petition for declaratory judgment and injunctive relief in the district court for Lancaster County. Baker's averred that it believed that its conduct was not in violation of the Weights and Measures Act and that a genuine controversy existed between Baker's and the Department regarding the Department's interpretation of the language set forth in § 1.1.2. Baker's stated that the district court had jurisdiction to resolve the controversy pursuant to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989 & Cum. Supp. 1992), or Neb. Rev. Stat. § 84-911 (Reissue 1987). Baker's alleged that unless the Department was enjoined from prohibiting the supermarket from offering strawberries for sale by both methods, it would suffer irreparable harm arising from disruption of its business operations and the loss of goodwill it had established with consumers.

In its answer, the Department admitted that the district court had jurisdiction under § 25-21,149. The Department asserted that an injunction should not issue because the parties had entered into an agreement in which the Department promised not to take any action to penalize Baker's or prohibit it from continuing to sell strawberries by both methods during the pendency of this action. The Department denied all other allegations.

The district court held that it had jurisdiction pursuant to § 84-911. On January 5, 1994, the district court denied Baker's petition for declaratory relief and other relief after finding that the Department's interpretation of § 1.1.2 was not clearly wrong, absurd, or unreasonable.

ASSIGNMENTS OF ERROR

Baker's, the appellant, asserts that the district court erred in (1) determining and holding that § 1.1.2 prohibits a vendor from selling strawberries both by volume and by weight at the same location simultaneously, (2) finding that the Department's interpretation of § 1.1.2 is reasonable in light of the purposes of the Weights and Measures Act, (3) giving deference to the Department's interpretation of § 1.1.2, and (4) entering judgment for the Department and dismissing Baker's petition.

STANDARD OF REVIEW

In an appeal from a declaratory judgment, the reviewing court has an obligation to reach its conclusion regarding questions of law independent from the conclusion reached by the trial court. *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995).

The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency. *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995).

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. *SID No. 57 v. City of Elkhorn, ante* p. 486, 536 N.W.2d 56 (1995); *George Rose & Sons v. Nebraska Dept. of Revenue, ante* p. 92, 532 N.W.2d 18 (1995). In addition, this court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994).

It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995).

When considering a series or collection of statutes pertaining to a certain subject matter which are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *Rust v. Buckler*, 247 Neb. 852, 530 N.W.2d 630 (1995); *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995); *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993).

ANALYSIS

JURISDICTION

The threshold question is, What is the proper statutory basis for jurisdiction over this declaratory judgment action? The district court claimed jurisdiction over the action under § 84-911 of the Administrative Procedure Act, which provides that the validity of any rule or regulation promulgated by an administrative agency may be determined upon a petition for declaratory judgment. Although we agree that the district court had jurisdiction over the matter, its jurisdiction arises under the Uniform Declaratory Judgments Act rather than under § 84-911.

It is the nature of the rule or regulation before us that dictates which of the declaratory judgment statutes applies. The Legislature incorporated into § 89-186 by reference Handbook 130, which contains § 1.1.2 and other applicable regulations, as it existed on June 30, 1992.

The Legislature may lawfully adopt by reference an existing law or regulation of another jurisdiction. *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994); *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967). When a regulation is adopted by reference, the effect is the same as if the regulation had been written into the adopting statute. *Clemens v. Harvey, supra*. Therefore, § 1.1.2 is not a rule or regulation promulgated by an administrative agency but is a statute lawfully enacted by the Legislature, and § 84-911 of the Administrative Procedure Act does not apply.

However, the Uniform Declaratory Judgments Act provides that any person whose rights are affected by a statute may have determined any question of construction or validity under the

statute and obtain a declaration of rights. § 25-21,150. Generally, an action for declaratory judgment against the state may not be had without the state's consent, because the Uniform Declaratory Judgments Act does not operate as a waiver of the state's sovereign immunity. *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993). However, a declaratory judgment action against a state officer or agent which seeks to restrain state officials from performing affirmative acts is not a suit against the state and is not prohibited by principles governing sovereign immunity. See *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995).

In its petition, Baker's joined three parties: the State; Larry Sitzman, the director of the Department of Agriculture; and Malone, the director of the Department's weights and measures division. Sitzman and Malone are responsible for whatever action is taken against Baker's for alleged noncompliance with the Department's interpretation of § 1.1.2. Thus, Baker's is entitled to obtain a determination of the validity of the Department's construction of § 1.1.2.

Statutory Interpretation

The applicable standard of review, see above, in this case dictate a strict construction of the applicable statutes because a violation of the Weights and Measures Act could ultimately result in a criminal penalty. Since this is a matter of statutory interpretation, we are obligated to reach our conclusions independent of the determination made by the Department.

The preamble to Handbook 130 states that its purpose is "to require accurate and adequate information about commodities so that purchasers can make price and quantity comparisons." The regulations found in Handbook 130 both proscribe and permit methods of sale for commodities such as butter, bread, flour, meat, poultry, fish, et cetera. For example, according to § 1.4, flour may be packaged and sold only by weight. Section 1.6 provides that fluid milk products shall be packaged for retail sale only by volume, such as pint or gallon. Therefore, milk cannot be sold by the pound and flour cannot be sold by the gallon. Consumers can easily compare the price of milk from different dairies, since the quantity is standard.

Section 1.1.2 states that berries, which includes strawberries, "shall be offered and exposed for sale and sold by weight, or by volume." Does this regulation mean that the retailer can choose either or both methods, or only one method? The Department argues that *or* must be read in the disjunctive and that the retailer must choose one method of sale at a location—weight or volume. Baker's argues that "or" means one, the other, or both of two alternatives.

The Department relies on several cases which interpret the use of the word "or" and stated that its proper usage is disjunctive. See, *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *Rapid Film Service, Inc. v. Bee Line Motor Freight*, 181 Neb. 1, 146 N.W.2d 563 (1966); *State ex rel. Finigan v. Norfolk Live Stock Sales Co., Inc.*, 178 Neb. 87, 132 N.W.2d 302 (1964); *Richter v. City of Lincoln*, 136 Neb. 289, 285 N.W. 593 (1939). We have said that "or," when used properly, is disjunctive, and "and" is conjunctive. The words are so frequently interchanged that in construing a civil statute, "or" may be read as "and" where a strict reading would lead to an absurd or unreasonable result and defeat the intent of the statute. *Hoiengs v. County of Adams, supra.*

In its reliance upon the *Hoeings* line of cases, the Department overlooks the possible criminal penalties. Penal statutes must be strictly construed. The Department also overlooks the legal principle that it is not within the province of a court to read a meaning into a statute that is not warranted by its language. See *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995). The Department would have us hold that § 1.1.2 states that strawberries shall be sold either by weight *or* by volume *but not both at the same time or place.*

Baker's, in its assignments of error, concentrates upon the meaning of § 1.1.2. However, it is not necessary to define whether "or" in § 1.1.2 is conjunctive or disjunctive. Another statutory provision within the Weights and Measures Act clearly limits Baker's ability to use both methods of sale at the same time.

Section 89-192, cited by Malone in his first communication to Baker's regarding this debate, provides that "commodities not in liquid form shall be sold only by weight, by measure, or by

count, so long as the method of sale provides the ability for cost comparison and accurate quantity information." Section 89-192 clearly intends that only one "method of sale" be used where to do otherwise would not allow cost comparisons.

It would be anywhere from difficult to inconvenient for many consumers to accurately compare the cost of strawberries priced by volume in prepackaged containers to the cost of strawberries priced by weight. A consumer would have to weigh the container and then convert arithmetically its fixed volume price to the per-pound price. Requiring the consumer to do that arithmetic conversion in order to compare prices is not within the contemplation of § 89-192. Simultaneous use of both methods of sale would defeat the statutory purpose of providing accurate and adequate information so that purchasers can readily make price and quantity comparisons.

We note that in partial support of its argument, Baker's offered testimony regarding the results of a customer survey. Customers were asked whether they preferred to buy strawberries by the container, by bulk, or by both methods. Over 83 percent of the respondents stated that they wished to have both methods available. However, the issue is not whether a retailer can offer strawberries for sale in bulk and also in prepackaged containers. They can clearly do both. The issue is pricing, not packaging. As such, the question before us is whether strawberries can simultaneously be priced for sale by volume and also priced by weight. There is nothing in the regulations that would prevent Baker's from offering strawberries both in bulk and in prepackaged containers which disclose the weight and per-pound price so that the customer can make price and quantity comparisons.

CONCLUSION

The decision of the district court denying declaratory relief to Baker's is hereby affirmed.

AFFIRMED.

STEPHEN T. KUCHAR, APPELLANT AND CROSS-APPELLEE, V. RONALD A. KRINGS, APPELLEE AND CROSS-APPELLANT.

540 N.W.2d 582

Filed December 15, 1995. No. S-94-618.

1. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
2. **Constitutional Law: Statutes: Ordinances: Appeal and Error.** The constitutionality of a statute or ordinance is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
3. **Political Subdivisions Tort Claims Act: Verdicts: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
4. **Constitutional Law: Special Legislation.** The general test of constitutionality with respect to prohibitions against special legislation is reasonableness of classification and uniformity of operation. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

Richard E. Mueting, of Mueting & Stoffer, for appellant.

Mark D. Fitzgerald, of Jewell, Gatz, Collins, Fitzgerald & DeLay, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ., and LIKES, D.J.

LIKES, D.J.

INTRODUCTION

This action for damages was brought by Stephen T. Kuchar as the result of an automobile-pedestrian accident involving Kuchar's daughter. Kuchar sued Ronald A. Krings, who was an employee of the Humphrey, Nebraska, public school system and was the driver of the pickup truck involved in the accident. The suit was brought personally against Krings and not under the Political Subdivisions Tort Claims Act (Act). As an affirmative

defense, Krings alleged that he was acting within the scope of his employment and that Kuchar had failed to comply with the provisions of the Act prior to the institution of the lawsuit. Krings argued in his motion for summary judgment that since he was acting within the scope of his employment, Kuchar was governed by the claims and statute of limitations provisions of the Act. Kuchar, in his reply, challenged the constitutionality of the Act. The trial court overruled Krings' motion for summary judgment. The matter proceeded to trial, and the jury returned a verdict in favor of Krings. Two days after the jury returned its verdict, the trial court found that the Act applied and that the statute of limitations in the Act was not unconstitutional. The court dismissed Kuchar's petition, Kuchar appeals, and Krings cross-appeals.

STANDARD OF REVIEW

The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 524 N.W.2d 61 (1994); *Henry v. Rockey*, 246 Neb. 398, 518 N.W.2d 658 (1994). The constitutionality of a statute or ordinance is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *Chrysler Motors Corp. v. Lee Janssen Motor Co., ante* p. 322, 534 N.W.2d 309 (1995); *State v. Popco, Inc.*, 247 Neb. 440, 528 N.W.2d 281 (1995).

In actions brought pursuant to the Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Millman v. County of Butler*, 244 Neb. 125, 504 N.W.2d 820 (1993); *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984).

FACTUAL BACKGROUND

On April 27, 1989, during the late afternoon or early evening, Krings was operating his pickup truck in a southerly

direction on 7th Street in Humphrey, Platte County, Nebraska. At the same time, Jennifer Lynn Kuchar, the 10-year-old daughter of Stephen Kuchar, exited her mother's pickup truck and traversed 7th Street at a point where there was no crosswalk. Krings first saw Jennifer in front of his left front headlight just before his pickup truck hit her. At the time of the accident, it was dark, windy, and raining heavily.

Krings was the head of maintenance for the Humphrey public school system. Immediately prior to the accident, Krings had been to the Farmer's Co-op to pick up two splash-guard cement blocks for the school. Krings, who was operating his private vehicle, was on his way to the school when the accident occurred. Kuchar sued Krings personally in Platte County District Court and argued in the summary judgment hearing that Krings did not have the school district's permission to use his own vehicle for school business and, as such, was not within the scope of his employment at the time of the accident. Kuchar supported his position with the affidavit and deposition of the school superintendent. Krings argued that the action was subject to the provisions of the Act, that the statute of limitations had run on the action, and that Kuchar had failed to file a timely claim with the appropriate political subdivision pursuant to the Act.

The parties, as well as the trial judge, used Robert Heckathorn, the school superintendent, as the primary source for determining whether Krings was acting within the scope of his employment at the time of the accident. Unfortunately, for both parties, as well as the trial judge, Heckathorn's continual equivocation on this central issue prior to the jury trial provided the springboard for the procedural problems which ensued.

On May 23, 1994, the jury trial began. Heckathorn testified to the trial court's satisfaction that Krings was acting within the scope of his employment at the time of the accident. The case was submitted to the jury on May 24, and a verdict was rendered in favor of Krings on that same day.

At trial, the parties stipulated that Krings' employer, Humphrey Public School District No. 67, was a political subdivision and that no one had filed a tort claim with the school district regarding the April 27, 1989, collision. On May

26, 1994, the trial judge sent a letter to the attorneys for Krings and Kuchar informing them as follows:

> Gentlemen:
>
> In reference to the issue of whether or not Mr. Krings was working within the scope of his employment, the Court finds that the defendant *was* working within the scope of his employment, and the Nebraska Tort Claim Act [sic] applies.
>
> The Court further finds that the statute of limitations in the Nebraska Tort Claim Act [sic] is *not unconstitutional* as the Tort Claim Act [sic] is a relinquishment of sovereignty and government can place any limitations it wishes on any relinquishment of sovereignty, and therefore, the Act does not violate the constitution.
>
> As a result, the Court finds generally for the defendant and against the plaintiff on this issue, and the plaintiff's Petition is dismissed.

ASSIGNMENTS OF ERROR

Kuchar contends that the district court erred in (1) determining that Neb. Rev. Stat. §§ 13-920 and 13-921 (Reissue 1991), which set forth the applicable statute of limitations, were constitutional; (2) determining that Krings was acting within the scope of his employment at the time of the accident; (3) overruling Kuchar's motions for directed verdict and motion for judgment notwithstanding the verdict on the applicability of the "range of vision" rule; (4) giving instructions regarding assumption of risk; (5) overruling Kuchar's objection to the court deciding, rather than the jury, the issue of whether Krings was acting within the scope of his employment; and (6) overruling Kuchar's motion for new trial and dismissing the case. Krings has cross-appealed and assigns as error that the trial court erred in (1) overruling his motion for directed verdict on the issue of the exercise of due care and (2) overruling his motion for directed verdict on the issue of contributory negligence.

ANALYSIS

We address Kuchar's assignments of error which relate to the Act, as they are dispositive of this case.

Kuchar assigns as error the trial court's determination that Krings was acting within the scope of his employment at the time of the accident. As stated above, Kuchar sued Krings personally, alleging negligence. Krings' defenses included the argument that he was an employee of a Nebraska political subdivision at the time of the accident and was acting within the scope of his employment. Krings argued that the statutes of limitations set forth in Neb. Rev. Stat. § 13-919 (Reissue 1991) should apply.

In support of his motion for summary judgment, Krings submitted an affidavit and a deposition by Heckathorn, superintendent of Humphrey Public School. Kuchar offered a different affidavit of Heckathorn. In each of the three exhibits, Heckathorn vacillated on whether Krings was acting within the scope of his employment while operating his own vehicle at the time of the accident. Because of Heckathorn's equivocation, the trial court overruled Krings' motion for summary judgment.

Toward the end of the trial, and outside the presence of the jury, Heckathorn testified that the school district did not have a policy prohibiting school employees like Krings from using their own vehicles for school business. Other testimony during the trial showed that Krings was responsible for the scheduling of his work hours, that he was en route to place the splash-guard cement blocks on the school building at the time the accident occurred, and that he had utilized his personal vehicle for school business on various other occasions and had not been told that such action was prohibited by his employer.

We agree with the trial court's determination that Krings was acting within the scope of his employment and that the Act applies to Kuchar's lawsuit. However, the timing and procedure utilized by the trial court in making that determination is problematic. Upon the court's determination that the provisions of the Act applied, the case was no longer properly a matter for the jury's determination. As such, the jury should have been discharged prior to beginning its deliberations. Having determined that Kuchar's action should not have been tried to a jury, we need not address Kuchar's assignments of error regarding the jury instructions or those of Krings which are similarly posited.

Kuchar argues in his next assignment of error that if a lawsuit is brought against an employee of a political subdivision, the determination of whether such employee was acting within his or her scope of employment at the time of the incident giving rise to the lawsuit is a question for the jury. Neb. Rev. Stat. § 13-907 (Reissue 1991) requires that "suits brought under sections 13-901 to 13-926 . . . shall be heard and determined by the appropriate court without a jury." Although this case was not originally filed as a political subdivisions tort claim, Krings raised the statute of limitations issue. In *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990), this court stated that failure to follow the appropriate tort claims procedure is an affirmative defense not activated by a general denial in the defendant's answer. The issue of noncompliance must be raised as an affirmative defense specifically expressing the plaintiff's noncompliance.

Neb. Rev. Stat. § 25-221 (Reissue 1989) provides that in any action in which it is claimed that the action is barred by the statute of limitations, any party may move that the issue raised be tried separately before any other issues in the case are tried. The court shall then proceed to determine the issue relating to the statute of limitations before trying other issues in the case. In the case at hand, Krings did receive a bifurcated proceeding to determine whether the action was barred by the statute of limitations, but the final decision was not handed down before the trial on the issue of negligence had commenced. The trial court did not err in refusing to permit the jury to decide the issue of whether Krings was acting within the scope of his employment.

Kuchar's next assignment of error is that the trial court erred in determining that §§ 13-920 and 13-921, which set forth the applicable statute of limitations, were constitutional. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 524 N.W.2d 61 (1994); *Henry v. Rockey*, 246 Neb. 398, 518 N.W.2d 658 (1994). The constitutionality of a statute or ordinance is a question of law; accordingly, the Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *Chrysler Motors*

Corp. v. Lee Janssen Motor Co., ante p. 322, 534 N.W.2d 309 (1995); *State v. Popco, Inc.*, 247 Neb. 440, 528 N.W.2d 281 (1995).

Kuchar argues that the Act is unconstitutional because it creates a separate class of citizens who are treated differently from all other citizens. Kuchar further claims that this legislation violates article III, § 18, of the Nebraska Constitution and the Equal Protection Clause of the U.S. Constitution in that it gives certain individuals special or exclusive privileges without a rational basis for such distinction. This court has previously considered these identical issues and found the Act to be constitutional. See *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976).

In *Campbell*, we held that the general test of constitutionality with respect to prohibitions against special legislation is reasonableness of classification and uniformity of operation. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. See *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989). The question is always whether the things or persons classified by the Act form by themselves a proper and legitimate class with reference to the purpose of the Act. *Id.*

The plaintiff in *Campbell* claimed that the Act is unreasonable and does not operate uniformly, because it puts persons injured by governmental torts in a different class than those injured by private torts and imposes special notice requirements and limitations of actions for claims against governmental subdivisions to which tort claims against private persons are not subject. This court, however, did not accept that argument. The Act creates a single class of tort-feasors, that being all political subdivisions. The Act applies equally and uniformly to all tort claims against a political subdivision. The fact that public agencies, generally speaking, differ from private persons or corporations in many respects is obvious. Under many circumstances, that difference has been held to be sufficient in itself to afford a proper subject for legislative classification. *Campbell v. City of Lincoln, supra*. The

taxpaying public has an interest in seeing that prompt and thorough investigation of claims is made where a political subdivision is involved. The public does not have such an interest as to claims against private persons or corporations. The taxpayers who provide the public treasury with funds have an interest in protecting that treasury from stale claims. *Id.*

Kuchar also argues that the Act creates a class of defendants without a rational basis, which is violative of the state and federal Constitutions. We disagree. In *Randall v. Fairmont City Police Dept.*, 186 W. Va. 336, 412 S.E.2d 737 (1991), the court stated that its research disclosed that almost all, if not all, of the reported precedents from other jurisdictions have rejected equal protection challenges to governmental tort claims acts based upon the argument that such act was not rationally based upon a legitimate state interest. The court stated that such qualified immunity from tort liability to an employee of a political subdivision did not violate equal protection principles. Such employee immunity was consistent, generally, with the political subdivision's qualified immunity, and reasonable because the act imposes employee liability for tort damages proximately caused by the employee's acts or omissions which were manifestly outside the scope of employment or official responsibilities or which were wanton, malicious, reckless, or in bad faith.

We agree with the court's rationale in concluding that the Act is not violative of the Equal Protection Clauses of the state and federal Constitutions. For the reasons set forth above, Krings' cross-appeal has no merit and is dismissed. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. THOMAS ALAN GLEASON, RESPONDENT.

540 N.W.2d 359

Filed December 15, 1995. No. S-94-845.

1. **Disciplinary Proceedings.** The determination of what discipline is appropriate requires consideration of the nature of the offense, need for deterrence of future misconduct by others, maintenance of the reputation of the bar as a whole, protection of clients, the expression of condemnation by society on the moral grounds of the prohibited conduct, justice to the attorney, and the attorney's fitness to continue in the practice of law.
2. ____. To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances.
3. ____. To determine whether and to what extent discipline should be imposed, it is necessary that the following factors be considered: (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) his or her present or future fitness to continue in the practice of law.
4. ____. Misappropriation of client funds, as one of the most serious violations of duty an attorney owes to clients, the public, and the courts, typically warrants disbarment.
5. **Disciplinary Proceedings: Appeal and Error.** The Supreme Court does not abdicate its power to discipline attorneys, but will give weight to the findings and recommendations of the referee.
6. **Disciplinary Proceedings.** Mitigating circumstances shown in the record are considered in determining the appropriate discipline imposed on an attorney for violating the Code of Professional Responsibility.
7. **Disciplinary Proceedings: Words and Phrases.** The nature of depression and the psychiatrist-assisted potential for cure are mitigating factors in Nebraska disciplinary proceedings.
8. ____: ____. The debilitating nature of depression and the psychiatrist-assisted potential for cure are mitigating factors in disciplinary proceedings involving misappropriation of client funds.

Original action. Judgment of suspension.

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

Joseph K. Meusey and Lawrence E. Welch, Jr., of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for respondent.

CAPORALE, LANPHIER, WRIGHT, and CONNOLLY, JJ., and RIST, D.J., and BOSLAUGH, J., Retired, and RONIN, D.J., Retired.

PER CURIAM.

On October 22, 1992, a complaint was filed against Thomas Alan Gleason with the Counsel for Discipline. Respondent Gleason testified that his client trust account was out of trust and that funds taken out of that account were used for his own purposes. The Nebraska State Bar Association's Committee on Inquiry of the Second Disciplinary District held a hearing on February 19, 1994. The committee, finding no public interest would be served in instituting formal charges, issued a private reprimand to respondent. The Counsel for Discipline appealed to the Disciplinary Review Board. The review board filed formal charges.

J. Thomas Rowen was appointed referee in December 1994. In the referee's finding of fact and recommendation, filed on April 4, 1995, the referee recommended that respondent receive a reprimand letter and 3 years' probation. The Counsel for Discipline on behalf of relator appealed to this court to review the referee's findings of fact and recommendations and to determine the appropriate discipline.

BACKGROUND

On June 24, 1975, respondent was duly admitted to the practice of law in the State of Nebraska and, at all times relevant, was engaged in the private practice of law in Omaha, Nebraska. On October 22, 1992, the Counsel for Discipline received a complaint against respondent from Tom Miller, a client. On November 9, respondent issued a check representing the net proceeds due Miller from a workers' compensation case and sent a copy of it by facsimile to the Counsel for Discipline. Respondent's trust account did not contain funds on that date sufficient to cover the check. On November 17, after respondent transferred funds to the trust account, the check was actually delivered to Miller. Respondent's testimony, given before the Committee on Inquiry of the Second Disciplinary District in February 1992 and March 1993, revealed respondent's trust account was out of balance, i.e., the balance was insufficient for the payment of funds due clients.

The actions of respondent, as set forth above, constitute violation of his oath of office as an attorney licensed to practice

law in the State of Nebraska, as provided by Neb. Rev. Stat. § 7-104 (Reissue 1991), and are in violation of Canon 1, DR 1-102(A)(1) and (3) through (6), and Canon 9, DR 9-102(A)(1) and (2) and (B)(1), (3), and (4) of the Code of Professional Responsibility.

Respondent answered, admitting the factual allegation, but raising as defenses a psychological condition in mitigation and a procedural question of whether the Disciplinary Review Board has the power to file formal charges if the Committee on Inquiry has chosen not to.

Two physicians testified that the mental condition of respondent was a proximate cause or proximate contributing cause of the conduct of respondent which led to the charges. Dr. Hudson Hsieh testified that he treated respondent who developed panic attacks that were first diagnosed in December 1989. Dr. Hsieh also testified that respondent favorably responded to Prozac.

Dr. Bruce Gutnik reviewed the records of Dr. Hsieh and of Dr. Rodney Nichter, another psychiatrist who treated respondent, and the records of Priscilla Scott Thralls, a clinical social worker who counseled respondent. Dr. Gutnik concurred in Dr. Hsieh's diagnosis of chronic depression (dysthymia) and panic attack. Dr. Gutnik stated that the illnesses were a contributing proximate cause to respondent being out of trust. The evidence is undisputed that respondent first sought treatment in 1989, was without a bookkeeper for the first time in the fall of 1990, and later was out of trust.

Medical personnel concurred that respondent's depression and panic disorder were a proximate cause of respondent being out of trust and not correcting the problem. Dr. Gutnik explained panic disorder to the committee, analogizing an attack to the feeling that one has when diving into deep water and then realizing there is insufficient air in one's lungs, the feeling that one experiences while thrashing toward the surface; these feelings are the same type of feelings an individual experiences during a panic attack. Both physicians, as well as numerous attorneys and judges, testified through affidavits that in their opinion respondent was fit to practice law.

It is agreed that no other area of respondent's practice was affected.

ASSIGNMENTS OF ERROR

The Counsel for Discipline asserts that the referee's findings of fact did not include facts which relate to respondent's failure to maintain proper trust account records. However, such facts are part of the record before us.

The Counsel for Discipline further asserts that the referee's recommendation that respondent be placed on probation for a period of 3 years is too lenient under the facts and circumstances as established by the record in this case.

STANDARD OF REVIEW

The determination of what discipline is appropriate requires consideration of the nature of the offense, need for deterrence of future misconduct by others, maintenance of the reputation of the bar as a whole, protection of clients, the expression of condemnation by society on the moral grounds of the prohibited conduct, justice to the attorney, and the attorney's fitness to continue in the practice of law. *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), *cert. denied* 488 U.S. 802, 109 S. Ct. 31, 102 L. Ed. 2d 10 (1988).

To determine what sanction is appropriate, each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances. *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991); *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987).

ANALYSIS

After a careful review of the record, we accept the referee's finding of facts relevant to the formal charges, especially as the facts relate to respondent's failure to maintain proper trust account records.

We do not accept, however, the referee's recommendation that respondent be placed on probation for a period of 3 years. Relator is correct in asserting that that is too lenient a discipline under the facts and circumstances of this case. The appropriate discipline is discerned from a careful review of the totality of the circumstances and the weighing of several factors.

To determine whether and to what extent discipline should be imposed, it is necessary that the following factors be

considered: (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) his or her present or future fitness to continue in the practice of law. *Veith, supra*; *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991); *State ex rel. NSBA v. Rhodes*, 234 Neb. 799, 453 N.W.2d 73 (1990), *cert denied* 498 U.S. 855, 111 S. Ct. 153, 112 L. Ed. 2d 119.

Factors to Consider

First, there is no question that misappropriation of client funds, as one of the most serious violations of duty an attorney owes to clients, the public, and the courts, typically warrants disbarment. *Veith, supra*. Respondent testified that he failed to maintain the integrity of client funds.

Second, it is paramount that the court deter others from taking the same course as respondent. However, respondent is unique to this court in that he was undergoing treatment for his psychological problems before the Counsel for Discipline contacted him with the informal complaint. Respondent suffered from certain well-defined psychological problems, and those problems led to the complaint. There can be no implication that he sought treatment for his behavior in order to find some excuse to use in this proceeding.

Third, the maintenance of the reputation of the bar is important to the court. The question is how to maintain that reputation.

Fourth, this court's duty to protect the public would not be served by merely a 3-year probation. We have heretofore at least suspended an attorney for such a violation.

Fifth, several affidavits and the record of all the disciplinary proceedings show that respondent's attitude throughout this process has been open and highly cooperative. Respondent has shown both remorse and a resolve to deter any possible infractions in the future. At every stage of this disciplinary process, respondent was unanimously found to be deserving of leniency. The court does not abdicate its power to discipline attorneys, but will give weight to the findings and

recommendations of the referee. See *State ex rel. NSBA v. Gilroy*, 240 Neb. 578, 483 N.W.2d 135 (1992).

Sixth, as to respondent's fitness to practice law, no client ever suffered any monetary loss, and all clients were represented professionally and zealously. As to respondent's fitness to practice in the future, both physicians who testified stated that respondent was reacting favorably to treatment and that respondent was fit to practice law.

Finally, there are several major mitigating factors to be considered in this case: respondent's dual psychological illnesses and the fact that treatment of the conditions preceded the complaint.

Respondent's active involvement in the betterment of the legal profession, the affirmations of character on his behalf, the current medical treatment of respondent, and his resolve to continue such treatment should also be considered.

The unique nature of respondent's cooperation is another important mitigating factor. It is solely by virtue of respondent's testimony that we became aware of the information which led to the formal charge that respondent was out of trust. Had respondent not disclosed this information or been uncooperative, we do not know if the Counsel for Discipline would have had enough information to pursue formal out-of-trust disciplinary charges. We are dealing with an ethical system, the success of which depends largely upon voluntary compliance. We hesitate to set a precedent which would chill future respondents' cooperation.

Mitigating circumstances shown in the record are considered in determining the appropriate discipline imposed on an attorney for violating the Code of Professional Responsibility. *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991); *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987).

The nature of depression and the psychiatrist-assisted potential for cure are mitigating factors in Nebraska disciplinary proceedings. See *State ex rel. NSBA v. Barnett*, 243 Neb. 667, 501 N.W.2d 716 (1993).

Many cases describe the debilitating nature of depression and state that it and the psychiatrist-assisted potential for cure are

mitigating factors in disciplinary proceedings involving misappropriation of client funds. *Veith, supra* (citing *Louisiana State Bar Ass'n v. Larré*, 457 So. 2d 649 (La. 1984)). See, also, *In the Matter of Howle*, 294 S.C. 244, 363 S.E.2d 693 (1988); *Frazer v. State Bar of California*, 43 Cal. 3d 564, 737 P.2d 1338, 238 Cal. Rptr. 54 (1987); *The Florida Bar v. Condon*, 647 So. 2d 823 (Fla. 1994); *Matter of Hoover*, 161 Ariz. 529, 779 P.2d 1268 (1989); *Discipline of McLendon*, 120 Wash. 2d 761, 845 P.2d 1006 (1993); *Louisiana State Bar Ass'n v. Standridge*, 534 So. 2d 1256 (La. 1988).

DISCIPLINE

We affirm that in virtually all future cases of misappropriation, disbarment will be the only appropriate discipline unless it appears that the misconduct resulted from nothing more than mere negligence. While avoiding a per se rule, we acknowledge our prior decisions and will regard a lesser sanction only when extraordinary mitigating factors are present. This court has found such factors in the past and may find other factors in the future. However, mitigating factors will only overcome the presumption of disbarment if they are extraordinary and, when aggravating circumstances are present, substantially outweigh those circumstances as well.

This court finds suspension to be the proper punishment in situations where the violation was grievous but the totality of the circumstances warranted leniency. See, *State ex rel. NSBA v. Gilroy*, 240 Neb. 578, 483 N.W.2d 135 (1992); *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991); *State ex rel. NSBA v. Neumeister*, 234 Neb. 47, 449 N.W.2d 17 (1989).

CONCLUSION

When we balance the need to protect the public, the nature of respondent's offenses, the need for deterring others, and the reputation of the bar as a whole against respondent's interest in preserving his privilege to practice law and all mitigating circumstances, we must conclude that the only appropriate judgment is to suspend respondent from the practice of law effective immediately.

JUDGMENT OF SUSPENSION.

WHITE, C.J., and FAHRNBRUCH and GERRARD, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V. KATHERINE KUNATH, APPELLANT.

540 N.W.2d 587

Filed December 15, 1995. No. S-94-964.

1. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.
2. ____: ____. 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. **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.
4. **Assault: Intent.** Neb. Rev. Stat. § 28-310(1)(b) (Reissue 1989) renders unlawful a promise to do another person bodily harm which is made in such a manner as to intentionally cause a reasonable person in the position of the one threatened to suffer apprehension of being so harmed.
5. **Criminal Law: Intent.** The intent with which an act is committed may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and MILLER-LERMAN, Judge, and WARREN, District Judge, Retired, on appeal thereto from the District Court for Seward County, BRYCE BARTU, Judge, on appeal thereto from the County Court for Seward County, MARY C. GILBRIDE, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

David L. Kimble, Seward County Public Defender, for appellant.

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

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

This appeal comes before us on petition for further review after the Nebraska Court of Appeals reversed Katherine Kunath's conviction for assault in the third degree, in violation of Neb. Rev. Stat. § 28-310(1)(b) (Reissue 1989). Kunath was convicted of third degree assault after a bench trial before the

county court for Seward County. That court held that 35-year-old Kunath had threatened one Ryan Apodac, a 13-year-old, in a menacing manner during a confrontation outside a school. The court sentenced Kunath to 20 days in county jail. The district court for Seward County affirmed the county court's conviction and sentence, and Kunath appealed to the Court of Appeals. The Court of Appeals reversed, finding the evidence insufficient to support Kunath's conviction. We granted the State's petition for further review.

BACKGROUND

At about 5:15 p.m. on October 15, 1993, Kunath went to the Seward Middle School to pick up her son and daughter. Kunath's daughter, Tonya, was distraught over an incident with another girl. Tonya and two of her girl friends met Kunath at the curb. Arm-in-arm, Kunath and Tonya walked toward the school in order to find Kunath's son. Kunath and Tonya were accompanied by the two other girls.

Apodac, then a 13-year-old student, was outside the school waiting for his parents to pick him up after football practice. As Kunath and Tonya passed him, Apodac made an offensive joke to some other boys implying that Kunath and her daughter were "girlfriends." Tonya called Apodac a faggot, and Apodac responded, "[S]uck me."

Kunath, Tonya, and Tonya's girl friends went into the school but soon returned on their way back to their car. Apodac was sitting on a bench, and the verbal warfare resumed as the Kunath group passed by. Kunath made gestures with her bottom at Apodac, and Apodac testified that he taunted her by asking, "Is that your butt or your face?" Kunath dared Apodac to make that comment to her face, and Apodac testified that he got up, approached Kunath, and repeated the comment. Apodac and several witnesses testified that at this point, Kunath "flat-handed" Apodac's nose and tried to knee him in the groin three or four times. Kunath herself admitted that she came chest-to-chest with Apodac and stepped on his feet. Kunath said she made up-and-down motions with her legs in order to avoid stepping on Apodac's feet. The two girls accompanying Kunath and her children testified on Kunath's behalf and said

that Kunath did not touch Apodac with her hand or knee.

Apodac testified that he felt intimidated and backed away. A witness testified that Apodac appeared scared, and the witness believed that Apodac was at some risk of being injured. After the incident, Kunath gathered her children and left the schoolgrounds in her car.

On November 2, 1993, the county attorney filed a complaint and information in the county court for Seward County and alleged that Kunath had violated § 28-310(1)(b), a Class I misdemeanor. The complaint alleged that Kunath had committed third degree assault by "intentionally, knowingly, or recklessly caus[ing] bodily injury to another person, or threaten[ing] another person in a menacing manner, to-wit: Ryan Apodac."

Kunath waived a jury trial. On April 11, 1994, a trial was conducted before the bench, and Kunath was found guilty of third degree assault.

A presentence evaluation was ordered, and that evaluation indicated that Kunath had one prior conviction of assault and three prior convictions of disturbing the peace, amended from assault. Sentencing was conducted on May 31. The county court deemed Apodac's behavior to be extremely impolite and irritating, but noted Kunath's refusal to accept responsibility and her lack of remorse. The court noted Kunath's prior criminal convictions. The county court sentenced Kunath to 20 days in jail plus costs.

On June 3, Kunath filed a notice that she intended to appeal her case to the district court for Seward County. For her statement of errors, Kunath alleged that the county court had erred in finding her guilty of third degree assault and by imposing an excessive sentence. On September 12, the district court held that competent, admissible evidence on the record sustained the county court's finding that Kunath was guilty of third degree assault. The district court further held that the sentence was within the statutory penalties provided for the offense and was not an abuse of discretion. Therefore, the district court affirmed the judgment of conviction and sentence of the county court in all respects.

Kunath timely perfected an appeal to the Court of Appeals.

That court, in *State v. Kunath*, 95 NCA No. 19, case No. A-94-964 (not designated for permanent publication), dated May 9, 1995, held that the evidence was insufficient to support Kunath's conviction and reversed Kunath's conviction and sentence.

We granted the State's petition for further review.

ASSIGNMENTS OF ERROR

In its petition for further review, the State asserts that the Court of Appeals erred by interpreting § 28-310(1)(b) as requiring that threatening conduct be accompanied by threatening words in order to find a person guilty of threatening another in a menacing manner in violation of that statute.

In her appeals to the lower courts, Kunath asserted (1) that the county court made an error on the record in finding beyond a reasonable doubt that she had threatened the victim in a menacing manner, (2) that the county court abused its discretion in imposing a sentence which was excessive and disproportionate to the severity of the offense when considered in light of her background and age, and (3) that the district court erred in affirming the conviction and sentence imposed by the county court.

STANDARD OF REVIEW

In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994); *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994); *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993).

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. Masters, supra*; *State v. Secret, supra*; *State v. Hand, supra*.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Cisneros, ante* p. 372, 535 N.W.2d 703 (1995); *State v. Derry, ante* p. 260, 534 N.W.2d 302 (1995); *State v.*

Groff, 247 Neb. 586, 529 N.W.2d 50 (1995).

ANALYSIS

Section 28-310(1)(b) provides that a person commits the offense of assault in the third degree if he threatens another in a menacing manner.

We have previously reviewed the type of conduct proscribed by § 28-310(1)(b) by examining the meaning of the words "assault," "threaten," and "menacing." See *In re Interest of Siebert*, 223 Neb. 454, 390 N.W.2d 522 (1986). A criminal "assault" includes the intentional doing of an act which places another person in reasonable apprehension of receiving bodily injury. To "threaten" is commonly understood to mean promising punishment, reprisal, or distress. The meaning of "menacing" includes the showing of an intention to do harm. *Id.*

"Thus, § 28-310(1)(b) renders unlawful a promise to do another person bodily harm which is made in such a manner as to intentionally cause a reasonable person in the position of the one threatened to suffer apprehension of being so harmed." 223 Neb. at 456, 390 N.W.2d at 524.

In her brief, Kunath argued to the Court of Appeals that her actions were not "menacing" to Apodac as that term is used in § 28-310(1)(b) because she did not make a "threatening" statement of intent to harm Apodac. The Court of Appeals agreed with Kunath's argument and reversed her conviction because the evidence failed to establish a threatening statement or any promise to do bodily harm or to establish circumstances such as were present in *In re Interest of Siebert, supra.*

In *In re Interest of Siebert*, the juvenile had directed a karate kick toward the complainant and had also stated that he would hurt him if the complainant did not return the juvenile's companion's bicycle. We stated that the juvenile's conduct (the karate kick) and his threatening statements fulfilled the requirement of § 28-310(1)(b) that the threat be made with the intention that a reasonable person be placed in apprehension of bodily harm.

The intent with which an act is committed may be inferred from the words and acts of the defendant and from the

circumstances surrounding the incident. See *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995). *In re Interest of Siebert* does not require that the promise to do another harm must be a verbal promise in order to constitute assault in the third degree. Such intent can be inferred from words or acts and the circumstances surrounding the incident.

In this case, there is plenty of evidence that verbal abuse was flung back and forth between Kunath and Apodac, but no specific evidence that Kunath verbally promised to inflict bodily harm upon the youth. However, there is more than sufficient evidence to support the finder of fact's conclusion that Kunath threatened Apodac in a menacing manner. Threatening words are not needed to reinforce a promise to do harm when one attempts to use her knees and places her hands upon the body of another.

We now turn to Kunath's assignment of error that her sentence was excessive. Assault in the third degree is a Class I misdemeanor and is punishable by up to 1 year's imprisonment, a $1,000 fine, or both. Kunath was sentenced to 20 days in the county jail and was assessed court costs. Her sentence was well within the statutory limits.

In considering a sentence, the sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *State v. Reichert*, 242 Neb. 33, 492 N.W.2d 874 (1992).

The county court noted Kunath's lack of remorse, her denials that she ever kicked or hit the victim, her assertion that the court was biased, and her prior convictions. Kunath's criminal record includes a previous conviction for assault in the third degree, for which she was sentenced to 1 year's probation and $686.25 in restitution. The record also reflects three convictions for disturbing the peace, amended from assault. The factors considered by the county court were proper and did not constitute an abuse of discretion.

CONCLUSION

The judgment of the Court of Appeals reversing Kunath's conviction and sentence is reversed, and the cause is remanded with directions to affirm the judgments of the district court and county court.

REVERSED AND REMANDED WITH DIRECTIONS.

CATHY A. TOOMBS, WIDOW OF JAMES M. TOOMBS, DECEASED, APPELLANT, V. DRIVER MANAGEMENT, INC., APPELLEE.

540 N.W.2d 592

Filed December 15, 1995. No. S-95-121.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court after review shall have the same force and effect as a jury verdict in a civil case.
2. ____: ____. 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 do not support the order or award.
3. ____: ____. Factual determinations by the Nebraska Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous.
4. **Trial: Waiver.** A party who fails to insist upon a ruling to a proffered objection waives that objection.
5. **Workers' Compensation.** In cases under the Workers' Compensation Act involving heart attacks, the principal issue is usually one of causation. The disability or death is not compensable unless the injury or death arose out of the employment. There is no fixed formula by which the issue may be resolved, and the issue must be determined by the facts of each case.
6. ____. In a workers' compensation case, the heart injury causation issue embraces two elements: (1) legal causation and (2) medical causation.
7. **Workers' Compensation: Proof.** In heart disease cases, a workers' compensation claimant has the burden of establishing by a preponderance of the evidence that

exertion or stress in his employment contributed in some material and substantial degree to cause the heart injury.

8. ____: ____. An exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person.
9. **Workers' Compensation: Expert Witnesses.** The trial court is entitled to accept the opinion of one expert over another. As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
10. **Workers' Compensation: Appeal and Error.** When the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.
11. **Workers' Compensation: Evidence.** For medical causation in a workers' compensation case, medical evidence must establish that the decedent's exertion, as the legal cause sufficient for compensability, in fact, caused the death which is the subject of a workers' compensation claim.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Michael A. Kelley and Christopher D. Jerram, of Kelley & Lehan, P.C., for appellant.

John W. Iliff, of Gross & Welch, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

Cathy A. Toombs, widow of James M. Toombs (the decedent), petitioned the Nebraska Workers' Compensation Court for benefits because of the decedent's sudden cardiac death while he was employed as an over-the-road truckdriver for Driver Management, Inc. (DMI).

Following a trial, a Workers' Compensation Court judge dismissed Toombs' petition. That court's review panel affirmed the trial court's dismissal order. Toombs timely appealed the Workers' Compensation Court's decision to this court.

The evidential record, as a whole, supports the findings of the compensation court, and we, therefore, affirm its judgment.

ASSIGNMENTS OF ERROR

Restated, Toombs claims that (1) the trial court erred in

denying Toombs' objection and motion to compel production of documents, receiving the deposition of defense witness Patrick Wallace into evidence over Toombs' motion to strike, and considering such testimony in its order of dismissal. Toombs then claims that (2) the Workers' Compensation Court's review panel erred in relying upon Workers' Comp. Ct. R. of Proc. 4 (1994) which Toombs claims exceeds statutory authority and is invalid.

For her third through sixth assignments of error, Toombs claims, in substance, that the trial court erred in (3) failing to find that the decedent died during the scope of his employment, (4) finding that the court would have to engage in speculation and conjecture in order to enter an award, (5) relying on the expert opinion of Dr. Michael Sketch, and (6) finding that Toombs failed to establish medical and legal causation.

STANDARD OF REVIEW

A judgment, order, or award of the compensation court after review shall have the same force and effect as a jury verdict in a civil case. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995). 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 do not support the order or award. *Id.*

Factual determinations by the Nebraska Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994).

FACTS

On July 4, 1992, the decedent, an over-the-road truckdriver for DMI, was traveling east on Interstate 70 in Missouri. An eyewitness traveling behind the decedent observed the decedent's truck leave the highway. Without stopping or slowing down, the truck continued across the shoulder and up the side of a hill and eventually rolled over on the driver's side. The

entire incident took place in a couple of seconds. The eyewitness testified that, during the incident, the decedent's truck made no "herky-jerky" or stop-and-go movements.

Paramedics arrived at the accident scene and found the decedent dead in the truck cab. An autopsy determined that the decedent died of arteriosclerotic heart disease. Among the autopsy findings were that the decedent had arteriosclerotic heart disease with marked atherosclerosis of all three major coronary arteries, old infarcts of the left ventricular wall, pulmonary edema and congestion, and congestion of the liver.

As a result of her husband's death, Toombs filed a petition in the Nebraska Workers' Compensation Court, seeking workers' compensation benefits. Toombs alleged that her husband's death arose out of and during the course of his employment with DMI.

On April 14, 1994, the parties conducted a telephonic deposition of defense witness Wallace, an independent insurance adjuster. Wallace testified as to a conversation he had with Toombs following her husband's death. Wallace acknowledged that prior to giving his deposition he reviewed his file and that without such a review, he could not have testified. At the deposition, Toombs' lawyer requested production of Wallace's entire file and ceased any further cross-examination, pending an opportunity to review Wallace's file.

On April 28, 1994, Toombs filed a motion to compel production of Wallace's file. A hearing was held regarding Toombs' motion to compel on May 9. At the hearing, Toombs asked the trial court to take the motion under advisement, and, if the court should sustain the motion, then Toombs would move to strike Wallace's testimony in its entirety. The trial court agreed and took the matter under advisement.

At trial, Toombs testified that she had a telephone conversation with her husband on July 3, 1992. She said that her husband told her that he could not unload his truck and could not pick up another load. According to Toombs, her husband was essentially stuck and unable to get home for the Fourth of July as had been promised by his employer. The Toombses had planned a golfing trip to Idaho for the Fourth of July. Toombs also stated that her husband was on the road and

away from home for 4- to 6-week runs.

Toombs offered the testimony of Dr. Randolph Ferlic, a thoracic and cardiovascular surgeon. Dr. Ferlic, testifying as an expert, stated that based upon a review of the decedent's diaries, the decedent apparently had an understanding with DMI that he could return home for the Fourth of July and that the decedent became very frustrated upon realizing that the perceived promise by DMI had been broken. According to Dr. Ferlic, the diary entry of July 3, 1992, reflects that the decedent became exceedingly stressed over what he considered to be an arbitrary and capricious decision to send him away from his home. Dr. Ferlic testified that the stress reaction caused the decedent to sustain an arrhythmia which led to death caused by ventricular fibrillation. However, Dr. Ferlic agreed in his deposition that typically hundreds of people on a daily basis face the same stress that the decedent experienced.

Dr. Michael Egger, a psychiatrist, testified as an expert that he believed that the decedent's death was related to the stress he experienced in the course of his employment duties. Dr. Egger further testified that the stress the decedent experienced immediately prior to death was greater than what others usually experience in their normal nonworking lives.

DMI offered the expert testimony of Dr. Sketch, a cardiologist. Dr. Sketch testified that, based on an autopsy report, the decedent had a severe preexisting heart disease which caused cardiac enlargement and congestive heart failure. Dr. Sketch further testified that the decedent suffered from significant coronary artery disease. Dr. Sketch described the decedent's demise as a sudden cardiac death resulting from a natural progression of his preexisting heart condition. The final event in the progression toward the decedent's death, according to Dr. Sketch, was a ventricular fibrillation of his heart which occurred in a couple of seconds. Dr. Sketch testified that emotional stress does not cause sudden cardiac death.

Following a single-judge trial, the workers' compensation court dismissed Toombs' petition. The trial court found, based upon the autopsy report, that the decedent had had a preexisting heart disease. The trial court was not persuaded by the expert opinion of Dr. Ferlic, because the court found that the opinion

was based on presumptions and inferences as to the decedent's state of mind on the date of the accident. The trial court refused to award compensation based upon speculation and conjecture. The trial court also found that the degree of the decedent's anger and frustration was not greater than that in the ordinary nonemployment life of any other person.

The trial court did not rule on Toombs' motion to compel production of Wallace's file.

Toombs applied to the Workers' Compensation Court for a three-judge review. The review panel affirmed the trial court. The review panel specifically found that the trial court was not clearly wrong in finding Dr. Sketch's testimony more credible than Dr. Ferlic's and in finding that Toombs failed to establish legal causation of her husband's death. The review panel did not find error in the trial court's evidentiary rulings. As to Wallace's file and deposition, the review panel held that Toombs did not file written objections pursuant to rule 4 of the Workers' Compensation Court.

ANALYSIS

Motion to Compel Production and Rule 4

Initially, Toombs claims the trial court erred in overruling her motion to compel production of Wallace's file, in receiving Wallace's deposition into evidence, and in considering Wallace's testimony in arriving at its dismissal order.

The record reflects that the trial court took Toombs' motion to compel production under advisement but never ruled on the motion. We have long held that a party who fails to insist upon a ruling to a proffered objection waives that objection. See, *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991); *Griffith v. Griffith*, 230 Neb. 314, 431 N.W.2d 609 (1988); *In re Estate of Kaiser*, 150 Neb. 295, 34 N.W.2d 366 (1948). Because there was no ruling on Toombs' motion to compel production of Wallace's file or to strike his deposition and because Toombs did not insist upon such rulings, the questions regarding the motion to compel production of Wallace's file and the admissibility of his deposition are not properly before this court. We need not address Toombs' assignment of error regarding the review panel's use of rule 4 because the issue

pertains to the admissibility of Wallace's deposition. Nonetheless, we are constrained to observe that appropriate judicial trial practice requires that trial judges rule on matters submitted to them in a timely fashion in order that the litigants be in a position to react to the ruling. The practice of deferring rulings on evidential, discovery, and like matters until deciding the cause on the merits and thus at a time when the litigants are no longer in a position to react to the ruling is condemned and is not to be employed.

LEGAL CAUSATION

Toombs claims that the trial court erred in not finding that her husband died during the scope of his employment. In cases under the Workers' Compensation Act involving heart attacks, the principal issue is usually one of causation. The disability or death is not compensable unless the injury or death arose out of the employment. There is no fixed formula by which the issue may be resolved, and the issue must be determined by the facts of each case. *Leitz v. Roberts Dairy*, 237 Neb. 235, 465 N.W.2d 601 (1991).

The heart injury causation issue embraces two elements: (1) legal causation and (2) medical causation. Under the legal test, the law must define what kind of exertion satisfies the test of arising out of the employment. *Id.*

The autopsy findings and Dr. Sketch's testimony reflect that the decedent had a preexisting heart condition. In heart disease cases, a workers' compensation claimant has the burden of establishing by a preponderance of the evidence that exertion or stress in his employment contributed in some material and substantial degree to cause the heart injury. *Spangler v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989). An exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person. *Leitz v. Roberts Dairy, supra.*

Dr. Egger testified that the stress the decedent experienced in the hours prior to his death was caused by his occupation and

that such stress was greater than that experienced during the ordinary nonemployment life of the decedent and other people generally. Dr. Egger further testified that the stress the decedent experienced materially and substantially contributed to his death.

Dr. Ferlic testified that the decedent's heart arrhythmia which resulted in his death was caused by his job-related anger and frustration. Dr. Ferlic further testified that the stress the decedent experienced is the same stress experienced every day by hundreds of people in nonoccupational settings. The trial court did not accept Dr. Ferlic's opinion on anger and frustration "because it is based on presumptions and inferences that requires [sic] the Court to award compensation on the basis of speculation and conjecture." The trial court also found the decedent's alleged anger and frustration did not constitute stress greater than that experienced during the ordinary nonemployment life of the decedent or any other person and that, therefore, Toombs failed to meet her burden of proving legal causation required by *Leitz v. Roberts Dairy, supra.*

The court further found that the sequence of events immediately preceding the decedent's truck leaving the highway supports the opinion of Dr. Sketch that the decedent's demise was a sudden cardiac death resulting from a natural progression of his preexisting heart condition and that the final event in the progression was a ventricular fibrillation. Dr. Sketch was also of the opinion that emotional stress does not cause sudden cardiac death.

From the record, it is quite apparent that there is a conflict in the testimony of the expert witnesses. When there is a conflict in testimony of expert witnesses, the trial court is entitled to accept the opinion of one expert over another. As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. See *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994). Also, when the record in a workers' compensation case presents conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. See *Leitz v. Roberts Dairy, supra.*

MEDICAL CAUSATION

Toombs claims that the trial court erred in finding that Toombs failed to establish medical causation. For medical causation in a workers' compensation case, medical evidence must establish that the decedent's exertion, as the legal cause sufficient for compensability, in fact caused the death which is the subject of a workers' compensation claim. See *Rosemann v. County of Sarpy*, 237 Neb. 252, 466 N.W.2d 59 (1991).

The expert opinion testimony of Drs. Ferlic and Egger for Toombs and that of Dr. Sketch for DMI are conflicting as to whether stress in the decedent's employment contributed in some material and substantial degree to heart injury that led to his death. The trial court considered the evidence and found more credible Dr. Sketch's opinion that the decedent died from a natural progression of a preexisting heart condition unrelated to stress. The trial court was not clearly wrong in relying upon the testimony of Dr. Sketch as opposed to that of Drs. Egger and Ferlic. Dr. Sketch's opinion was supported by the autopsy finding of a preexisting heart condition.

DR. FERLIC'S TESTIMONY

Toombs claims that the trial court erred in finding that it would have to engage in speculation and conjecture in order to enter an award. The record reflects that Dr. Ferlic's opinion that the decedent died from stress ventricular fibrillation on July 4, 1992, was based upon the decedent's July 3 diary entry. The trial court was not clearly wrong in finding that such an analysis required a speculative assumption that the decedent on the following day resurrected his stress level to the point of suffering ventricular fibrillation.

CONCLUSION

The trial court was not clearly wrong in dismissing Toombs' petition for workers' compensation benefits on account of the death of her husband. Therefore, the decision of the Nebraska Workers' Compensation Court is affirmed.

AFFIRMED.

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