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STATE OF NEBRASKA, APPELLEE, V. RANDY R. DETWEILER, APPELLANT.
STATE OF NEBRASKA, APPELLANT, V. RANDY R. DETWEILER, APPELLEE.
STATE OF NEBRASKA, APPELLEE, V. LUCINDA H. DETWEILER, APPELLANT.

544 N.W.2d 83

Filed March 1, 1996. Nos. S-95-420, S-95-503, S-95-585, S-95-520.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. **Search Warrants: Probable Cause.** In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
3. **Sentences: Probation and Parole: Appeal and Error.** When the State appeals from a sentence, contending that it is excessively lenient, an appellate court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court.
4. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** After-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts.
5. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.
6. ____: ____. The reliability of an informant may be established by showing that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
7. **Search Warrants: Affidavits: Probable Cause.** When considering the sufficiency of probable cause based on information supplied by an informant, it is important to distinguish the police tipster, who acts for money, leniency, or some other selfish purpose, from the citizen informant, whose only motive is to help law officers in the suppression of crime.
8. **Eyewitnesses: Presumptions.** An untested citizen informant who has personally observed the commission of a crime is presumptively reliable.

9. **Eyewitnesses.** An anonymous tipster's explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles the tip to greater weight than might otherwise be the case.
10. **Criminal Law: Final Orders: Judgments: Appeal and Error.** Under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1994), the State may request review of an adverse decision or ruling in a criminal case after a final order or judgment in the criminal case has been entered. The purpose of this procedure is to provide an authoritative exposition of the law to serve as precedent in future cases.
11. **Double Jeopardy.** Jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant.
12. ____. The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Judgments in Nos. S-95-420, S-95-503, and S-95-520 affirmed. Exception sustained in No. S-95-585.

David L. Kimble, Seward County Public Defender, for Randy R. Detweiler.

Michael G. Mullally for Lucinda H. Detweiler.

C. Jo Petersen, Seward County Attorney, for State (cases Nos. S-95-420, S-95-503, S-95-585).

Don Stenberg, Attorney General, and Joseph P. Loudon for State (case No. S-95-520).

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

WRIGHT, J.

I. INTRODUCTION

Randy R. and Lucinda H. Detweiler were convicted in a bench trial of manufacturing a controlled substance and possession of a controlled substance with intent to deliver. In addition, they were each charged with failure to affix a drug tax stamp. The record demonstrates that the district court dismissed this charge against Randy, but the record is silent as to the charge against Lucinda. Randy and Lucinda appeal their convictions, which appeals were docketed as Nos. S-95-420 and S-95-520 respectively. The State appeals the dismissal of the drug tax stamp charge against Randy, which appeal was

docketed as No. S-95-585. The State also appeals the sentence given to Randy as excessively lenient, which appeal was docketed as No. S-95-503.

II. SCOPE OF REVIEW

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Grimes, supra*; *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993).

When the State appeals from a sentence, contending that it is excessively lenient, an appellate court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court. *State v. Foral*, 236 Neb. 597, 462 N.W.2d 626 (1990).

III. FACTS

On June 24, 1993, Patrick Dorcey, deputy sheriff of the Seward County Sheriff's Department, was told by a confidential informant (CI) that a friend of the CI's had taken photographs inside the Detweiler residence of an "elaborate marijuana growing operation, with lights and a watering system." The CI believed the photographs were taken on June 19 in the upstairs portion of the Detweiler house in a room with a covered north window. The CI also told Dorcey that he had seen individuals who used drugs frequenting the Detweiler residence on numerous occasions, and the CI provided those names to Dorcey.

Dorcey told the CI to instruct his friend to supply Dorcey with the photographs and to make a report. The CI informed Dorcey that the friend did not wish to become involved and

would not deal with Dorcey directly. The CI was instructed to send the photographs himself or to have his friend send the photographs directly to Dorcey and make an anonymous report regarding the photographs to Crimestoppers.

Thereafter, an envelope containing photographs matching the description provided by the CI arrived at the Seward County Sheriff's Department. The envelope was sent to Dorcey, but did not bear a return address. The photographs showed several large marijuana plants growing in pots inside a room with covered windows, as well as marijuana hanging to dry.

Subsequently, an individual called Seward County Crimestoppers, acknowledged sending the photographs to Dorcey, and requested a Crimestoppers identification number. On July 3, 1993, the individual again called Crimestoppers, described the photographs, and stated that the photographs were taken by the caller in an upstairs room of the Detweiler residence on June 19. The caller had "observed many different people constantly going in and out of the house and lots of different cars at the Detweiler residence."

Dorcey prepared an affidavit and motion for a search warrant on July 7, 1993, in which he conveyed the information provided by the CI and the Crimestoppers caller, as well as additional information gathered by independent investigation. As a result, a search warrant was issued. That same day, Dorcey and other officers served the warrant and seized a large number of items from locations throughout the house, including marijuana in various forms, drug paraphernalia, a triple-beam scale, a number of lights, and a crude irrigation system. The Detweilers were arrested and charged with three counts each: (1) manufacturing a controlled substance, to wit: marijuana, a Class III felony; (2) possession of marijuana with intent to deliver, a Class III felony; and (3) failure to affix a drug tax stamp, a Class IV felony.

Prior to trial, the Detweilers argued that convictions for possession with intent to deliver and failure to affix a drug tax stamp would violate their Fifth Amendment rights against double jeopardy under *Department of Revenue of Montana v. Kurth Ranch*, ____ U.S. ____, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994). The Detweilers also moved to suppress the evidence

seized pursuant to the search warrant. The district court overruled the motions to suppress, but withheld ruling on the double jeopardy issue until sentencing.

Following a bench trial, the Detweilers were convicted of manufacturing a controlled substance and possession with intent to deliver. Prior to sentencing, the district court dismissed the charge of failure to affix a drug tax stamp against Randy Detweiler. No dismissal of the drug tax stamp charge appears in the record regarding Lucinda Detweiler. Randy was sentenced to 4 years' probation, including a jail term of 180 days, with extensive probation restrictions. Lucinda was sentenced to 4 years' probation.

IV. ASSIGNMENTS OF ERROR

In their appeals, the Detweilers assert that the district court erred (1) in overruling their motions to suppress physical evidence seized at their residence pursuant to an invalid search warrant and (2) in admitting into evidence those items seized at the residence pursuant to the invalid search warrant.

In its appeals, the State asserts that the district court erred in dismissing the drug tax stamp charge against Randy Detweiler and abused its discretion in granting him probation.

V. ANALYSIS

1. Motion to Suppress

The Detweilers argue that the affidavit upon which the search warrant was issued was insufficient to provide probable cause to issue the warrant and that, therefore, the evidence seized during the search of their residence should be suppressed. The affidavit relied on information provided to the police by two informants: a confidential informant and a Crimestoppers caller.

In reviewing the strength of an affidavit as a basis for finding probable cause to issue a search warrant, we have adopted the "totality of the circumstances" rule established by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Under this standard, the question is whether, under the totality of the circumstances, the issuing magistrate had a "substantial basis" for finding that the affidavit established probable cause. *State v. Duff*, 226 Neb.

567, 412 N.W.2d 843 (1987). In *Gates*, the Court described this standard as follows:

> [A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." . . . "A grudging or negative attitude by reviewing courts toward warrants" . . . is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." . . .
>
> . . . Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a "substantial basis for . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more.

462 U.S. at 236.

When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994). We therefore consider the sufficiency of the information received and the reliability of the information.

(a) Basis for Affidavit's Allegations of Criminal Activity

The affidavit states that Dorcey was told by the CI that a friend of his had taken photographs of the inside of the Detweilers' home on June 19, 1993, and that the photographs depicted an "elaborate marijuana growing operation, with lights and a watering system." The growing operation was said to be in the upstairs of the house in a room with a covered window, and the CI stated that shortly before the photographs were taken, the Detweiler residence " 'looked like a jungle.' "

However, the CI stated that when the photographs were taken, there "were not as many plants in the room as there had been prior to the photos being taken, but that there were some plants that were just getting started in pots." The CI further stated that he had seen individuals he knew to be drug users at the Detweiler residence on a number of occasions, and he informed Dorcey of their names. Although the identity of the CI's friend was not disclosed, the friend sent the photographs to Dorcey.

Dorcey told the CI to have his friend call Crimestoppers to make a report regarding the Detweilers. The factual basis to support the affidavit was ultimately provided by the Crimestoppers caller. The caller stated that on June 19, 1993, he had taken a number of photographs depicting a marijuana growing operation inside the Detweilers' home. The caller correctly stated that the photographs were of a number of marijuana plants and that one of the photographs showed marijuana plants hanging to dry. The photographs were taken in an upstairs room, and the caller had personally "observed many different people constantly going in and out of the [Detweiler] house and lots of different cars at the Detweiler residence."

(b) Credibility of Information in Affidavit

The reliability of an informant may be established by showing that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992).

In determining the relative reliability of an informant's information to demonstrate probable cause to issue a search warrant, we have distinguished between the ordinary "confidential informant" and the "citizen informant." See *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). We described this distinction as follows:

> " 'When considering the sufficiency of probable cause based on information supplied by an informant, it is important to distinguish the police tipster, who acts for

> money, leniency, or some other selfish purpose, from the citizen informer, whose only motive is to help law officers in the suppression of crime.
>
> "...."
>
> " 'In the latter the rule of prior reliability is considerably relaxed for several reasons. In the first place the citizen informer has rarely had any earlier experience in reporting suspected criminal activity. Furthermore, unlike the professional informant, he is without motive to exaggerate, falsify or distort the facts to serve his own ends.' "

Id. at 822, 420 N.W.2d at 304. Accord *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991).

"[A]n untested citizen informant who has personally observed the commission of a crime is presumptively reliable." *State v. Payne*, 201 Neb. 665, 670, 271 N.W.2d 350, 352 (1978). "An anonymous tipster's 'explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles [the] tip to greater weight than might otherwise be the case.' " *State v. Vermuele*, 241 Neb. 923, 931-32, 492 N.W.2d 24, 31 (1992) (quoting *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)).

The Detweilers argue that the Crimestoppers caller was not a citizen informant because the affidavit did not set forth the circumstances by which the caller's status as a citizen informant may be inferred. The Detweilers claim the Crimestoppers caller was not acting "openly" in aid of law enforcement and that the caller does not meet the definition of a citizen informant. We disagree.

In *State v. Duff*, 226 Neb. 567, 571, 412 N.W.2d 843, 846 (1987), we referred to a definition given by other courts of a citizen informant as " 'a citizen who purports to . . . have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement. . . .' " We have not previously adopted a requirement that a citizen informant cannot remain anonymous, and we decline to do so. Reliability may appear by the very nature of the circumstances under which the incriminating information became known. *Id.*

The affidavit set forth a significant basis for finding that the Crimestoppers caller was a "citizen informant." The caller made an anonymous report to Crimestoppers, claiming to have taken photographs of a crime in progress. The caller sent the photographs to the police and then verified their contents. The photographs and the caller's description of them provide a detailed description of the crime that the caller alleged to have personally witnessed.

Moreover, there is no evidence that the caller had any selfish motivation for working with the police, such as promises of leniency or financial benefit. There is no indication that the caller had any incentive to exaggerate the information made available to Dorcey in pursuit of personal ends. Dorcey averred in his affidavit that the photographs matched the description provided by the caller. In addition, Dorcey corroborated the caller's claim that the Detweiler home had a second story by independent investigation and verified that the windows in a room on the north side of the house, which the Crimestoppers caller identified as the "growing room," were covered.

(c) Determination

In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993). Given the totality of the circumstances, probable cause existed to justify the issuance of the search warrant in the present case.

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Grimes, supra*; *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). The issuance of the warrant was proper, and the trial court did not err in refusing to suppress or in admitting the evidence obtained during the search of the Detweiler residence.

2. Double Jeopardy

The Detweilers each argued that their charge of failure to affix a drug tax stamp should be dismissed, claiming that convictions for possession with intent to deliver and failure to affix a drug tax stamp would violate their Fifth Amendment right against double jeopardy. The district court dismissed the charge of failure to affix a drug tax stamp against Randy. The court cited *Department of Revenue of Montana v. Kurth Ranch*, ____ U.S. ____, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994), in its order of dismissal.

Pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1994), the county attorney for Seward County applied for leave to docket an appeal on the double jeopardy issue. Under § 29-2315.01, the State may request review of an adverse decision or ruling in a criminal case after a final order or judgment in the criminal case has been entered. The purpose of this procedure is to provide an authoritative exposition of the law to serve as precedent in future cases. See *State v. Jennings*, 195 Neb. 434, 238 N.W.2d 477 (1976). The scope of such an appeal, however, is limited.

Under Neb. Rev. Stat. § 29-2316 (Cum. Supp. 1994), the judgment of the court in any action taken under § 29-2315.01

> shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state.

In those cases where our decision establishes that the final order of the trial court was erroneous and the defendant was not placed legally in jeopardy prior to the entry of such erroneous order, § 29-2316 authorizes the trial court to "upon application of the county attorney issue its warrant for the rearrest of the defendant and the cause against him or her shall thereupon proceed in accordance with the law as determined by the decision of the appellate court."

It is well established in Nebraska that under Neb. Const. art. I, § 12, jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant.

State v. Dail, 228 Neb. 653, 424 N.W.2d 99 (1988); *State v. Chamley*, 223 Neb. 614, 391 N.W.2d 99 (1986). The district court withheld determination on the motion to dismiss until the time of sentencing. At trial, the State presented evidence on the failure to affix a drug tax stamp charge, including evidence that the marijuana seized at the Detweiler residence did not bear a drug tax stamp; therefore, jeopardy attached. Thus, we review the court's legal conclusion pursuant to § 29-2316 for the purpose of instructing parties as to the law for pending and subsequent cases.

While the U.S. Supreme Court determined in *Kurth Ranch* that Montana's Dangerous Drug Tax Act violated the defendants' rights not to be placed in double jeopardy, the Court's analysis specifically excluded such a holding with respect to the facts of the case at bar. The enforcement of the Montana drug tax was pursued in a separate and distinct proceeding from the criminal action against the defendants. As the majority noted in footnote 21, the Montana statute did not require the Court to "comment on the permissibility of 'multiple punishments' imposed *in the same proceeding*." (Emphasis supplied.) *Kurth Ranch*, 114 S. Ct. at 1947.

The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989); *State v. Stubblefield, ante* p. 436, 543 N.W.2d 743 (1996). Here, we consider whether the successful prosecution of Randy Detweiler for both the possession with intent to deliver charge and the drug tax stamp charge would lead to multiple punishments for the same offense.

In *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983), the Court considered whether a defendant could simultaneously be charged with the crimes of "armed robbery" and "armed criminal action" without violating the Double Jeopardy Clause. The armed robbery charge required proof of every fact required to prove the armed criminal action charge, and the armed criminal action charge did not require proof of any element not required for proving armed robbery.

The defendant claimed that the crime of armed criminal action appeared to be a lesser-included offense of armed robbery and that prosecution for both charges should therefore be considered double jeopardy under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

The Court rejected this argument and explained that when two offenses are tried in the same proceeding, the only double jeopardy issue is whether convictions on both charges would constitute multiple punishment for the same offense. The determination of whether such convictions would lead to a multiple punishment, however, depends on whether the legislature that designed the criminal statutory scheme intended that cumulative sentences be applied for conviction on both offenses. If the legislature intended that defendants be punished cumulatively under both charges and the sentences for both charges are imposed in a single trial, the Double Jeopardy Clause is not offended. *Missouri v. Hunter, supra.*

The Court explained that the *Blockburger* test is a rule of statutory construction. The purpose of the test is to prevent double punishment in a situation where the legislature has in fact intended to provide a single punishment for the offense. The *Blockburger* test is inapplicable in those cases where the legislature has intended to punish both offenses cumulatively.

> [S]imply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. . . .
>
> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Hunter, 459 U.S. at 368-69. In *Hunter*, the armed criminal action statutes stated that " '[t]he punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through

the use, assistance, or aid of a dangerous or deadly weapon. . . .' " *Hunter*, 459 U.S. at 362. Thus, the Court found that there was no double jeopardy violation.

The same analysis applies to the drug tax stamp statute, Neb. Rev. Stat. § 77-4309 (Cum. Supp. 1994), which states in part:

> A dealer distributing or possessing marijuana or a controlled substance without affixing the official stamp, label, or other indicium shall be guilty of a Class IV felony. *Notwithstanding any other provision of the criminal laws of this state*, an indictment may be found and filed or an information or complaint filed upon any criminal offense specified in this section in the proper court within six years after the commission of such offense.

(Emphasis supplied.) Section 77-4309 demonstrates that the Legislature recognized that a person might be charged with a criminal offense with a separately applicable statute of limitations and demonstrates that the Legislature intended the drug tax stamp violation to remain an independent offense from any criminal prosecution for a drug crime.

In addition, the drug tax stamp requirement applies to any "dealer," which Neb. Rev. Stat. § 77-4301 (Cum. Supp. 1994) defines as one who, "*in violation of Nebraska law*, manufactures, produces, ships, transports, or imports into Nebraska or in any manner acquires or possesses six or more ounces of marijuana . . . ." (Emphasis supplied.) When the Legislature created additional penalties for the crime of failure to affix a drug tax stamp, the Legislature recognized that the drug tax stamp requirement would apply against one who is also in violation of a separate criminal law. The Legislature intended that defendants would be subject to cumulative punishments for the separate offenses of possession with intent to deliver and failure to affix a drug tax stamp. Where a legislature has demonstrated an intent to permit cumulative punishments, the Double Jeopardy Clause is not violated. See *Department of Revenue of Montana v. Kurth Ranch*, ____ U.S. ____, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994). The Court recognized in *Kurth Ranch* that "Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or, indeed, if it had

assessed the tax in the same proceeding that resulted in his conviction." 114 S. Ct. at 1945, citing *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).

The State's exception to the dismissal of the failure to affix a drug tax stamp charge against Randy Detweiler is sustained. We make no determination as to the disposition of this charge against Lucinda Detweiler. The record does not demonstrate that the district court entered an order dismissing the drug tax stamp charge against Lucinda or that the court entered a judgment on the drug tax stamp charge with respect to her.

3. Leniency of Sentence

The State appeals Randy Detweiler's sentence as excessively lenient, pursuant to Neb. Rev. Stat. § 29-2320 (Cum. Supp. 1994). The district court sentenced him to 4 years' probation, including 180 days' incarceration. The court placed significant limitations on his personal behavior during the period of probation and ordered substance abuse monitoring and chemical dependency evaluation and treatment as required.

When the State appeals from a sentence, contending that it is excessively lenient, an appellate court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court. *State v. Foral*, 236 Neb. 597, 462 N.W.2d 626 (1990).

Randy Detweiler was sentenced to 4 years of restrictive probation, extensive monitoring, and treatment for substance abuse. The probationary term includes 180 days of incarceration. This sentence was not clearly untenable given the circumstances, and we cannot say that the district court abused its discretion.

VI. CONCLUSION

The district court's judgments of conviction and sentences are affirmed. The court's dismissal of the failure to affix a drug tax stamp charge against Randy Detweiler was incorrect, and the State's exception is sustained.

Judgments in Nos. S-95-420, S-95-503, and S-95-520 affirmed.

Exception sustained in No. S-95-585.

IN RE APPEAL OF GARY M. LANE FOR ADMISSION TO THE NEBRASKA STATE BAR ASSOCIATION.
GARY M. LANE, APPELLANT, V. BAR COMMISSION OF THE NEBRASKA STATE BAR ASSOCIATION, APPELLEE.

544 N.W.2d 367

Filed March 8, 1996. No. S-34-950002.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** Under Neb. Ct. R. for Adm. of Attys. 15 (rev. 1992), the Nebraska Supreme Court reviews determinations made by the Nebraska State Bar Commission de novo on the record, reaching a conclusion independent of the findings of the referee; provided, however, that where credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Rules of the Supreme Court: Attorneys at Law: Time.** Under Neb. Ct. R. for Adm. of Attys. 3 (see appendix A), 9, and 10 (rev. 1992), the Nebraska State Bar Commission is empowered to continue investigations into an applicant's character and fitness between the time the applicant has taken the bar examination and such time as the applicant has taken the oath of admission.
3. **Attorneys at Law.** Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability.
4. ____. It is not necessary that an applicant for admission to the Nebraska State Bar Association have had an intent to deceive in order to be found to have lacked candor in filling out an application.
5. ____. False, misleading, or evasive answers to bar application questions may be grounds for finding a lack of requisite character and fitness.
6. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** The reasons set forth in the written statement for appealing from a determination of the Nebraska State Bar Commission filed under Neb. Ct. R. for Adm. of Attys. 15 (rev. 1992) serve the same function as assignments of error in a brief, namely, to advise the Nebraska Supreme Court as the reviewing court of the issues to be decided, in the sense that the court is informed of the legal bases upon which the contentions to be considered are grounded.
7. ____: ____: ____. Reasons which are set forth in a written statement filed under Neb. Ct. R. for Adm. of Attys. 15 (rev. 1992) for appealing a denial of admission to the Nebraska State Bar Association, but which are not argued, will not be considered.

Original action. Affirmed.

Robert B. Creager, of Anderson, Creager and Wittstruck, P.C., for appellant.

Denzel R. Busick, of Luebs, Leininger, Smith, Busick & Johnson, for appellee.

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

PER CURIAM.

Pursuant to Neb. Ct. R. for Adm. of Attys. 15 (rev. 1992), the applicant-appellant, Gary M. Lane, challenges the decision of the respondent-appellee, the bar commission of the Nebraska State Bar Association, to deny his application for readmission to the Nebraska bar through membership in the association.

SCOPE OF REVIEW

In attorney discipline cases, we review recommendations de novo on the record, reaching a conclusion independent of the findings of the referee; provided, however, that where credible evidence is in conflict on a material issue of fact, we consider 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. Woodard, ante* p. 40, 541 N.W.2d 53 (1995); *State ex rel. NSBA v. Ogborn*, 248 Neb. 767, 539 N.W.2d 628 (1995). Under rule 15 we also so review a determination of the bar commission.

FACTS

At various times Lane was admitted to the bars of Colorado, Iowa, Nebraska, Texas, Virginia, and Washington, D.C. He permitted the Nebraska membership obtained in 1978 to lapse, and in 1994 when he again applied for admission to the Nebraska bar, he no longer held membership in the Iowa bar.

Noting that Lane had failed to list in his application any employment from October 1990 through October 1994, the association's admissions clerk, Jim L. Henshaw, wrote for an explanation. Lane responded by letter that he was unemployed during that period of time. However, in a later letter to the association's executive director, James Sajevic, Lane admitted that he had been employed in temporary jobs during the questioned period of time.

The commission then received information indicating that Lane had exhibited threatening, confrontational, obnoxious, and paranoid behavior. Henshaw wrote Lane requesting his appearance before the commission. Lane appeared, and the

commission thereafter advised him that it would continue its background investigation, but that pending the results thereof, he would be permitted to sit for the February 1995 bar examination if he desired to do so. Lane took the examination and was notified that he had passed and that the commission was continuing its investigation.

After the investigation was concluded, the commission advised Lane's attorney by letter that it had concluded Lane lacked the current character and fitness required for admission to the Nebraska bar. The reasons for the denial of admission were stated to be:

> 1. Evidence of hostile, threatening, and disruptive interactions with individuals since . . . Lane has resided in Nebraska.
>
> 2. Lack of candor in completing his application for admission to the bar, including an incomplete disclosure of past employment and an incomplete disclosure of previous bar admissions.

Lane then wrote the commission requesting a hearing pursuant to Neb. Ct. R. for Adm. of Attys. 10 (rev. 1992). Lane's attorney later requested that the commission furnish him with a bill of particulars regarding the reasons for the denial of admission. The commission wrote Lane's attorney that the reasons supporting its decision were:

> 1. Lack of candor in completing the application for admission to the Bar.
>
> A. The application was received on October 31, 1994. Question 2 inquired as to whether he had ever applied for admission to the Bar of any state or applied to take the Bar examination of any state. If so, he was to state the date of the application, the jurisdiction to which he applied, the outcome of the application, and the dates of admission in each jurisdiction. On January 27, 1995, he appeared at a hearing before the Commission and disclosed for the first time that he had been previously admitted in Nebraska and Iowa.
>
> B. In his Application received on October 31, 1994, he was asked to respond to questions . . . 7 and 8 relating to past employment. The response was to include temporary

or part-time employment for the past 10 years. He did not list any employment since October of 1990. A specific inquiry was made of this matter by letter of November 22, 1994, from Jim L. Henshaw. He responded by letter of November 23, 1994, that he had been unemployed from October of 1990 to the date of his letter. It was not until a letter dated April 11, 1995, to Mr. Sajevic that he admitted to such temporary employment. No details were given. Our investigation has found that he had been employed for temporary employment in March and April, 1993, for Manpower and Apple One Employment.

C. In his Application received October 31, 1994, Question 11 asked if any civil actions or judgments had ever been filed against him. He indicated that such actions or judgments were in existence. He did not attach NSBC Form 3 to the Application. It was not until the hearing of January 27, 1995, that this matter was explained.

2. Evidence of Hostile, threatening, and disruptive interaction with individuals since he resided in Nebraska which reflect upon his character and fitness to practice.

A. At the hearing on January 27, 1995, he discussed his attempts to volunteer at the Creighton Legal Clinic. Catherine Mahern, the Director of the Clinic, has indicated that she and Connie Kearney had a meeting with him to discuss his role in the Clinic. At this meeting in September or October of 1994, it was reported that he was hostile and threatening. The next day, Catherine Mahern asked him to leave the Clinic and not return. He was again threatening, hostile and rude.

B. On or about January 19, 1995, he was in attendance at a BAR-BRI Review at Creighton University. Apparently, he could not locate his keys and began accusing other attendees of taking his keys. Kay Strong was one of the individuals accused. He also accused Corby Gary and threatened to fight him. He also indicated to Mr. Gary that he would find out where he lived. As a result, he was asked to not participate in the BAR-BRI Review. An arrangement was made whereby he could review the

tapes of the sessions by himself. Thomp Pattermann and Laura Pattermann were also witnesses to other disruptive behavior at the review sessions before he was asked to leave. Robert J. Launbenthal, an active member of the Nebraska and Iowa Bars, observed him making inappropriate and demeaning statements to a security guard at Creighton Law School during the early days of the BAR-BRI Review.

C. Shortly after his dismissal from the BAR-BRI Review, he spoke by telephone with Kay Coffey and Cindy Lilleoien of NCLE by telephone [sic]. He was rude and threatening to both of the NCLE employees. There apparently had been a controversy regarding whether audiotapes or videotapes would be supplied.

A hearing was then held by the commission, which Lane attended with his attorney. Through his attorney, Lane was permitted to cross-examine witnesses testifying before the commission and to present his own witnesses and evidence, and he himself testified. The commission found there was no evidence to support the assertion that Lane had been rude or threatening toward employees of the NCLE and that he had substantially complied with question 11 on the application by listing a civil judgment against him on his bankruptcy schedules that had been provided to the commission. The commission also found that although Lane failed to reveal his prior admissions to the Nebraska and Iowa bars, as the application form requested, the omission was not the result of an intent to deceive, but that it did indicate a casual attitude about compliance with instructions and the need to fully inform the commission. The commission further found, however, that Lane had acted in a threatening and intimidating manner while at the Creighton University legal clinic and at the BAR-BRI review course. The commission also found that Lane had intended to conceal the history of his temporary employment in Colorado, denoting a lack of candor in the application process.

REASONS FOR APPEAL

Rule 15 provides: "The notice of appeal shall be accompanied by a written statement . . . setting forth the nature

of the case, the reason for the appeal, and the facts and pertinent authorities upon which the applicant relies."

Lane asserts seven reasons for appealing which, restated and summarized, claim that (1) the denial was untimely, (2) the evidence does not support the denial, and (3) the procedure employed in reaching the decision and reasons articulated for the denial deprive Lane of the due process and equal protection of the law guaranteed by the Constitutions of the United States and of this state.

TIMELINESS

In averring that the commission's decision was untimely, Lane urges that it should have made its decision before permitting him to sit for the bar examination and that once the commission permitted him to take the examination, it was precluded from holding subsequent hearings into his fitness and character or passing on questions relating thereto.

Rule 10 provides in relevant part as follows:

> Any applicant who has failed to pass the bar examination or to be admitted on motion, or who has been refused permission to take the examination, may, within 30 days after the mailing of the notice of failure, or refusal of permission, or denial of admission on motion, request a hearing before the bar commission.

Lane concludes therefrom that the only persons entitled to a hearing are those who (1) failed the bar examination, (2) were denied admission on motion, or (3) were refused permission to sit for the examination. He implies that because applicants in his position are not specifically referenced as being entitled to a hearing, it is inappropriate for the commission to continue its investigation into such an applicant's character and fitness. However, this contention fails to take into account Neb. Ct. R. for Adm. of Attys. 3 (rev. 1992) (see appendix A), and Neb. Ct. R. for Adm. of Attys. 9 (rev. 1992).

Rule 3 provides, in part: "A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission." As an applicant is not admitted to the Nebraska bar until such time as he or she has taken the oath of admission,

Neb. Ct. R. for Adm. of Attys. 5E (rev. 1992), it follows that a deficient record could constitute the basis of a denial of admission any time until the oath of admission has been administered, including the period of time after the bar examination has been given.

Appendix A, as referenced in rule 3, further empowers the commission to continue investigations into an applicant's character and fitness after the applicant has sat for the bar examination. The appendix states:

> The primary purposes of character and fitness screening before admission to the bar of Nebraska are to assure the protection of the public and to safeguard the justice system. . . .
>
> . . . The bar commission will administer character and fitness screening. It will perform its duties in a manner that assures the protection of the public by recommending for admission only those who qualify.
>
> . . . .
>
> . . . The revelation or discovery of any of the following should be treated as cause for further inquiry before the bar commission decides whether the applicant possesses the character and fitness to practice law . . . .

See *In re Application of Majorek*, 244 Neb. 595, 508 N.W.2d 275 (1993). In order to fulfill its obligations to the public and the justice system, the commission is allowed to continue investigations of possible misconduct even after an applicant has taken the bar examination.

Moreover, rule 9 provides that the commission is "to make recommendations to the court with reference to applicants for admission . . . ." Not only does the rule not place any time restrictions on the performance of that duty, it goes on to provide that the "commission . . . will, prior to the examinations, examine the proofs of qualifications filed in accordance with these rules and may make further investigation as to the qualifications of any applicant as it deems expedient." The rules therefore specifically contemplate that further investigation of an applicant may be necessary after the initial investigation made prior to the examination being given.

Were the situation otherwise, an applicant could commit with impunity any number and variety of transgressions after taking the bar examination, for both the commission and this court would be powerless to deny admission to the bar. The first reason for appealing is therefore without merit.

EVIDENCE

The second reason rests on Lane's premise that the evidence is deficient in two respects. First, according to Lane, it does not support the conclusion that he was hostile, threatening, and disruptive, and even if the evidence does so, the conduct is not such as warrants denial of admission to the bar. Second, again according to Lane, the evidence that he failed to disclose his previous temporary employment does not support the conclusion that he lacked candor, and if the evidence does so, the conduct does not warrant denial of admission to the bar.

Hostile, Threatening, and Disruptive Conduct.

At the June 9, 1995, hearing, various witnesses testified to events which occurred during September 1994 and January through February 1995. Two of the events are worthy of discussion.

The first concerns Lane's involvement at the Creighton University legal clinic. Catherine Mahern, an associate professor of law at Creighton, as well as the director of the clinic, and Connie Kearney, an adjunct professor at the clinic, testified that Lane had come to the clinic in the spring or early summer of 1994 and offered to volunteer after school started again. On his first day, September 19, 1994, Lane accompanied Kearney and two law students to a juvenile court hearing. Lane asked to sit with the students at counsels' table, but Kearney told him that he should remain behind the bar. Lane responded that he was a licensed attorney, that he was in good standing, and that he wanted to sit with the students. Kearney again told him that she wanted him to remain behind the bar, to which Lane responded, "I'll remember this." Kearney testified that she took this statement as a threat.

Mahern met with Kearney and Lane to discuss Lane's role in the clinic and to clear up any misunderstandings that might have occurred at the hearing. During the meeting, Lane stated that

Kearney was the type of woman who does not know how to deal with men and is intimidated by them. He also admitted what he had said to Kearney at the hearing and that he did not take it back. He told Mahern that while he could work with students, he would not work with women students. Finally, Lane stated that "those people in Colorado" had gotten to Mahern, that what they had told her was not true, that the record had been expunged, and that they could not prove anything.

The next day, Mahern called Lane into her office and asked him to leave the clinic. Lane became very irritated and said that Kearney and a student were on the phones in the back room talking to each other about him in whispered voices or in code. When Mahern stated that he must have been mistaken, he said in a loud voice, "[D]on't you accuse me of auditory hallucinations, I've been accused of that before and it's not true." On his way out, Lane passed by Kearney's desk and asked that she keep him out of her phone conversations from now on.

Lane testified that he did not intend to threaten Kearney at the juvenile court hearing; he had made the statement to her because he felt she was being deliberately discourteous to him as a lawyer from a neighboring jurisdiction. He also stated that he did not tell Mahern that he would not work with the female students, but, rather, that he would let them approach him if they wanted help and that he would just work with the male students "who apparently didn't find [Lane] very intimidating."

The second event occurred during the BAR-BRI review course at Creighton University law school. During one of the review sessions, Lane left approximately 10 minutes early. After the review session ended, Lane returned and demanded to know who had stolen his keys. Lane used strong and profane language in accusing the students in attendance of stealing his keys. After the students had left the room, Lane said to one of the students, Corby Gary, "[W]e can take this outside and settle this." Lane went on to say to Gary, "I'll find out where you live." Gary testified that the latter statement caused him concern for himself and his wife.

Other events which were mentioned by witnesses at the hearing included intimidating and rude conduct directed at a

security guard and a custodian at Creighton and abrasive behavior during the BAR-BRI review sessions.

In addition, there are other events alluded to in the evidence which cause some concern, especially his interactions with women. His employment history at AppleOne Colorado, Inc., indicates that he had "outbursts in lobby while filling out application," that he was very rude to female employees, and that he walked off one job, allegedly telling a supervisor to have all of his employees see a psychiatrist. Lane testified that he did not quit that shift early, but, rather, was asked to leave because he was "having another one of these disagreements with another one of these women who didn't apparently like me or my demeanor." Lane acknowledged that his being accused of behaving in an intimidating manner toward women is "part of a recurring problem that I've experienced," and that more women tend to find him intimidating than men.

Lane was also discourteous in his answers to various questions put to him by commission members at the hearing:

> Q. Well, it was a stormy night that night, is that correct?
>
> A. No, it was not. We're going to talk about the weather now[?]
>
> . . . .
>
> Q. Aren't you glad you didn't go outside with him?
>
> A. I think that's kind of a silly question.
>
> . . . .
>
> Q. What's the title of the one that was published?
>
> . . . .
>
> A. . . . I don't see what relevance this has . . . .
>
> . . . .
>
> Q. Were [the keys] lost?
>
> . . . .
>
> A. I don't understand why this is so important.

Moreover, his correspondence with the commission during the investigation process evidences a sarcastic and cavalier attitude toward it and its responsibilities. One letter to Harold L. Rock, the chairperson of the commission, contains the following:

> I am sure you are cognizant of the ethical obligation attorneys have to be courteous to one another. Mr.

> Henshaw clearly disregards this obligation. If Mr. Henshaw does not have an undisclosed agenda perhaps he should be questioned concerning his unnecessary sarcasm. Perhaps my unemployment is not so difficult to understand after all, if this is the attitude of persons in positions of authority.

Another letter to the commission chairperson reads:

> I do not think slanderous innuendoes constitute sufficient grounds to deny me a license to practice law in the State of Nebraska. I recognize that you may have a qualified privilege during this process. . . . I note your sarcastic use of the phrase "working with dispatch" in your letter. If the Commission had worked with dispatch on my application, the investigation would have been completed by now. . . .
>
> . . . Apparently, my failure to fail has again found your side "delaying the game". I use the words "your side" because this process has taken on the characteristics of a football match, not an administrative inquiry. Are you hoping that only if you delay long enough, something negative will happen to disqualify me for admission?
>
> . . . My economic burden of your continued refusal to find me fit to practice in the face of overwhelming favorable evidence pales in comparison to the shabbiness of your effort to impune [sic] my professional integrity.

Also of concern is his belief in various conspiracies being aligned against him. In his interview in January 1995, Lane asserted that because as an attorney he had taken on powerful interests in Texas and because Colorado is dominated by Texas investors, Texas businessmen, and Texas finance, there was an effort on the part of various people in Colorado to politically harass him. Lane stated that the reason a judge in Colorado Springs filed an ethics complaint against him was out of political animosity because "she's a conservative judge in a conservative county."

He also attributed the three other ethics complaints filed against him in Colorado to political harassment. According to Lane, clerks, judges, and attorneys were upset that he came to Colorado Springs to set up a law practice because his reputation in Texas had preceded him.

Lane also implies that the commission was politically motivated in its investigation of his character and fitness. This assertion had been made earlier in a letter from Lane to the commission, in which he objected to the "inquisitorial approach to [his] Bar admission that [he] believe[s] to be motivated by personal or political animosity." Furthermore, Lane is under the impression that all of the people who were in the BAR-BRI course were against him, allegedly because of racial animosity they felt toward him (Lane testified that he is part Hispanic, part Italian, and part "Anglo Irish"), and because they may have heard of his reputation.

While any one of the events described above, viewed in isolation, could perhaps be attributed to the pressures of taking the bar examination or perhaps a misunderstanding, taken together these incidents show that Lane is prone to turbulence, intemperance, and irresponsibility, characteristics which are not acceptable in one who would be a counselor and advocate in the legal system.

Accordingly, our de novo review of the record leads us to independently conclude that Lane has exhibited a pattern of acting in a hostile, threatening, and disruptive manner.

Having so determined, we turn our attention to Lane's claim that even so, the behavior does not constitute sufficient relevant conduct to deny admission under the provisions of rule 3.

Rule 3 provides, in part, as follows:

> An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission.

Apparently, Lane is arguing that abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent conduct does not reflect on his "honesty, trustworthiness, diligence, or reliability." He is wrong.

Appendix A to rule 3 explains that "[a]n attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them." A record of conduct which shows a

history of abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior is not the type of record which justifies the trust of others with respect to the professional duties owed them. Our Code of Professional Responsibility speaks directly to this issue. Canon 7, EC 7-10, provides that a lawyer is obligated to treat with consideration all persons involved in the legal process, and Canon 7, EC 7-37, provides that although ill feelings may exist between clients in an adversary proceeding,

> such ill feeling should not influence a lawyer in his or her conduct, attitude, and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

The requisite restraint in dealing with others is obligatory conduct for attorneys because "[t]he efficient and orderly administration of justice cannot be successfully carried on if we allow attorneys to engage in unwarranted attacks on the court [or] opposing counsel . . . . Such tactics seriously lower the public respect for . . . the Bar." *Application of Feingold*, 296 A.2d 492, 500 (Me. 1972). It necessarily follows that "[a]n attorney who exhibits [a] lack of civility, good manners and common courtesy . . . tarnishes the . . . image of . . . the bar . . . ." *In re McAlevy*, 69 N.J. 349, 352, 354 A.2d 289, 291 (1976).

In addition, appendix A declares, in part, that "[t]he public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their attorneys." When members of the public engage attorneys, they expect that those attorneys will conduct themselves in a professional and businesslike manner. Attorneys who routinely exhibit abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior toward others involved in the legal system are not worthy of such trust and confidence. What cannot be permitted in attorneys cannot be tolerated in those applying for admission as attorneys. *In re Martin-Trigona*, 55

Ill. 2d 301, 302 N.E.2d 68 (1973), *cert. denied* 417 U.S. 909, 94 S. Ct. 2605, 41 L. Ed. 2d 212 (1974).

Moreover, the qualities listed in the rule are merely illustrative; "[t]he fact is that in reviewing an application for admission to the bar, the decision as to an applicant's good moral character must be made on an ad hoc basis." *In re Application of Majorek*, 244 Neb. 595, 606, 508 N.W.2d 275, 282 (1993). We therefore join other courts in holding that abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior is a proper basis for the denial of admission to the bar. See, *Board of Overseers of the Bar v. Campbell*, 663 A.2d 11 (Me. 1995); *In re Alexander*, 807 S.W.2d 70 (Mo. 1991), *cert. denied* 502 U.S. 885, 112 S. Ct. 241, 116 L. Ed. 2d 196; *Matter of Ronwin*, 139 Ariz. 576, 680 P.2d 107 (1983).

Even if we assume, arguendo, that Lane believes he is the victim of a conspiracy which encompasses various interests in Texas, various people in Colorado, and the commission itself, the sincerity of his belief in this supposed wide-ranging conspiracy against him cannot overcome the requirements for the practice of law. Belief unrelated to reason is a hallmark of fanaticism, zealotry, or paranoia rather than reasoned advocacy. The practice of law requires the ability to discriminate between fact and faith, evidence and imagination, reality and hallucination. *Matter of Ronwin, supra*. While an applicant for admission to the bar is entitled to argue vigorously that the commission erred in its findings and recommendation, and this court would take seriously any substantiation of the existence of bias or misconduct on the part of the commission, a much stronger showing is needed than demonstrated by this record to warrant a conclusion that the commission had acted out of some type of political or personal animus. See *In re Demos*, 579 A.2d 668 (D.C. App. 1990).

Verbal abuse, unfounded accusations, and the like have no place in legal proceedings. While occasional lapses in decorum can be overlooked, Lane's transgressions exceed occasional incivility, anger, or loss of control. On this record, they form a pattern and a way of life which appear to be Lane's normal reaction to opposition and disappointment.

We agree with and adopt the observations in *Matter of Ronwin*, 139 Ariz. at 583–84, 680 P.2d at 114–15:

> Care with words and respect for courts and one's adversaries is a necessity, not because lawyers and judges are without fault, but because trial by combat long ago proved unsatisfactory.
>
> . . . .
>
> The profession's insistence that counsel show restraint, self-discipline and a sense of reality in dealing with courts, other counsel, witnesses and adversaries is more than insistence on good manners. It is based on the knowledge that civilized, rational behavior is essential if the judicial system is to perform its function. Absent this, any judicial proceeding is likely to degenerate into verbal free-for-all and some, no doubt, into physical combat. . . . [H]abitual unreasonable reaction to adverse rulings . . . is conduct of a type not to be permitted of a lawyer when acting as a lawyer. What cannot be permitted in lawyers, cannot be tolerated in those applying for admission as lawyers.

Our de novo review leads us to independently conclude, contrary to Lane's contention, that his egregious pattern of abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent conduct is sufficient relevant conduct to deny him admission to the bar.

Lack of Candor.

Question 7 of the application read: "List every job you have held for the ten year period immediately prior to the date of this application or since the age of 18, beginning with your present employment, if any. Please include self-employment, clerkships, internships, temporary or part-time employment and military service." Lane explained that he had failed to list the Colorado temporary employment because he held simple common labor jobs, and he may have either misread the question or forgotten about the jobs. We agree with the commission's determination that such an explanation is not credible. The correspondence between Lane and Henshaw set out earlier establishes not only that Lane failed to list the

employment, but that he originally denied having had any employment during the period in question.

In addition, not only did Lane fail to list his former membership in the Iowa bar, but he failed to reveal that he had previously been a member of the bar of this state, the very state whose bar he was again seeking to join. That piece of information was certainly one of the more important and relevant items he could have provided the commission. His explanation that he simply forgot to list it, or that he had run out of space, or that he did not think it was relevant or material, we find to be incredible, despite the somewhat contrary finding of the commission.

Contrary to the commission's implication, we have never held that in order to be found to have lacked candor in filling out an application, an applicant must have had an intent to deceive. On the contrary, in *In re Application of Majorek*, 244 Neb. 595, 604, 508 N.W.2d 275, 281 (1993), we observed that "false, misleading, or evasive answers to bar application questions may be grounds for a finding of lack of requisite character and fitness." While an intent to deceive will reflect on whether such answers are false, misleading, or evasive, and would properly be considered by the commission, an applicant who recklessly fills out an application, as the consequence of which the application contains false answers, is just as culpable of lacking candor in the application process as is the applicant who intends to deceive the commission.

Accordingly, our de novo review of the record leads us to independently find that Lane lacked candor in filling out the application at issue. Moreover, contrary to Lane's contention, we independently find such conduct reflects on Lane's honesty, trustworthiness, diligence, and reliability, and thus provides an additional reason to deny him admission to the bar of this state.

DUE PROCESS AND EQUAL PROTECTION

While Lane listed due process and equal protection violations among his reasons for appealing, he did not delineate the facts and pertinent authorities upon which he relied in making these claims. We have often held that errors assigned but not argued in a brief will not be considered by this court.

Anderson/Couvillon v. Nebraska Dept. of Soc. Servs., 248 Neb. 651, 538 N.W.2d 732 (1995); *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995); *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994). The reasons for appealing assigned in the written statement filed under rule 15 serve the same function as assignments of error in a brief, namely, to advise the reviewing court of the issues to be decided, in the sense that the reviewing court is informed of the legal bases upon which the contention to be considered is grounded. See, *Coyle v. Janssen*, 212 Neb. 785, 326 N.W.2d 44 (1982); *Cook v. Lowe*, 180 Neb. 39, 141 N.W.2d 430 (1966). Accordingly, just as errors assigned but not argued in a brief will not be considered, so, too, reasons for appealing which are assigned in a written statement filed under rule 15 but which are not argued will not be considered.

Consequently, under the law of this state, Lane's constitutional claims are procedurally barred. Indeed, Lane rejected an opportunity to file a brief in addition to the rule 15 written statement, in which brief he could have provided additional argument for his appeal reasons, had he elected to so do.

CONCLUSION

For the foregoing reasons, we affirm the commission's decision to deny Lane's application to be readmitted to the bar of this state through membership in the Nebraska State Bar Association.

AFFIRMED.

GERRARD, J., not participating.

WRIGHT, J., dissenting.

The various incidents described by the majority suggest that Lane is at times obnoxious, has a temper, and can be difficult to work with and that these qualities appear to be amplified around women. With this, I cannot quibble. Until today, however, being obnoxious, having a quick temper, and being hard to get along with were not grounds for the extreme sanction of denial of admission to the Nebraska bar. The majority reaches far beyond the current rules governing admission to the Nebraska bar; therefore, I respectfully dissent.

The majority cites two grounds for excluding Lane: (1) Lane's disruptive, threatening, and hostile behavior and (2) Lane's lack of candor.

After reviewing the factual basis for its first allegation against Lane, the majority concludes that "these incidents show that Lane is prone to turbulence, intemperance, and irresponsibility, characteristics which are not acceptable in one who would be a counselor and advocate in the legal system." While I do not approve of such characteristics, there are no bar admission rules for excluding an applicant on such grounds.

The majority states that it has found authority to exclude turbulent or intemperate people such as Lane in Neb. Ct. R. for Adm. of Attys. 3 (rev. 1992). The pertinent portion of rule 3 provides:

> An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant may constitute a basis for denial of admission.

Lane's behavior does not meet this definition. Rule 3 provides authority for the bar to deny admission for behavior which manifests "a significant deficiency in the honesty, trustworthiness, diligence, or reliability" of an applicant. Obnoxious and rude behavior *by definition* simply do not reflect on one's character for honesty, trustworthiness, diligence, or reliability—let alone demonstrate a "significant deficiency" in these traits, as required by rule 3.

Dishonesty and incivility are two vastly different behavioral traits. Rule 3 reaches the former, but simply does not reach the latter. Nothing in the record suggests that Lane has manifested dishonesty toward clients, adversaries, courts, or others with respect to the professional duties owed to them. Rule 3 is not a catchall exclusionary rule reaching all sorts of personality defects in applicants.

The majority explains that we must preclude Lane from membership in the bar in order to protect the public. However, Lane has practiced law in a number of states since being admitted to practice in 1977. Whatever interpersonal problems

Lane may have, they apparently have not led to injury to his clients.

Lane is accused of lacking candor based on two omissions on his bar application. First, Lane failed to report approximately 60 to 100 hours of temporary employment during a 5-week period in 1993. At the commission hearing, Lane could not recall exactly why he left the temporary employment off his application. He thought that he may have either misread the question or forgotten about the jobs. Lane speculated that given that the jobs were short-lived, trivial positions, he may have thought that it was not important to mention them or that he may have been embarrassed to do so. The majority does not find this explanation credible.

Second, Lane failed to report that he was formerly a member of the Iowa and Nebraska bars. Lane noted that there were only three lines available on the application for listing past or current bar memberships. Lane speculated that once he filled in those three lines—with information about his other bar memberships—he intended to attach an extra sheet listing these memberships, but forgot to do so prior to sending in his application.

Whatever the case, an allegation of lack of candor is only probative of one's character for honesty if there is evidence of some intent to deceive, or at least purposeful evasiveness. The record does not show any such intent or even any motive for Lane to deceive the commission. The record shows no disciplinary sanctions against Lane in the omitted states, nor any evidence of malpractice. Lane apparently just filled out his application carelessly.

Nevertheless, the majority concludes that an applicant who "recklessly" fills out an application—and as a result the application contains false answers—is just as culpable of lacking candor in the application process as an applicant who intends to deceive the commission. Consequently, the majority finds that Lane lacked candor in filling out the application and that such conduct reflects on his honesty, trustworthiness, diligence, and reliability. The majority cites this as an additional reason to deny him admission to the bar.

However, the determination of whether someone is dishonest is a judgment about that person's state of mind and about his or her intentions. If the goal of the "lack of candor" standard is to ensure that potential attorneys are not dishonest, then a rule which holds that lack of candor can be established without showing any culpable state of mind is a rule that does not advance its own purpose.

Moreover, such a rule completely ignores the "use of information" instructions that we have issued to the commission. Appendix A to the rules for admission of attorneys states: "In making this determination [of whether the present character and fitness of an applicant qualify the applicant for admission], the following factors should be considered in assigning weight and significance to prior conduct: . . . 10. the materiality of any omissions or misrepresentations." The majority's approach to application omissions ignores factor No. 10. Likewise, we have held that an omission can be material to a consideration of honesty if the omission also demonstrates an intent to deceive, give false answers, or be evasive. See *In re Application of Majorek*, 244 Neb. 595, 508 N.W.2d 275 (1993). Lane's omissions do not establish that he intended to deceive the commission or that he is dishonest.

Under the current rules for admission to the Nebraska bar, I do not believe that Lane can be denied admission.

CONNOLLY, J., joins in this dissent.

RICHARD E. PERRINE, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

544 N.W.2d 364

Filed March 8, 1996. No. S-94-120.

1. **Rules of the Supreme Court: Appeal and Error.** While Neb. Rev. Stat. § 25-1919 (Cum. Supp. 1994) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1992) provide that consideration of the cause on appeal is limited to errors assigned and

discussed by the parties, that same statute and rule permit this court to note any plain error not assigned.

2. **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.
3. **Motor Vehicles: Blood, Breath, and Urine Tests: Police Officers and Sheriffs.** Upon requesting a motorist to submit to a chemical test, an officer must advise that motorist of the consequences both of refusing to submit to the test and of submitting to and failing the test.
4. **Motor Vehicles: Licenses and Permits: Revocation.** In enacting and amending the administrative license revocation statutes, the Legislature made the advisement of consequences mandatory.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

Clark J. Grant, of Grant, Rogers, Maul & Grant, for appellant.

Don Stenberg, Attorney General, and Amy Hollenbeck for appellee.

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

PER CURIAM.

Richard E. Perrine's motor vehicle operator's license was revoked for a period of 1 year by the director of the Department of Motor Vehicles (DMV) following an administrative hearing authorized by the administrative license revocation statutes. See Neb. Rev. Stat. §§ 60-6,196 through 60-6,208 (Reissue 1993). (As of January 1, 1994, the Nebraska Rules of the Road, formerly chapter 39, article 6, of the Nebraska Revised Statutes, were renumbered. They are now codified at Neb. Rev. Stat. § 60-601 et seq. (Reissue 1993, Cum. Supp. 1994 & Supp. 1995). For clarity, we use the new numbering scheme.) Perrine filed a petition for review of administrative license revocation in the district court for Platte County. The director's decision was affirmed by the district court. Perrine then appealed to the Nebraska Court of Appeals, and we, on our own motion, removed the matter to this court under our authority to regulate the caseloads of the Court of Appeals and this court.

We now reverse and vacate the order of the director of the DMV which had revoked Perrine's operator's license, because Perrine was not fully advised of the consequences of refusing to take the chemical breath test as required by § 60-6,197(10). See, *Biddlecome v. Conrad, ante* p. 282, 543 N.W.2d 170 (1996); *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995).

FACTUAL BACKGROUND

On April 22, 1993, Officer Mark Harreus of the Columbus Police Department arrested Perrine for driving while under the influence of alcohol and transported him to the Columbus police station. Perrine initially agreed to submit to a chemical test of his breath, and prior to administering the breath test, the arresting officer read an administrative license revocation advisement form to him as required by § 60-6,197(10). Perrine was cited for refusal to submit to a chemical breath test as a result of his failing to provide an adequate breath sample, and the police officer gave him notice of the proposed revocation of his operator's license on that same date. Perrine requested an administrative hearing to contest the revocation, and an administrative hearing was held on May 11, 1993.

The crux of Perrine's complaint at his administrative hearing, and later to the district court, was that he had a physical disability which prevented him from blowing hard enough to register an adequate breath sample on the Intoxilyzer Model 4011AS machine. Perrine testified that he had a 20-year history of problems with his lungs, and he produced a one-page emergency room record, dated March 14, 1993, from Columbus Community Hospital with a diagnosis of "sinusitis[,] bronchitis and/or and pneumonitis." Perrine also asked to take a blood test after he twice failed to provide an adequate breath sample at the police station.

Officer Carl Campbell, Jr., of the Columbus Police Department testified that Perrine initially agreed to submit to a chemical test of his breath even though he complained of some unspecified lung problem. On Perrine's first two attempts, he gave breath samples insufficient to allow the Intoxilyzer Model 4011AS machine to print a test record card. Perrine was offered a third opportunity to submit a sufficient breath sample, but he

refused to try again. Officer Campbell testified that he was actually holding the machine's mouthpiece in his hand on Perrine's second attempt, and he could feel that there was breath coming from around Perrine's mouth outside of the mouthpiece. It was Officer Campbell's opinion that not all of Perrine's breath was being directed into the mouthpiece. After Perrine declined to provide a third breath sample, Officer Campbell tested the Intoxilyzer Model 4011AS machine using his own breath, whereupon the machine printed a complete test record card with the correct result.

Based on this evidence, the director of the DMV revoked Perrine's operator's license, and the district court affirmed the director's decision.

ASSIGNMENTS OF ERROR

Perrine asserts that the district court erred in (1) determining that he presented insufficient evidence to support his claim of physical inability to perform a chemical breath test and (2) determining that an inability to perform a breath test requires corroboration by medical evidence.

ANALYSIS

As we similarly held in *Biddlecome v. Conrad, ante* p. 282, 543 N.W.2d 170 (1996), it is not necessary to address Perrine's assignments of error, because the advisory form read to Perrine prior to the attempted testing did not fully advise Perrine of the consequences of refusing to submit to a chemical breath test or of failing the breath test. See *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995). That Perrine did not raise this error below is of no matter. While Neb. Rev. Stat. § 25-1919 (Cum. Supp. 1994) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1992) provide that consideration of the cause on appeal is limited to errors assigned and discussed by the parties, that same statute and rule permit this court to note any plain error not assigned. *Biddlecome v. Conrad, supra.*

> 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.

In re Estate of Morse, 248 Neb. 896, 897, 540 N.W.2d 131, 132 (1995). In the present case, the inadequacy of the license revocation advisory form constitutes such an error under our holdings in *Smith v. State, supra*, and *Biddlecome v. Conrad, supra*.

In *Smith*, we upheld an order vacating an administrative license revocation due to an advisory form's nonconformance with § 60-6,197(10), which mandates that upon requesting a motorist to submit to a chemical test, an officer must advise that motorist of the consequences both of refusing to submit to the test and of submitting to and failing the test. The police officer in *Smith* had advised the motorist of some but not all of these consequences. The advisory form used in this case is identical to the one used in *Smith* and *Biddlecome*, in which cases this court held such advisement was deficient because it, among other things, failed to inform the arrested party of (1) the evidentiary consequences of the chemical test; (2) the license reinstatement fee; (3) whether criminal penalties attached to the first, second, third, and fourth commissions of refusal to submit to the chemical test, or rather to the first, second, third, and fourth commissions of driving while under the influence of alcohol; (4) other charges, including felony charges, which can result from a test disclosing an illegal concentration of alcohol; and (5) the restrictions on a motorist's ability to obtain employment driving privileges contained in § 60-6,206(2). Like the advisory form we found defective in *Smith* and *Biddlecome*, the form read to Perrine included such a limited recitation of consequences as to be "not only inadequate but misleading." *Smith*, 248 Neb. at 367, 535 N.W.2d at 698. Accord *Biddlecome v. Conrad, supra*.

In enacting and amending the administrative license revocation statutes, the Legislature made the advisement of consequences mandatory. Since the advisory form in this case fails to conform to that mandate, the director had no authority to revoke Perrine's license. See *Biddlecome v. Conrad, supra*.

CONCLUSION

Accordingly, we reverse the judgment of the district court and remand this cause to the district court with directions to vacate the order of the director of the DMV which had revoked Perrine's operator's license.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., dissenting.

I dissent for the reasons stated in my dissent in *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995).

WRIGHT and GERRARD, JJ., join in this dissent.

COLDWELL BANKER TOWN & COUNTRY REALTY OF HASTINGS, INC., APPELLANT, V. B. CHARLES JOHNSON AND BETTY J. JOHNSON, HUSBAND AND WIFE, APPELLEES.

544 N.W.2d 360

Filed March 8, 1996. No. S-94-272.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a verdict and will not be set aside on appeal unless they are clearly wrong.
2. **Brokers: Real Estate: Contracts: Sales.** Where a real estate broker, while the brokerage contract is in full force and effect, obtains a purchaser for real estate and no sale is made during the existence of the agreement but sale is made thereafter by the owner to the person produced by the agent, on substantially the terms that had been offered through the agent's efforts, the broker is entitled to a commission for making the sale.
3. ____: ____: ____: ____. Ordinarily a real estate broker, who for a commission undertakes to sell land on certain terms and within a specified period, is not entitled to compensation for his or her services unless he or she produces a purchaser within the time limited who is ready, able, and willing to buy upon the terms prescribed.
4. ____: ____: ____: ____. Where a real estate broker obtains a purchaser for real estate and no sale is made during the existence of the agreement but sale is thereafter made by the owner to the person produced by the agent but not on substantially the terms that had been offered through the agent's efforts, the broker is not entitled to a commission for making the sale.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed.

Gene C. Foote II for appellant.

David B. Downing, of Downing, Alexander & Wood, for appellees.

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

CAPORALE, J.

In this breach of contract action the plaintiff-appellant, Coldwell Banker Town & Country Realty of Hastings, Inc., seeks damages resulting from the failure of the defendants-appellees, B. Charles Johnson and Betty J. Johnson, husband and wife, to pay a commission allegedly owed under an agreement entered into by and between the parties. Following a bench trial, the district court dismissed Coldwell Banker's petition. Coldwell Banker then appealed to the Nebraska Court of Appeals, asserting that the district court erred in ruling as it did. In order to regulate the caseloads of the two courts, we, on our own motion, moved the appeal to our docket. We now affirm the judgment of the district court.

In a bench trial of a law action, the trial court's factual findings have the effect of a verdict and will not be set aside on appeal unless they are clearly wrong. *McCook Nat. Bank v. Bennett*, 248 Neb. 567, 537 N.W.2d 353 (1995); *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995); *First Westside Bank v. For-Med, Inc.*, 247 Neb. 641, 529 N.W.2d 66 (1995).

Following the filing of a lis pendens by the Federal Land Bank, the Johnsons signed an agreement listing their improved farmland for sale by Coldwell Banker. This listing agreement provided for a sale price of $450,000 or other terms acceptable to the Johnsons, and the Johnsons agreed to pay Coldwell Banker a cash fee of 5 percent of the gross sale price if, before March 31, 1987, a sale was made or a purchaser was found who was ready, willing, and able to purchase the property.

Coldwell Banker sold part of the property to third parties for $90,000 and was paid a commission of $4,500. A nephew of

the Johnsons then contacted Coldwell Banker and informed it that he had relatives in California, Stephen and Joan Tolliver, who were interested in acquiring the remaining Johnson property. Coldwell Banker and the nephew proposed that the Tollivers trade unimproved Nebraska property Joan Tolliver had inherited for the remaining Johnson property. On January 30, 1987, the Tollivers executed an offer to purchase the remaining Johnson property. However, the Johnsons did not execute the offer which had been prepared for their purchase of the Tolliver property.

As of March 31, 1987, no agreement for the trade had been reached. One of the many problems in executing such an agreement was that the Federal Land Bank held a $450,000 mortgage and was unwilling to consent to the exchange unless the Tollivers paid an additional sum of approximately $51,000. The Tollivers were, as of the expiration date of the listing agreement, unwilling to do this.

On April 3, 1987, the Tollivers, without the participation of Coldwell Banker, entered into negotiations with the Johnsons' attorney for the purchase of the remaining Johnson property. As a result, purchase agreements were executed calling for an exchange of the two properties whereunder the Tollivers would acquire the remaining Johnson property and the Johnsons would acquire the Tolliver property. The Tollivers agreed to pay an additional sum of $25,000, and the Johnsons were to take out a new loan from the Federal Land Bank in the amount of $37,000. The additional consideration, the new loan, the net sale proceeds of the portion of the Johnson land sold previously, and the value of the Tollivers' property totaled $450,000.

The exchange agreements were subject to a number of contingencies remaining to be resolved. First, the Federal Land Bank needed to release the mortgage it held on the Johnson property and to approve the $37,000 loan to the Johnsons. In addition, the Federal Land Bank needed to freeze the balance due on the mortgage without additional interest.

Second, other agreements had to be reached with the Tollivers concerning the crop proceeds from the two properties. The negotiations regarding rights to the 1987 crops were complicated by the fact that the Federal Land Bank could not

accept certain federal program payments because it had exhausted the limit of such amounts it could receive.

Third, the Tollivers were unwilling to complete the exchange unless arrangements were made to convert certain grain-handling equipment on the remaining Johnson property to a storage facility and to lease the facility to a commercial elevator.

Fourth, in order for the Tollivers to be in a position to pay the additional $25,000, they had to borrow money by increasing their loan from The Equitable Life Assurance Society of the United States, which held a first mortgage on their property. This required a complete requalification of the loan and a release of Equitable's mortgage on the property.

These contingencies were all ultimately met, and the closing took place on October 19, 1987.

Coldwell Banker first argues that it is entitled to a commission based on the sale of the remaining Johnson property because it continued working for them notwithstanding the expiration of the listing agreement, if not actively, then through the Johnsons' attorney, "who had more or less assumed the shoes of [Coldwell Banker] in negotiating the final agreement with the Federal Land Bank." Brief for appellant at 1.

But the Johnsons' attorney testified that he was never hired nor paid by Coldwell Banker. It would indeed be a strange result if an attorney, while negotiating a transaction on behalf of a client, suddenly found himself or herself to be the agent of some third party. Little wonder, therefore, that Coldwell Banker cites no authority for such a proposition.

But Coldwell Banker also claims that it is entitled to a commission because

> [w]here a real estate broker, while his brokerage contract is in full force and effect, obtains a purchaser for real estate and no sale is made during the existence of the agreement but sale is made thereafter by the owner to the person produced by the agent, on substantially the terms that had been offered through the agent's efforts, the broker is entitled to a commission for making the sale.

Byron Reed Co., Inc. v. Majers Market Research Co., Inc., 201 Neb. 67, 71–72, 266 N.W.2d 213, 215 (1978). See *Marathon Realty Corp. v. Gavin*, 224 Neb. 458, 398 N.W.2d 689 (1987). The real issue, therefore, is whether the eventual sale of the Johnson property to the Tollivers was on substantially the same terms offered through Coldwell Banker's efforts.

The January 30, 1987, offer of the Tollivers was for them to purchase the Johnson property for $365,000: $5,000 as a downpayment and $360,000 cash upon closing. Contemporaneously with that offer to purchase, the Tollivers offered to sell their property to the Johnsons for $365,000: $1 down and $364,999 cash upon closing. These are obviously not substantially the same terms as were eventually agreed to by the Tollivers and Johnsons after the listing agreement expired.

The executed purchase agreements did provide for an exchange of properties; however, there the similarities end. The executed agreements also provided for the payment of an additional $25,000 by the Tollivers and the receipt of a loan in the amount of $37,000 by the Johnsons. Neither the Tollivers nor the Johnsons had been willing to do this as of the expiration of the listing agreement between the Johnsons and Coldwell Banker. In addition, none of the various contingencies had been negotiated or agreed upon by the expiration date, and some had not even been considered.

This case is controlled by our opinion in *Huston Co. v. Mooney*, 190 Neb. 242, 207 N.W.2d 525 (1973). Therein, a real estate broker brought an action to recover a commission alleged to have been earned for procuring a purchaser of real estate pursuant to the terms of the listing agreement. The listing agreement provided for a cash sale of $20,000 or terms that were acceptable to the owner. During the time the listing agreement was in effect, the broker wrote to the owner, stating that a potential buyer had been located who would pay $1,000 down somewhat as an option, holding the property for 6 months, at which time interest of 8 percent would commence and the buyer would pay an additional $4,000. The buyer would pay an additional $5,000 1 year after the contract was entered into and the balance of $10,000 6 months later, or in two semiannual payments of $5,000. The owner did not consent.

Approximately 3 months after the expiration of the listing agreement, the owner sold the property for $20,000 cash plus abstracting costs to the party with whom the broker had been negotiating. There was no evidence in the record to indicate that the broker was at any time able to obtain from the buyer an offer to purchase for $20,000 cash.

We held that, on these facts, the broker was not entitled to a commission. We found that the record supported the conclusion that the consummation of the sale upon terms acceptable to the owner was the result of efforts of the owner himself after the listing had expired. We went on to write:

> Ordinarily a real estate broker, who for a commission undertakes to sell land on certain terms and within a specified period, is not entitled to compensation for his services unless he produces a purchaser within the time limited who is ready, able, and willing to buy upon the terms prescribed. [Citation omitted.] Where a real estate broker obtains a purchaser for real estate and no sale is made during the existence of the agreement but sale is thereafter made by the owner to the person produced by the agent but not on substantially the terms that had been offered through the agent's efforts, the broker is not entitled to a commission for making the sale.

Id. at 245, 207 N.W.2d at 527. See *The Nebraskans, Inc. v. Homan*, 206 Neb. 749, 294 N.W.2d 879 (1980).

In this case, neither the list price nor the January 30 offer of the Tollivers was on substantially the same terms as were finally agreed upon. The record before us also supports the conclusion that the consummation of the sale on terms acceptable to both the Johnsons and the Tollivers was the result of the work of the Johnsons' attorney, not of anything done by Coldwell Banker. Under these circumstances, the district court as the finder of fact could well conclude that it was the Johnsons' attorney, not Coldwell Banker, who negotiated the final agreement with the Tollivers and also with the Federal Land Bank.

Accordingly, the judgment of the district court cannot be said to be clearly wrong.

AFFIRMED.

MICHAEL J. McINTOSH, A MINOR, BY AND THROUGH MICHAEL T. McINTOSH, FATHER OF SAID MINOR CHILD, AND MICHAEL T. McINTOSH, APPELLANTS AND CROSS-APPELLEES, V. THE OMAHA PUBLIC SCHOOLS, APPELLEE AND CROSS-APPELLANT.

544 N.W.2d 502

Filed March 8, 1996. No. S-94-310.

1. **Invitor-Invitee: Licensee: Trial.** The determination as to whether a plaintiff is an invitee or licensee is a question of fact.
2. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
3. **Invitor-Invitee: Words and Phrases.** An invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage.
4. **Licensee: Words and Phrases.** A licensee is a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor.
5. **Invitor-Invitee: Licensee: Words and Phrases.** If an invitation relates to the business of the one who gives it or for the mutual advantage of both parties of a business nature, the party receiving it is an invitee. If an invitation is for the convenience, pleasure, or benefit of the person enjoying the privilege, it is only a license, and the person receiving it is a licensee.
6. **Trial: Presumptions.** Triers of fact may apply to the subject before them that general knowledge which any person must be presumed to have.
7. **Negligence: Liability: Invitor-Invitee: Proximate Cause.** A possessor of land is subject to liability for injury caused to a business invitee by a condition of the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.
8. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.

9. **Trial: Expert Witnesses.** The soundness of a trial court's ruling regarding an expert's qualifications depends upon the particular facts of the case.
10. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed in part, and in part reversed and remanded with directions.

Gordon R. Hauptman and Terry M. Anderson, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellants.

Brien M. Welch, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

PER CURIAM.

In this lawsuit, brought under Nebraska's Political Subdivisions Tort Claims Act against the Omaha Public Schools (OPS), Michael J. McIntosh, an OPS high school student, and Michael T. McIntosh (his father) claim that the trial court erred in holding that the younger McIntosh (McIntosh) was a licensee rather than an invitee when he was injured while participating in a 2-week spring football clinic conducted by an OPS high school on its football field.

In order to hold OPS liable for McIntosh's injury, the trial court required McIntosh, as a licensee, and his father to prove willful or wanton negligence on the part of OPS in its maintenance and use of the practice field upon which McIntosh's injury occurred.

We agree with McIntosh and his father that, under the facts of this case, McIntosh was an OPS invitee. Therefore, OPS was subject to a higher standard of care toward McIntosh than if he had been a licensee. As a result, we reverse the judgment of the district court for Douglas County in favor of OPS and remand the cause for further proceedings consistent with this opinion.

In a cross-appeal, OPS claims that the trial court erred in finding that the lawsuit was not barred by the Nebraska Recreation Liability Act, Neb. Rev. Stat. § 37-1001 et seq.

(Reissue 1993). We reject OPS' cross-appeal claim and affirm the district court's holding that the Nebraska Recreation Liability Act does not apply in this case.

ASSIGNMENTS OF ERROR

The McIntoshes claim that the trial court erred in (1) finding that McIntosh was not an invitee, (2) finding that OPS was not negligent, (3) finding that OPS' negligence was not the proximate cause of McIntosh's injury, (4) finding that McIntosh assumed the risk of injury from the unsafe premises, and (5) abusing its discretion by improperly limiting the scope of the McIntoshes' expert witness.

OPS' cross-appeal claims that the trial court erred by not finding that the petition was barred by the Nebraska Recreation Liability Act.

STANDARD OF REVIEW

The determination as to whether a plaintiff is an invitee or licensee is a question of fact. See *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994).

In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the judgment, it must be considered in the light most favorable to the successful party. See *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995). 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. *Id.* See *Harvey v. Metropolitan Utilities Dist.*, 246 Neb. 780, 523 N.W.2d 372 (1994).

FACTS

Michael J. McIntosh played freshman football for Omaha South High School in 1988. In his freshman year, fall football practice was conducted at Collin Field on the campus of Omaha South High School. Before McIntosh began playing freshman football, McIntosh's father signed a permission form in which he agreed not to hold the school responsible for any injury occurring to his son in the course of the athletic activity.

McIntosh and his father also signed a "parental consent form" which warned them of potential injuries which could result from participation in any athletic activity.

In the spring of 1989, prior to his sophomore year, McIntosh attended a spring football clinic at Omaha South High School. According to McIntosh, the 2-week clinic served to familiarize future high school football players with the offensive and defensive schemes of the football team. OPS claimed that attendance at the clinic was voluntary. It was McIntosh's understanding that if a student wanted to play football, he should attend the spring clinic. Chris Kirby, a student who also attended the spring clinic, testified that in order to play football, a student "needed" to attend the spring clinic.

The spring clinic was conducted after school was dismissed for the day during the 2-week period. The participants did not pay a fee and did not use school equipment.

Jerry Bartee, then athletic director at Omaha South High School, testified that the spring clinic was a school-related function under the physical education program at Omaha South High School. Jack Oholendt, the head coach of the varsity football team, testified that the spring clinic was part of the high school football program. The school's varsity football coaches were in charge of the clinic.

Before the spring clinic, McIntosh considered Collin Field a dangerous field for contact football. In fact, as a freshman, McIntosh had complained to his football coach that Collin Field was a "hard field." McIntosh's father also felt that his son could be injured playing on Collin Field. At trial, McIntosh described Collin Field as "very hard-surfaced" and "uneven." He testified that "if you were standing back on the track and looking at the field, you would see grass, but if you went to the center of the field where it was mostly traveled, there was basically no grass."

Chris Hamblin, a student who also attended the spring clinic, described Collin Field as "rutted" with "clumps of hard-packed dirt."

Oholendt described Collin Field as a hard "clay, compacted area." In comparing Collin Field to other OPS fields, Oholendt testified that it was the worst field in the OPS district. He also

testified that during his entire tenure at Omaha South High School, he did not believe that Collin Field was ever "maintained at a level I thought it should be."

Bartee, however, testified that Collin Field was usable for athletic competition in the spring of 1989. The record reflects that, at an earlier time, Bartee had described Collin Field as being in terrible condition.

Duane Haith, coordinator of physical education and athletics for OPS, testified that Collin Field was safe for physical education activities and athletic event activities. He, however, also testified that when comparing Collin Field to other fields in the OPS system in the spring of 1989, Collin Field ranked in the "lower quartile" in terms of usability and playability. Phillip Gould, an OPS employee responsible for taking care of Collin Field, testified that he could not recall any ruts on Collin Field in June 1989.

On June 1, 1989, the last day of school, the spring football clinic conducted a seven-on-seven touch football game on Collin Field. McIntosh played middle linebacker during the game.

The play during which McIntosh became injured was a passing play. After the quarterback threw the football, McIntosh jumped and successfully deflected the pass. McIntosh testified that he then landed his left foot "flat and my body went into a twisting motion . . . . And I heard a pop. . . . I remember hopping a few times on my right leg, looking down and seeing my foot kind of dangle and then I just fell." McIntosh testified that his left foot was stuck or caught and that it stayed in the same position from the time he planted it flat on the ground until the time he heard his leg pop.

Kirby witnessed the injury and testified that as McIntosh "came down, his foot remained stationary and he twisted, and his foot remained there as he tried to fall." Kirby further testified that the location on the field where McIntosh's left foot first touched the ground was "very hard, rutted and [had] very little grass, if any at all."

Oholendt, in completing an OPS school accident report, stated that after jumping, McIntosh "came down and twisted with foot caught on ground."

Dr. Richard Murphy, McIntosh's treating physician, diagnosed McIntosh as suffering a compound fracture of the left tibia and fibula.

On July 14, 1993, McIntosh and his father filed an amended petition in the district court for Douglas County against OPS. The amended petition alleged in substance that McIntosh's injury was directly and proximately caused by the school's negligence in (1) conducting practice on the portion of the field that contained ruts and holes, (2) failing to warn McIntosh of the dangerous field condition, (3) not repairing holes and ruts and hard areas of the field, (4) not inspecting the field prior to practice and not suspending practice until the field was safe, (5) failing to maintain the field so that it did not become hard, and (6) failing to install a smooth and flexible surface.

In its answer, OPS denied any negligence on its part and claimed, in substance, that McIntosh had knowledge of the risks and hazards of football activity and the conditions of Collin Field and that the petition was barred by the Nebraska Recreation Liability Act. OPS also claimed that the action was barred because the father had signed "a Parent's or Guardian's Permission form and a Parental Consent form agreeing not to hold [OPS] responsible for any injury to plaintiff Michael J. McIntosh in his participation in football." However, the record reflects that only the parent's permission form contained language agreeing not to hold the school responsible for any injury occurring to McIntosh in the course of football activities.

During the trial, the McIntoshes offered the testimony of expert witness Marc Rabinoff, professor in the department of human performance, sport, and leisure studies at the Metropolitan State College of Denver and president of Rabinoff Consulting Services. Rabinoff testified that the operation and maintenance of Collin Field on June 1, 1989, was below industry standards of care. Rabinoff further testified that Collin Field was not maintained adequately for physical education activities and was not appropriate by any standard for the use of high school football practice.

When Rabinoff was asked if he had an opinion as to whether a student athlete would recognize the dangers of an unsafe field condition such as Collin Field, counsel for OPS objected on the

grounds of lack of qualifications of the witness and foundation. The trial court sustained the objection.

Following the trial, the district court found that the Nebraska Recreation Liability Act did not apply, because Collin Field was owned and maintained by OPS and was not open or available to the public for recreational activities. The trial court also found that McIntosh, as a licensee, did not prove willful or wanton negligence on the part of OPS or that OPS failed to warn of hidden dangers or peril known to the school, but unknown to McIntosh.

ANALYSIS

The McIntoshes argue that the trial court erred in finding that McIntosh was a licensee rather than an invitee and that, as a result, the court applied the wrong standard of care.

An invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage. *Schild v. Schild*, 176 Neb. 282, 125 N.W.2d 900 (1964). A licensee is a person who is privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent, but who is not a business visitor. *Blackbird v. SDB Investments, ante* p. 13, 541 N.W.2d 25 (1995). The real difference is the purpose of the invitation. If an invitation relates to the business of the one who gives it or for the mutual advantage of both parties of a business nature, the party receiving it is an invitee. If an invitation is for the convenience, pleasure, or benefit of the person enjoying the privilege, it is only a license, and the person receiving it is a licensee. *Roan v. Bruckner*, 180 Neb. 399, 143 N.W.2d 108 (1966).

In *Russell v. Board of Regents*, 228 Neb. 518, 423 N.W.2d 126 (1988), a University of Nebraska at Omaha student was injured when he fell on a patch of ice on a campus parking lot while walking from a class building to his car. The student brought an action under the State Tort Claims Act. The Board of Regents appealed from the trial court's ruling in favor of the student. In affirming the trial court's judgment, this court treated the student as an invitee and relied upon *Tichenor v.*

Lohaus, 212 Neb. 218, 322 N.W.2d 629 (1982), which involves a business invitee.

OPS relies on *McCurry v. Young Men's Christian Assn.*, 210 Neb. 278, 313 N.W.2d 689 (1981), in which an individual brought an action against Young Men's Christian Association (YMCA) as a result of an injury which arose from a fall while playing basketball on an outdoor asphalt playground owned by YMCA. The plaintiff was not a member of YMCA and had not obtained any express permission to use the playground. There was no evidence of an invitation by YMCA to the public to use the playground. The trial court entered a directed verdict in favor of YMCA. We affirmed the trial court and held that given the facts of the case, the plaintiff was a licensee and not an invitee.

Similar to the facts in *Russell v. Board of Regents, supra*, McIntosh was a student who was on campus for a school function when he was injured. That is far removed from the facts of *McCurry v. Young Men's Christian Assn., supra*, which involved an uninvited person who was not a member of YMCA. OPS invited McIntosh, a student, to attend the spring clinic as part of the physical education program of Omaha South High School. The invitation was of a business nature for the mutual advantage of both parties.

Triers of fact may apply to the subject before them that general knowledge which any person must be presumed to have. *Beavers v. Christensen*, 176 Neb. 162, 125 N.W.2d 551 (1963). It is general knowledge that a public school is a tax-supported political subdivision in the business of providing academic and physical fitness and, as such, is liable for negligence under the Political Subdivisions Tort Claims Act. At the time that McIntosh suffered injury, he was a student participating in an Omaha South High School physical fitness educational clinic which was mutually beneficial to McIntosh and the school. Clearly, at the time of the injury, McIntosh was an invitee.

Because McIntosh was an invitee, the trial court was clearly wrong in placing upon the McIntoshes the burden to prove willful or wanton negligence on the part of OPS. A possessor of land is subject to liability for injury caused to a business invitee by a condition of the land if (1) the possessor defendant

either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff. *Cloonan v. Food-4-Less*, 247 Neb. 677, 529 N.W.2d 759 (1995).

As a result of our analysis, we reverse the judgment of the trial court and remand the cause for a new trial, at which the proper standard of care is to be utilized.

Because the trial court's factual findings were applied under the wrong standard of care, we need not review the McIntoshes' assigned errors regarding the factual findings of the trial court.

In their fifth assigned error, the McIntoshes claim that the trial court abused its discretion by improperly limiting the scope of their expert witness, Rabinoff. Specifically, the trial court, on grounds of witness qualification and foundation, refused to allow Rabinoff to answer whether a student athlete would recognize the dangers present on a field such as Collin Field.

A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Kroeger v. Ford Motor Co.*, 247 Neb. 323, 527 N.W.2d 178 (1995). The soundness of a trial court's ruling regarding an expert's qualifications depends upon the particular facts of the case. *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995). 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. *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995).

The record reflects that Rabinoff taught courses in sports psychology at Metropolitan State College of Denver, covering areas such as motivation, anxiety, and stress. The record also reflects that coaches and athletic directors take sports

psychology courses to learn about the ability of athletes to make risk assessments. However, the record does not reflect that Rabinoff is a sports psychologist. Neither does the record reflect that the courses taught by Rabinoff cover risk assessments by student athletes.

In any event, given the particular facts of the case, the McIntoshes were not unfairly prejudiced. The record had already established that McIntosh, a student athlete, was aware of the risk and considered the field to be dangerous for contact football. We do not find that the trial court abused its discretion in limiting the scope of the expert testimony.

Finally, in its cross-appeal, OPS argues that the trial court erred by not finding that the petition was barred by the Nebraska Recreation Liability Act. The stated purpose of that act "is to encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon." § 37-1001. In order to facilitate the purpose of the act, a landowner need allow only some members of the public, including the plaintiff, to use his land without charge. See *Holden v. Schwer*, 242 Neb. 389, 495 N.W.2d 269 (1993).

Clearly, a student participating in a clinic sponsored by his school's athletic program does not fall under the category of recreational use of land open to members of the public without charge. Collin Field, as it pertained to McIntosh, was not open to members of the public without charge. Rather, at the time of McIntosh's injury, the field was open to students who were members or who intended to be members of the Omaha South High School football team. The trial court was not clearly wrong in finding that the Nebraska Recreation Liability Act does not apply to the case at bar.

CONCLUSION

We affirm the district court's holding that the Nebraska Recreation Liability Act does not apply in this case. We hold that the district court was clearly wrong in finding that McIntosh was a licensee and, because of that error, utilized the

wrong standard of care in determining whether OPS was liable for McIntosh's injury. On that issue, we reverse the judgment of the trial court and remand the cause to the district court for further proceedings in accordance with this opinion.

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

STATE OF NEBRASKA, APPELLEE, V. PHILIP M. YOUNG, APPELLANT.

544 N.W.2d 808

Filed March 8, 1996. No. S-94-495.

1. **Drunk Driving: Licenses and Permits: Revocation.** The purpose of administrative license revocation is to protect the public from the health and safety hazards of drunk driving by quickly getting driving while under the influence offenders off the road.
2. ____: ____: ____. The administrative license revocation statutes also further a purpose of deterring other Nebraskans from driving drunk.
3. **Criminal Law: Double Jeopardy.** Under the Double Jeopardy Clause, a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.
4. **Double Jeopardy: Statutes.** The fact that a statute designed primarily to serve remedial purposes secondarily serves the exemplary purpose of general deterrence does not require a conclusion that the statute results in punishment for double jeopardy purposes.
5. **Criminal Law: Collateral Estoppel.** Collateral estoppel arises in a criminal case with the existence of four conditions: (1) the identical issue was decided in a prior action, (2) that action resulted in a valid final judgment on the merits, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) the parties had the opportunity to fully and fairly litigate the issue in the prior action.
6. **Criminal Law: Double Jeopardy: Collateral Estoppel: Proof.** In relying on collateral estoppel in relation to the constitutional protection against double jeopardy in a present proceeding, a criminal defendant has the burden to prove that the particular issue which the State seeks to relitigate was necessarily and conclusively determined in the prior proceeding.

7. **Criminal Law: Double Jeopardy: Collateral Estoppel.** The constitutional basis for collateral estoppel in a criminal case is founded on the principle that the Double Jeopardy Clause prohibits multiple prosecutions and multiple punishments.
8. **Res Judicata: Collateral Estoppel: Proof.** The doctrines of collateral estoppel and res judicata are not applicable when the burden of persuasion is different in the subsequent proceeding.
9. **Criminal Law: Drunk Driving: Licenses and Permits: Revocation: Public Policy.** Sound policy reasons support leaving a degree of separation between the civil administrative license revocation hearing and criminal driving while under the influence prosecutions.

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 Douglas County, JOSEPH S. TROIA, Judge, on appeal thereto from the County Court for Douglas County, RICHARD M. JONES, Judge. Judgment of Court of Appeals affirmed.

James E. Schaefer, of Gallup & Schaefer, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

PER CURIAM.

Philip M. Young was arrested for driving a motor vehicle while under the influence of alcohol (DUI), in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992) (now codified at Neb. Rev. Stat. § 60-6,196 (Reissue 1993)). Young was convicted of that offense by a jury in the Douglas County Court. On appeal, the district court for Douglas County affirmed the conviction. The Nebraska Court of Appeals in turn affirmed the district court. *State v. Young*, 3 Neb. App. 539, 530 N.W.2d 269 (1995). We affirm.

Young was arrested at his home on suspicion of DUI on April 16, 1993, following a confrontation with another motorist. When the arresting officer arrived, Young had already parked his car in his garage and allegedly had been drinking inside his home. The arresting officer administered a field sobriety test to Young; Young failed the test. The officer then took Young to the

police station where he administered an Intoxilyzer test. Because Young's breath alcohol level registered in excess of .10, the arresting officer issued Young a citation for DUI. The officer also impounded Young's driver's license pursuant to Neb. Rev. Stat. § 39-669.15 (Cum. Supp. 1992) (now codified at Neb. Rev. Stat. § 60-6,205 (Reissue 1993)), which provides for administrative license revocation (ALR) in addition to criminal prosecution and sentencing.

Young petitioned for a hearing with the Department of Motor Vehicles. At his hearing, Young presented evidence that he was not operating his vehicle at the time that he was intoxicated. Persuaded by Young's showing, the director of the Department of Motor Vehicles restored Young's license. Young then appeared before the county court for Douglas County to defend against the criminal DUI charge. Young moved to dismiss the charge, arguing that prosecution for DUI following his exoneration at the ALR hearing violated the Double Jeopardy Clause of the Nebraska Constitution and the Fifth Amendment to the U.S. Constitution. Alternatively, Young argued that principles of collateral estoppel bar the State from relitigating a claim in county court after losing on the merits at the administrative level. The Douglas County Court denied Young's motion. Young appeals his conviction, raising the same issues in this court.

Young first asserts that ALR constitutes punishment and that, as such, the Double Jeopardy Clause of the Fifth Amendment bars any criminal prosecution and punishment following an ALR hearing. This argument stems from the question of whether a sanction such as ALR is remedial or punitive in purpose, raised by the U.S. Supreme Court in *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). Under Young's interpretation of *Halper*, a statute whose purpose is partially punitive must necessarily constitute punishment, thereby triggering the protections of the Double Jeopardy Clause.

This assignment of error must fail on the basis of our own recent decision in *Hansen v. State, ante* p. 177, 542 N.W.2d 424 (1996). We found in *Hansen* that the purpose of ALR is to protect the public from the health and safety hazards of drunk

driving by quickly getting DUI offenders off the road. At the same time, the ALR statutes also further a purpose of deterring other Nebraskans from driving drunk. *Hansen, supra.* These dual purposes do not offend the Supreme Court's holding in *Halper* that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 448–49.

The fact that a statute designed primarily to serve remedial purposes secondarily serves the exemplary purpose of general deterrence does not require a conclusion that the statute results in punishment for double jeopardy purposes. *Hansen, supra.* Since we found ALR to serve primarily a remedial purpose, the prohibition of multiple punishments enunciated in *Halper* does not apply to Young's case. This assignment of error fails.

Young's second argument is predicated upon his success at the ALR hearing. Young persuaded the ALR hearing officer that he had achieved statutory intoxication level in the safety of his home by "chugging" five or six shots from a vessel of whiskey in the spare moments between his arrival at home and the arrival of the arresting officer. Young complains that his criminal trial constituted relitigation of a settled claim, and he argues that the doctrine of collateral estoppel bars such relitigation by the State.

Collateral estoppel arises in a criminal case with the existence of four conditions: (1) the identical issue was decided in a prior action, (2) that action resulted in a valid final judgment on the merits, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) the parties had the opportunity to fully and fairly litigate the issue in the prior action. *State v. Gerdes*, 233 Neb. 528, 446 N.W.2d 224 (1989). In relying on collateral estoppel in relation to the constitutional protection against double jeopardy in a present proceeding, a criminal defendant has the burden to prove that the particular issue which the State seeks to relitigate was necessarily and conclusively determined in the prior proceeding. *Id.*

Under *Gerdes*, Young must show that the issue of whether he was operating a motor vehicle under the influence of alcohol was determined at his ALR hearing and that his ALR hearing operates as a judicial proceeding. We acknowledge that the ALR hearing officer found that Young had parked the car before he began drinking. That finding, however, cannot deprive the county court of its jurisdiction to hear Young's criminal charges.

The constitutional basis for collateral estoppel in a criminal case is founded on the principle that the Double Jeopardy Clause prohibits multiple prosecutions and multiple punishments. *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Because we held in *Hansen, supra*, that ALR does not amount to punishment, Young has no constitutional basis for his collateral estoppel challenge. The absence of double jeopardy exposure forecloses the application of collateral estoppel against the State in its prosecution of DUI after an ALR hearing because only remedial sanctions could have been imposed at that civil traffic proceeding. See *State v. Higa*, 79 Haw. 1, 897 P.2d 928 (1995).

Furthermore, the doctrines of collateral estoppel and res judicata are not applicable when the burden of persuasion is different in the subsequent proceeding. *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995). In an ALR hearing, the State establishes its prima facie case for license revocation by submitting the arresting officer's report. The burden of proof thereafter rests solely with the motorist, who must show by a preponderance of the evidence that the requirements for ALR are not satisfied. *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). Conversely, the burden in the criminal proceeding rests solely with the State, which must prove beyond a reasonable doubt every element of the charged offense. *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995).

In *Yelli, supra*, we applied this reasoning to find that the judgment in a civil paternity action is not binding under the doctrines of res judicata and collateral estoppel in a subsequent criminal prosecution for criminal nonsupport of children. The same difference in burdens constitutes the fatal flaw in Young's preclusion arguments. The process by which the issue of Young's intoxication was adjudicated in the civil action cannot

be reconstructed on the basis of a new and different burden at the criminal trial. See *Yelli, supra*. Given that the more serious issues of criminal guilt or innocence are not at stake in a civil administrative proceeding, the difference in burdens also indicates that the State lacked a full and fair opportunity to litigate its case against Young in the ALR hearing. See *State v. Bishop*, 113 N.M. 732, 832 P.2d 793 (N.M. App. 1992).

Were we to grant Young's plea for preclusion, we would violate not only our own precedent of collateral estoppel, but also sound policy reasons for leaving a degree of separation between the civil ALR hearing and criminal DUI prosecutions. Were this court to force the State to litigate thoroughly every element of DUI at an ALR hearing, such a holding would seriously undermine the Legislature's goal of providing an informal and prompt review of the decision to suspend a driver's license. See *Bishop, supra*. ALR hearings would quickly evolve into full-blown trials at which the State must fully litigate every possible issue regarding a motorist's actions, thereby losing their effectiveness in removing potentially dangerous drivers from the Nebraska highways within 1 month of their offense.

Because Nebraska's ALR proceedings serve mostly remedial functions, Young's subsequent criminal prosecution is not barred by principles of double jeopardy or, accordingly, principles of collateral estoppel.

AFFIRMED.

CONNOLLY, J., concurring.

I concur in the result reached by the majority, but write separately to address issues raised by the dissent. The dissent ignores the U.S. Supreme Court's holding in *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989); rebukes the majority of this court for ignoring the U.S. Supreme Court; mischaracterizes the holding of the majority opinion in *State v. Hansen, ante* p. 177, 542 N.W.2d 424 (1996); and misconstrues the holdings of appellate courts from other jurisdictions. Consequently, I am compelled to respond.

The issue presented in this case, as in *Hansen*, is best articulated by the Court in *Halper*, which stated: "[T]he question we face today [is]: whether a civil sanction, in

application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." 490 U.S. at 443. The *Halper* Court went on to provide the general principle from which to resolve this issue by stating:

> We therefore *hold* that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosection may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only as a deterrent or retribution*.

(Emphasis supplied.) 490 U.S. at 448–49.

After applying *Halper*'s holding to the facts of *Hansen, supra*, this court found that substantial remedial purposes underlie Nebraska's ALR statutes and concluded that its primary remedial character was not defeated by the fact that the statutes also play a secondary role in deterring others from driving drunk. As a result, we held that "the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions do not bar prosecuting a motorist for DUI after the motorist's driver's license has been administratively revoked, because such revocation does not subject the offender to multiple punishment for the same offense." *Hansen, ante* at 194, 542 N.W.2d at 435.

Despite *Halper*'s clear holding, the dissent focuses on a seemingly inconsistent passage within that opinion which states "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 490 U.S. at 448. The dissent asserts that this passage is the holding of *Halper* and that the majority of this court ignored the U.S. Supreme Court. I find such assertions troubling in light of the fact that the language the majority followed as precedent was deemed the "holding" by the *Halper* Court. ("We therefore hold . . . ." *Id.*)

Black's Law Dictionary 731 (6th ed. 1990) defines "holding" as "[t]he legal principle to be drawn from the opinion (decision) of the court. Opposite of dictum . . . ." It is the duty of this court to follow the holdings of the U.S. Supreme Court, which

is, as the dissent points out, "the only legal authority in this nation empowered to bind this court." Thus, if any "selective reading" or strategic ignoring of the U.S. Supreme Court has occurred, it was not done by the majority.

The dissent goes on to state that "[t]he selective reading of *Halper* endorsed by the majority might be easier to accept had the U.S. Supreme Court not resolved the question of which interpretation of *Halper* is correct in *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)." However, the *Austin* Court did not proclaim that opinion to be a modification or reversal of *Halper*. Instead, it merely applied *Halper*'s dictum to the civil forfeiture context. In fact, the only cases cited by the dissent that applied *Austin*'s language were in the civil forfeiture context. As of this date, this court has not had the opportunity to determine whether civil forfeitures constitute punishment for purposes of double jeopardy. In any event, that issue is not in question in the instant case.

Interestingly, the dissent cites *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367 (1995), a case "considering [the] alleged deterrent impact of sex offender registration and community notification statutes," for the proposition that "*Austin* clarifies *Halper*'s prohibition of punitive purposes in civil sanctions." However, in *Poritz* the court found:

> The contention . . . based on the language that initially appeared in *Halper*, that even the slightest deterrent consequence, *whether intended or not*, whether the inevitable consequence of remedial provisions or not, renders the statute or the sanction involved "punishment" is not borne out either by a careful reading of the language relied on or by the judicial analysis of the issue. Furthermore, the contention is not supported by the outcome in various cases where the claim of punishment is rejected despite some obvious deterrent impact.

(Emphasis supplied.) 142 N.J. at 60, 662 A.2d at 397.

Thus, it is obvious that *Poritz* does not stand for the proposition that *Austin* is a clarification of *Halper* as the dissent claims. To the contrary, *Poritz* provides significant support to *State v. Hansen, ante* p. 177, 542 N.W.2d 424 (1996). One of the cases referred to by the *Poritz* court was *Department of*

Revenue of Montana v. Kurth Ranch, ____ U.S. ____, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994). In *Kurth Ranch*, a case decided after *Halper* and *Austin*, the Court found the drug tax imposed to be excessive and thus punishment; however, it acknowledged that other types of nonpunitive sanctions could legitimately include deterrent aspects. ("We begin by noting that neither a high rate of taxation nor an *obvious deterrent purpose* automatically marks this tax a form of punishment." 114 S. Ct. at 1946. "While a high tax rate and *deterrent purpose* lend support to the characterization of the drug tax as punishment, these features, in and of themselves, do not necessarily render the tax punitive." (Emphasis supplied.) *Id.* at 1947.)

The dissent does not mention *Kurth Ranch* in its opinion because it refutes the dissent's position that *Austin* was a clarification of *Halper*. If *Austin* was intended to be applicable outside the forfeiture context, the Court would not have subsequently stated in *Kurth Ranch* that an obvious deterrent purpose does not automatically mark a civil sanction a form of punishment.

The dissent mischaracterizes the holding of *Hansen* by asserting "[t]he majority in *Hansen* and this case, among other jurisdictions, adopted the [holding of *Halper*] and interpreted it to mean that a civil sanction must be *only* deterrent in nature, lacking any remedial aims, to qualify as punishment."

The dissent implies that the majority interpreted *Halper* to mean that even if a statute has a primary punitive purpose, it would not qualify as punishment for purposes of double jeopardy so long as it has a secondary remedial purpose. However, in *Hansen*, we held "the fact that a statute designed primarily to serve remedial purposes secondarily serves the exemplary purpose of general deterrence as well does not necessitate the conclusion that the statute results in punishment for double jeopardy purposes." *Hansen, ante* at 191, 542 N.W.2d at 434. If in fact the sanction had a primary punitive purpose, then clearly it would constitute punishment for purposes of double jeopardy.

Finally, the dissent misstates that all the courts which find ALR to be remedial "simply deny that any deterrent purpose exists in ALR." It is obvious that the dissent did not carefully

analyze these opinions. The courts that have dealt most convincingly with this problem have acknowledged that the revocation of a driver's license based on the driver's misconduct does have a deterrent aspect. Nevertheless, these courts have held that administrative license revocations remain "remedial" in nature. See, *State v. Zerkel*, 900 P.2d 744, 756 (Alaska App. 1995) (administrative revocation of driver's license is remedial even though it may have a deterrent goal and may achieve some deterrent effect. "[I]t would be naive to suggest that the legislature did not hope to deter misconduct when it enacted the statutes . . . . But this deterrent purpose does not mean that administrative revocation of these licenses is 'punishment' for purposes of the double jeopardy clause"); *State v. Savard*, 659 A.2d 1265, 1268 (Me. 1995) ("we conclude that any punitive or deterrent purpose served by the suspension of an operator's driver's license following an arrest for [DUI] is merely incidental to the overriding purpose intended by the Legislature to provide the public with safe roadways"); *State v. Strong*, 158 Vt. 56, 61, 605 A.2d 510, 513 (1992) ("[a]lthough there is an element of deterrence to the summary suspension of an operator's license, this element is present in any loss of license or privilege and is not the primary focus of [the] statutory scheme"); *State v. Nichols*, 169 Ariz. 409, 413, 819 P.2d 995, 999 (Ariz. App. 1991) ("[w]e acknowledge that [ALR] may serve an additional purpose of punishing the violator and perhaps deterring that individual as well as other drivers from driving while intoxicated. We do not believe, however, that because of this incidental effect, it 'may not fairly be characterized as remedial' " (citing *Halper, supra*)). See, also, *Butler v. Dept. of Public Safety & Corr.*, 609 So. 2d 790 (La. 1992).

Likewise, under our ALR statutes, any deterrent purpose served by the revocation of a driver's license following an arrest for DUI is merely secondary to the overriding remedial purpose of providing the public with safe roadways. As a result, the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions do not bar prosecuting a motorist for DUI after the motorist's driver's license has been administratively revoked because such revocation does not subject the offender to

multiple punishment for the same offense.

WHITE, C.J., dissenting.

> Underlying the principle of double jeopardy is the idea that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187–88, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). Accordingly, the State is prohibited from repeated attempts to punish an individual, as multiple punishments are anathematic to the Double Jeopardy Clause. *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). Few principles of American constitutionalism have been more "deeply 'rooted in the traditions and conscience of our people.' " *Bartkus v. Illinois*, 359 U.S. 121, 155, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959) (Black, J., dissenting).

In following the majority of other state appellate courts, the majority here finds the existence of a consensus of states is more meaningful than what that consensus says. Most disturbingly, the majority ignores the U.S. Supreme Court, the only legal authority in this nation empowered to bind this court. Because the majority has made the initial critical error of rejecting U.S. Supreme Court precedent at the outset, all that follows in *State v. Hansen, ante* p. 177, 542 N.W.2d 424 (1996), and the instant case is contrary to the amendment from which that precedent derives.

HALPER AND *AUSTIN*

Halper arose from the federal criminal prosecution of 65 counts of false medicare claims. After the trial court sentenced Halper to 2 years in prison and a fine of $5,000, the government instigated further action against Halper under the civil counterpart to the criminal false claims statutes, which provided for monetary penalties. Although the government acknowledged that this civil penalty had some punitive purposes, it argued that

the concurrent remedial purpose of the civil sanction precluded a finding that the penalty was "punishment," and thus precluded double jeopardy scrutiny. *Id.*

The Court rejected this interpretation of "punishment" and rendered a definition of punishment that is instructive to this court's task in this case. The emerging rule from *Halper* states that a civil sanction constitutes punishment when the sanction "serves the goals of punishment." *Id.* at 448. The Court elaborated on this simple rule by holding that

> punishment serves the twin aims of retribution and deterrence. . . . Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." . . . From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand the term.

(Citations omitted.) *Id.*

This language creates a simple equation: a sanction equals punishment, not a mere "penalty," when the purpose behind the sanction impedes or has a tendency to prevent a given act—when the State seeks, through this penalty, to deter its citizens from certain behavior. Having presented this simple equation, however, the *Halper* Court then obscured that simplicity by writing in the following paragraph that "under the Double Jeopardy Clause, a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 448–49. Many jurisdictions, including this court, have taken the apparent incongruity as an invitation to read *Halper* selectively, rejecting the simple equation and the language whence it derives in favor of this latter language. See, e.g., *Hansen, supra*; *Tench v. Com.*, 21 Va. App. 200, 462 S.E.2d 922 (1995); *State v. Hanson*, 532 N.W.2d 598 (Minn. App. 1995).

In the analysis of punitive elements of ALR, a court's choice of language from *Halper* is critical. The majority in *Hansen* and this case, among other jurisdictions, adopted the latter language

and interpreted it to mean that a civil sanction must be *only* deterrent in nature, lacking any remedial aims, to qualify as punishment. Conversely, the former *Halper* language, which requires sanctions "*solely* to serve a remedial purpose," indicates that a civil sanction must be *only* remedial to avoid characterization as punishment. One interpretation shields from double jeopardy scrutiny an ALR sanction whose purposes include deterrence; the other interpretation focuses scrutiny on punishment where punishment appears, even if it appears in tandem with a remedial purpose.

The selective reading of *Halper* endorsed by the majority might be easier to accept had the U.S. Supreme Court not resolved the question of which interpretation of *Halper* is correct in *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993). The *Halper* language requiring a "solely . . . remedial purpose" appears—*twice*—in *Austin*, in response to the government's claim that because a statutory in rem civil forfeiture did not solely seek to deter, but also furthered a remedial purpose, it was not punishment. *Austin*, 113 S. Ct. at 2806 and 2812. Significantly, the language from *Halper* that seems to require a solely deterrent purpose in order to trigger double jeopardy protection does not appear in *Austin*. More significantly, in quoting the language requiring a " '*solely* . . . remedial purpose,' " the *Austin* Court deliberately emphasized the word "solely," even further clarifying the Court's intent in *Halper*. *Austin*, 509 U.S. at 621.

Beyond the context of ALR, courts have found no difficulty in reading *Halper* and *Austin* together, such that *Austin* clarifies *Halper*'s prohibition of punitive purposes in civil sanctions. See, *U.S. v. Ursery*, 59 F.3d 568 (6th Cir. 1995) (finding civil forfeiture to qualify as punishment); *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367 (1995) (considering alleged deterrent impact of sex offender registration and community notification statutes); *U.S. v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994) (determining whether civil forfeiture pursuant to money laundering statutes qualifies as punishment), *op. amended* 56 F.3d 41 (9th Cir. 1995); *State v. 1979 Cadillac DeVille*, 632 So. 2d 1221 (La. App. 1994) (finding civil forfeiture pursuant to drug conviction to qualify as punishment).

Within the context of ALR, however, courts have refused to read *Austin* and *Halper* together. This court, among others, rejects *Austin*—and its clarification of *Halper*—on the grounds that *Austin* was decided under the Excessive Fines Clause of the Eighth Amendment, rather than under the Double Jeopardy Clause of the Fifth Amendment. See, e.g., *State v. Hansen, ante* p. 177, 542 N.W.2d 424 (1996); *Tench, supra*; *Hanson, supra*. These courts fail to explain why *Austin* punishment analysis, which was decided under *Halper* punishment analysis, is incongruous with the application of *Halper* to ALR cases. The majority in *Hansen* dismissed *Austin* summarily, stating only that "*Austin*, which was . . . decided upon the Eighth Amendment's 'Excessive Fines' Clause [is] inapplicable to [this] case." *Ante* at 185, 542 N.W.2d at 430. Other courts have altogether ignored *Austin* in considering the reach of *Halper*. See, e.g., *State v. Young*, 3 Neb. App. 539, 530 N.W.2d 269 (1995); *State v. Funke*, 531 N.W.2d 124 (Iowa 1995); *State v. Higa*, 79 Haw. 1, 897 P.2d 928 (1995). Indeed, the State fails altogether to even mention *Halper* and *Austin* in its brief, much less explain why *Austin* is inapposite to our consideration.

I will not assent to this selective reading of U.S. Supreme Court holdings. This court is bound not by a majority of other jurisdictions, but only by the precedent and the guidance of the U.S. Supreme Court. Yet, the majority has cavalierly dismissed the U.S. Supreme Court's holding in *Austin* that "punishment" under the Eighth Amendment and "punishment" under the Fifth Amendment are defined by the same constitutional ideals. In so doing, the majority disregards the facts that both *Halper* and *Austin* seek a definition of "punishment"; both *Halper* and *Austin* consider how much of a deterrent purpose is permissible before an ostensibly remedial sanction becomes "punishment"; and the *Austin* Court found that the correct inquiry under *Halper* "is whether forfeiture serves *in part* to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion," (emphasis in original) 509 U.S. at 619 n.12.

Because both the Fifth and Eighth Amendments limit the government's power to punish its citizens, what the Constitution prohibits as "punishment" under one amendment cannot

logically be permissible under another. *Austin* and *Halper* define "punishment" as the threshold inquiries for the respective amendments each case concerns: we must first know what "punishment" is before we can assess whether a particular sanction is, by virtue of the Fifth or Eighth Amendment, imposed against the mandates of the Bill of Rights. The majority, however, makes the same artificial distinction of *Austin* from *Halper* that other state courts have made in order to circumvent *Halper*'s rule that deterrent-purpose sanctions equal "punishment." The only fair reading of *Austin* counsels that *Austin* and *Halper* together resolve the "punishment" issue with respect to civil sanctions. To conclude otherwise effectively invalidates the Double Jeopardy Clause by allowing multiple punishments for the same conduct merely because the punishments also serve remedial purposes. *U.S. v. Hudson*, 14 F.3d 536 (10th Cir. 1994).

The governing language of *Halper* is the language emphasized in *Austin*, stating that " 'a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment . . . .' " *Austin*, 509 U.S. at 610. Even absent *Austin*, the ultimate result of *Halper* would demand the same conclusion: the Court remanded Halper's case to the trial court with instructions to ascertain how much of the civil penalty exceeded what was necessary to compensate the government, and to eliminate the excess as serving not a remedial purpose, but an improper punitive purpose. The Supreme Court's instruction in *Halper* should guide our determination of whether ALR in Nebraska serves as the first of an impermissible two punishments for one offense.

CHARACTERISTICS OF "PUNISHMENT"

Halper provided a procedural framework for this determination: a reviewing court, burdened with the task of determining whether a civil sanction qualifies as punishment, must perform "a particularized assessment of the penalty imposed and purposes that the penalty may fairly be said to serve." *Halper*, 490 U.S. at 448. The Court ruled that a civil penalty should bear a "rational relation" to the goal of

remedying the government's claimed malady, and should not "[appear] to qualify as 'punishment' in the plain meaning of the word." 490 U.S. at 449. This language is instructive to the question of whether the true purpose of ALR looks more like a remedy or more like punishment.

REMEDIAL PURPOSE

The State argued that Neb. Rev. Stat. § 39-669.15 (Cum. Supp. 1992) (now codified at Neb. Rev. Stat. § 60-6,205 (Reissue 1993)) is partially remedial in purpose and that any punitive element rises at worst to an acceptable "sting of punishment" described by the *Halper* Court. 490 U.S. at 447 n.7 (noting that "for the defendant even remedial sanctions carry the sting of punishment"). In tolerating the punitive purpose of ALR, the majority confuses the distinction made by the *Halper* Court: a punitive purpose violates double jeopardy, whereas a punitive "sting" or inevitable punitive impact does not. In determining whether ALR carries a punitive "sting" or rather operates with a purpose of punishing the motorist, we are properly guided by *Halper*'s question of what purpose a sanction may "fairly be said . . . to serve."

The Supreme Court of New Jersey applied this analysis in *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367 (1995), which I cite as an example of a truly remedial remedy to be contrasted against ALR. In *Poritz*, a convicted sex offender sought to enjoin enforcement of statutes requiring registration of convicted sex offenders and community notification of their presence. The appellant argued that these statutes violated the Double Jeopardy Clause's prohibition against multiple punishments. The Supreme Court of New Jersey rejected this challenge and upheld the statutes, finding that the legislature had addressed rationally a problem within its competence and without any intent of punishing. The statutes responded to a documented history of attacks by convicted sex offenders in New Jersey. The state had warned that any harassment of known sex offenders would not be tolerated, and had further expressed in the clearest words that the sole purpose of these statutes was to protect, not to punish. This stated purpose was borne out by the words and operation of the statutes, which suggested means

by which a community, notified of the presence of a sex offender, could act to protect its children and families from reoffense. Because the statutes focused on the state's responsibility to the community, the sanction of registration and notification could not fairly have been said to serve as further punishment for convicted sex offenders.

In upholding the statutes, the *Poritz* court analyzed the degree of deterrence or retribution that the Fifth Amendment tolerates in a remedial statute. The court never denied that convicted sex offenders would feel stigmatized if their neighbors learned of their status. This stigma, however, was the "sting of punishment" and not the deliberate purpose of the statute. "What counts . . . is the purpose and design of the statutory provision, its remedial goal and purposes, and not the resulting consequential impact, the 'sting of punishment' that may inevitably, *but incidentally*, flow from it." (Emphasis supplied.) *Poritz*, 142 N.J. at 58, 662 A.2d at 396.

The *Poritz* court wrote that the Double Jeopardy Clause was not intended to prevent government from performing its legitimate functions, "especially when [a statute's] regulatory intent is totally free of any suggestion of concealed punitive purpose. As the punitive impact becomes more pronounced, however, the balance may shift and the fact of punishment may overwhelm the purity of the government's action, imputing to it . . . a punitive purpose." 142 N.J. at 61, 662 A.2d at 398. By distinguishing punitive *impact* from punitive *purpose*, the *Poritz* court distinguished the sex offender statutes from other statutes whose purpose cannot be limited to remedy.

The regulatory intent of the New Jersey sex offender statutes was consciously free from a deliberate punitive purpose. The same cannot be said of Nebraska's ALR statutes. The ALR statutes do not reflect the remedial aspects of the New Jersey sex offender statutes: the focus of ALR is the offender and the crime rather than a general, remedial purpose. The deterrent—and thus punitive—effect of ALR far exceeds the "sting" or incidental impact that *Halper* tolerates. The most painfully obvious evidence of a punitive purpose appears in the introductory paragraph of § 39-669.15 (now § 60-6,205):

> Because persons who drive while under the influence of alcohol present a hazard to the health and safety of all persons using the highways, a procedure is needed for the swift and certain revocation of the operator's license of any person who has shown himself or herself to be a health and safety hazard by driving with an excessive concentration of alcohol in his or her body and *to deter others from driving while under the influence of alcohol.*

(Emphasis supplied.)

This language is inescapable. Despite *Halper*'s holding that "deterrence is not a legitimate nonpunitive purpose," 490 U.S. at 447, the Legislature chose to state in the clearest words its intent to deter Nebraskans from driving drunk. This blunt deterrent purpose does not concern the majority, which finds that a secondary deterrent purpose somehow passes muster under *Halper*. The majority admits the existence of a deterrent purpose in this case and in *Hansen, supra*, holding that "[t]he fact that a statute designed primarily to serve remedial purposes secondarily serves the exemplary purpose of general deterrence does not require a conclusion that the statute results in punishment for double jeopardy purposes."

This holding defies both *Halper* and all reasonable explanation. Common sense tells us that general deterrence is achieved by punishing one as an example for others; it cannot be achieved without an instance of specific deterrence. The *Halper* Court never distinguished between general and specific deterrence in stating that any deterrent purpose is impermissible. Even without the clarification of *Austin*, the language of *Halper* allows at most a "sting of punishment," and certainly does not permit an "exemplary purpose of general deterrence." In fact, not one of the courts that upholds ALR on the basis of a more restrictive reading of *Halper* has allowed anything resembling an "exemplary purpose of general deterrence." Those courts simply deny that any deterrent purpose beyond a "sting of punishment" exists in ALR. As the Nebraska Legislature—unlike any other state legislature—removed all question of a deterrent purpose in its wording of § 39-669.15 (now § 60-6,205), the majority has set forth an

unprecedented interpretation of *Halper* that allows a deterrent purpose—the very thing that *Halper* stands to prohibit.

If a particular remedial sanction can only be understood as also serving punitive goals, then the person subjected to that sanction has been punished despite that the sanction is also remedial. *U.S. v. Hudson*, 14 F.3d 536 (10th Cir. 1994). See, also, *Kvitka v. Board of Registration in Medicine*, 407 Mass. 140, 551 N.E.2d 915 (1990) (finding that remedial purpose of sanctioning physician, convicted of drug offense, was overwhelmed by disciplinary board's stated desire to punish physician and to deter other physicians from engaging in similar conduct, thereby triggering double jeopardy protection). The fact that ALR may advance a remedial purpose of clearing our roads of drunk drivers cannot negate the fact that the Legislature also aimed, in deliberate design and purpose, to deter drunk driving by creating another means of punishing drunk drivers.

Not only is the deterrent purpose at least equal in force to the stated remedial purpose, but a careful reading of the ALR statutes reveals provisions that weaken the force of the remedial purpose. Notably, as the arresting officer impounds a motorist's license with one hand, he or she immediately issues the motorist a 30-day temporary license with the other hand. § 39-669.15(4) (now § 60-6,205(4)). Yet the stated remedial purpose of ALR is to get drunk drivers off the roads immediately, thereby ostensibly reducing the chance that a motorist will drive drunk again between arrest and trial. The persuasive value of this purpose depends on an assumption that a drunk driver poses no DUI threat during the life of the 30-day temporary permit, but that the DUI threat is resurrected when the 30-day period expires and would manifest but for the activation of ALR. The majority does not explain what remedy is furthered by giving a DUI offender 30 more days to drive drunk before revoking his license.

The majority states correctly that the temporary permit is necessary to protect a motorist's rights to due process: as a driver's license is a constitutionally protected interest, it cannot be taken without due process. See, *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 20 L. Ed. 2d 90 (1971); *State v. Michalski*,

221 Neb. 380, 377 N.W.2d 510 (1985). Indeed, the stated remedial goal of ALR forces the State into a Hobson's choice: either stay true to the goal of getting drunk drivers off the road, issue no temporary permit, and violate the motorist's right to due process; or issue a temporary permit, cast grave doubts upon the claim that ALR has any remedial qualities, and trigger double jeopardy protection. Either way, this court must sacrifice a constitutional guarantee to uphold a statute whose remedial purpose is weak and whose indicia of punitive purpose are strong. The Legislature's provision for procedural protections does not cancel out the bluntly stated purpose of furthering a deterrent objective in plain violation of *Halper* and the Fifth Amendment.

APPEARING TO QUALIFY AS PUNISHMENT

For the Legislature to excise its deterrent language from the statute would not remove the underlying deterrent purpose of the statute. *Halper* holds that a civil penalty should bear a rational relationship to the goal of compensating what the government has lost, and should not "[appear] to qualify as 'punishment' in the plain meaning of the word." 490 U.S. at 449. Even assuming the legitimacy of the remedial purpose of ALR, this penalty still appears to qualify as punishment in ways that overwhelm the goal of protecting the public from drunk drivers.

Austin v. United States, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), in addition to clarifying the controlling language of *Halper*, provides an exemplary list of characteristics of punishment that shows that ALR indeed appears to qualify as punishment. In *Austin*, the U.S. Supreme Court found civil forfeiture under certain federal statutes to qualify as "punishment" on the basis of these characteristics. The majority's rejection of *Austin*, however, averted any need to address those characteristics in its opinion.

The first *Austin* characteristic is the historical understanding of the sanction in question. The *Austin* Court considered whether, at the time the Eighth Amendment was ratified, civil forfeiture "was understood at least in part as punishment." 509 U.S. at 610-11. Notably, the Court consistently qualified the

requirement of a historical understanding in punishment to be no more than "at least in part." *Id.* at 610 and 619. That some remedial purposes may have been advanced by civil forfeiture did not, for the *Austin* Court, negate the fact that forfeiture also advanced concurrently a punitive purpose.

The U.S. Supreme Court's recognition of historical concurrent remedial and punitive purposes is important to ALR analysis. Unlike forfeiture, ALR as a sanction is not replete with centuries of common-law history. Although this court has found that revocation of a driver's license under the point system is designed to protect the public, *Durfee v. Ress*, 163 Neb. 768, 81 N.W.2d 148 (1957), our case law does not address whether ALR is historically understood, at least in part, as punishment. Revocation under the point system, however, is not in question under ALR.

Notwithstanding ALR, DUI offenders historically have been subject to revocation through multiple mechanisms: the point system and judicial revocation under statutes criminalizing DUI. Neb. Rev. Stat. § 39-669.07(2) (Cum. Supp. 1992) (now codified at Neb. Rev. Stat. § 60-6,196(2) (Reissue 1993)). As ALR complements both mechanisms, the history of judicial revocation is as instructive as that of point system revocation. This court has not distinguished the purpose of judicial revocation from other instruments of punishment meted out for a DUI conviction. See, e.g., *Gembler v. City of Seward*, 136 Neb. 196, 285 N.W. 542 (1939) (finding city had power to punish DUI, where punishment included license revocation). License revocation for DUI has been imposed historically both to further remedial aims and to punish the offender.

The second *Austin* characteristic is the provision of an innocence defense in the statute providing for sanction. Such a defense serves to "focus the provisions on the culpability of the [defendant] in a way that makes them look more like punishment, not less." 509 U.S. at 620. This characteristic is relevant to Nebraska's ALR statutes. A motorist facing ALR has available only those defenses he would raise prior to or at his criminal trial. The motorist circumvents ALR entirely only by proving at an ALR hearing that he did not violate § 39-669.07 (now § 60-6,196), or that his arrest was unlawful for reasons

relating to Fourth Amendment criminal procedure. § 39-669.15(6)(c) (now § 60-6,205(6)(c)). Once imposed, ALR terminates prematurely only if the motorist prevails at his criminal trial or if the State decides not to prosecute. Neb. Rev. Stat. § 39-669.16(4) (Cum. Supp. 1992) (now codified at Neb. Rev. Stat. § 60-6,206(4) (Reissue 1993)).

The *Austin* Court next pointed to the fact that, in the example of the federal forfeiture statutes, Congress had tied forfeiture directly to the commission of certain crimes. Similarly, in § 39-669.15 (now § 60-6,205), the Legislature tied ALR directly to commission of the crime of DUI. ALR is triggered only by proof that DUI has been committed or, if the motorist refuses to submit to a sobriety test, by the arresting officer's reasonable belief that DUI has been committed. § 39-669.15 (now § 60-6,205(2) and (3)). The sanction is imposed only after the driver has been arrested, and its duration lengthens if the motorist's license has been previously revoked for the same crime. § 39-669.16 (now § 60-6,206(1)). That ALR is irrefutably linked to commission of a misdemeanor under the Nebraska Criminal Code, by plan and design of the Legislature, only strengthens the argument that ALR "appears to qualify as 'punishment.' "

ALR "appears to qualify as 'punishment' " from the words and operation of the statutes in more ways than *Austin* enumerates as characteristics of punishment. First, ALR can outlast the sentence resulting from the motorist's criminal trial. Were the trial judge to sentence a DUI first offender to probation or suspend the sentence, the motorist would incur a 60-day judicial revocation; yet, ALR would remain in effect for the full 90-day period notwithstanding the sentence. Were the trial judge to sentence a DUI second offender to probation or suspend the sentence, the motorist would incur a 6-month judicial revocation; yet, ALR would remain in effect for a full year. Given that the stated purpose of ALR is to remove drunk drivers from the road more swiftly than the criminal trial process might, it is difficult to understand how that purpose is furthered by *keeping* a motorist off the road after the criminal sentence ends.

Second, ALR limits the motorist's ability to obtain employment driving privileges pursuant to Neb. Rev. Stat. § 60-4,130 (Cum. Supp. 1992). An employment permit is available to any motorist whose license is revoked for offenses, including drunken driving, enumerated in the point system. ALR renders the employment permit statute inapplicable to only DUI offenders, without showing as much "remedial" concern for drivers whose habits are less publicly reviled, but no less dangerous. Motorists whose licenses have been revoked under the point system for violations, including willful reckless driving, habitually speeding more than 10 miles per hour over the speed limit, and *motor vehicle homicide*, can obtain an employment permit immediately upon revocation of their driver's licenses. Neb. Rev. Stat. § 60-4,129(1) (Cum. Supp. 1992). Currently, under § 60-6,206(2), a first-time DUI offender, however, cannot obtain an employment permit for the first 30 days of revocation; for any subsequent DUI offense, the motorist cannot obtain an employment permit at all (previously 60 days under § 39-669.16(2)).

It is axiomatic that the State should have the same remedial interest in swiftly removing from the roads a motorist who drives recklessly enough times to incur revocation, or who kills another person as a result of grossly negligent or reckless driving, as it does in swiftly removing a first-time DUI offender. It is further axiomatic that dangerous speeding and reckless driving are committed in transit to and from work more commonly than is DUI. Yet, the Legislature returns to the roads all violators of the Nebraska Rules of the Road except drunk drivers.

This discrepancy can be explained only as an attempt to deter Nebraskans from driving drunk with the threat that motorists will lose the ability to drive to work or, if their employment requires a valid driver's license, their livelihoods. The motorist's loss of transportation to, from, and in the course of employment is particularly pernicious beyond Lincoln and Omaha and certainly in Nebraska's more rural counties, where public transportation is largely if not entirely unavailable. Even were it available, public transportation would be of little utility to a farmer or rancher for whom the use of a car or truck is

simply a practical necessity. While this sanction may well be appropriate within the confines of a criminal sentence imposed by a trial judge, its inclusion in an ostensibly remedial sanction absolutely makes ALR "[appear] to qualify as 'punishment.' "

Whether the cumulative impact of these punitive aspects of ALR is disproportionate either to the offense or to the costs to the State created by drunk driving is irrelevant to our determination of whether a sanction appears to qualify as "punishment" under *Halper*. Although in *Halper*, the civil sanction imposed was much greater than the actual costs of Halper's fraud, the Court did not articulate a "proportionality test" by which a sanction is punishment if it is greater than the offense. Rather, a sanction is punishment if it serves a deterrent purpose, which was true of the fine in *Halper* and which is true of the punitive aspects of ALR.

Proportionality analysis determines not whether punishment exists, but whether it is excessive; in fact, proportionality is used to determine whether the Eighth Amendment—the constitutional protection under which *Austin* arose—has been violated. See *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). Given that, it is particularly disingenuous for the majority to adopt a line of Eighth Amendment analysis which is inapposite to Double Jeopardy Clause analysis, while rejecting the clarification of "punishment" in *Austin* (which never reached the proportionality question) merely because *Austin* is an Eighth Amendment case by legal taxonomy. The U.S. Supreme Court in *Halper* did not ask whether a sanction appears to qualify as punishment disproportionate to the offense, but whether it appears to qualify as punishment at all. In the case of ALR, that question should have been answered in the affirmative.

There is nothing unconstitutional per se in a sentence providing for lengthy license revocation, or for fines and imprisonment that, without violating the Excessive Fines Clause of the Eighth Amendment, make drunk driving a prohibitively expensive endeavor, nor in a criminal sentence that denies an employment permit to any DUI offender in Nebraska, irrespective of one's rural predilections or dependency upon a motor vehicle for one's livelihood. When these sanctions are

imposed as a condition of one singular punishment for one offense of DUI, such a punishment would not offend the Double Jeopardy Clause. What *is* unconstitutional per se is the imposition of any of these deterrent provisions under the auspice of "remedial sanctions" that can fairly be said to serve the purpose of punishment. The clearest holdings of *Halper*, ignored by the majority, distinguish retribution and deterrence from nonpunitive objectives and prohibit the former from creeping into the latter.

For even the most heinous crimes and the cruelest offenses, the State must concentrate its powers of punishment into a singular punitive effort. Under this court's interpretation of *Halper*, the State can deter its citizens from crime by inviting each concerned agency of the State in turn to unleash its powers upon an offender, each acting under the pretext of remedy, such that the offender never knows when his debt to society is finally paid in full. My dissent does not stand for the idea that the Legislature should surrender its war against drunk driving, but only that the casualties of this war must not include the Bill of Rights.

For these reasons, as well as the reasons articulated by Justice Gerrard in his dissent in *Hansen v. State, ante* p. 177, 542 N.W.2d 424 (1996), I dissent.

FAHRNBRUCH and GERRARD, JJ., join in this dissent.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. REX TAY JOHNSON, RESPONDENT.

544 N.W.2d 803

Filed March 8, 1996. No. S-94-1164.

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. **Disciplinary Proceedings: States: Proof.** A respondent bears the burden of showing that the discipline to be imposed upon him or her should be less severe than that imposed in the first state.
6. **Disciplinary Proceedings.** An attorney who neglects a matter entrusted to him has failed to act competently and is guilty of unprofessional conduct.
7. ____. It is also necessary to consider mitigating factors in determining the appropriate discipline imposed on an attorney.

Original action. Judgment of disbarment.

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

No appearance for respondent.

CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

On October 11, 1994, the Colorado Supreme Court suspended Rex Tay Johnson (Respondent) from practicing law in that state for 3 years. The Counsel for Discipline for the Nebraska State Bar Association (NSBA) then filed a motion for reciprocal discipline on December 12, 1994, based upon the acts of Respondent that led to that Colorado suspension.

Respondent was admitted to the practice of law in the State of Nebraska on June 22, 1970, and to the Colorado bar on October 12, 1973. The Colorado Supreme Court found that Respondent's conduct with respect to seven clients and the

disciplinary board violated a variety of disciplinary rules. The Colorado Supreme Court also found that Respondent was uncooperative during the investigation of the grievances against him. Respondent stated that he has a stuttering problem, which caused breakdowns in communication and subsequently caused the grievances to be filed. On October 11, 1994, the Colorado Supreme Court suspended Respondent for a period of 3 years.

BACKGROUND

In the Colorado proceedings, the parties stipulated to the following facts and conclusion:

A

In October 1987, Ella M. Ray retained the respondent to file a Chapter 7 bankruptcy proceeding. Ray initially paid the respondent $350 and later an additional $125 for costs. In connection with work performed by the respondent prior to the sale of Ray's home, the respondent prepared a promissory note and deed of trust to himself in the amount of $3,310, plus interest at the rate of 8% per annum for work already completed and for "anticipated" legal expenses. The respondent eventually received $3,359.55 from the proceeds of the sale of Ray's home.

The respondent has stipulated that he charged an excessive fee in the Ray matter, that he failed to account for the application of the funds he received from the deed of trust after being requested to do so, and that he misrepresented to the bankruptcy court the amount of money he collected for attorney's fees in the proceeding. As the respondent admits, his conduct violated DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); DR 1-102(A)(5) (a lawyer shall not engage in conduct prejudicial to the administration of justice); DR 2-106(A) (a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee); and DR 9-102(B)(3) (failure to render appropriate accounts to the client regarding the client's property).

The Ray bankruptcy matter has been closed, and any restitution by the respondent will require that the

proceeding be reopened and that the respondent's refund be paid to Ray's creditors. The respondent has agreed to take action and enter into an agreement with the bankruptcy trustee and make payments on the amount of restitution owed prior to reinstatement.

B

Dwight Fox retained the respondent in August 1991 and delivered to the respondent an original promissory note payable to the client's father. The amount remaining due on the note was $32,353.53, plus collection costs. In June 1992, the lawyer for Connie Fox, the client's former spouse, wrote the respondent a letter explaining Connie Fox's authority to collect on the note, and requesting that the respondent deliver the note to the lawyer. The respondent did not reply to the lawyer's letter, and the lawyer discovered that the respondent's office telephone was disconnected. A second lawyer for Connie Fox wrote to the respondent in July 1992, and asked for delivery of the promissory note. The second lawyer received no reply from the respondent, and became concerned because Dwight Fox's father was in his eighties and a lost instrument bond would be difficult to obtain. The day after the second lawyer filed a request for investigation with the office of Disciplinary Counsel, the respondent called the lawyer about the note, and subsequently delivered the promissory note to the second lawyer on August 20, 1992. As the respondent has admitted, his conduct violated DR 1-102(A)(6) (a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law), and DR 6-101(A)(3) (a lawyer shall not neglect a legal matter entrusted to the lawyer).

C

On February 6, 1992, Ron Lindsey consulted the respondent about filing a bankruptcy petition. Lindsey paid the respondent a total fee of $667, including the filing fee. The respondent told Lindsey that the petition would be filed in April or May, 1992, but Lindsey did not hear further from the respondent. After Lindsey filed a request for investigation with the Office of Disciplinary Counsel,

the respondent told Lindsey that he would file the petition after reviewing it to determine if it was still accurate. The respondent nevertheless failed to return Lindsey's subsequent telephone calls. The respondent has stipulated that his failure to communicate with Lindsey and failure to file the bankruptcy petition in a timely manner violated DR 6-101(A)(3) (neglect of a legal matter).

D

The respondent was retained in October 1987 to represent the estate of Elnora Long. Lois Daniels was the personal representative of the estate. Daniels located a purchaser for Long's former residence in the spring of 1992, and she asked the respondent to obtain new letters of administration so that she could transfer title properly. Although the new letters of administration were apparently issued on April 30, 1992, they were not forwarded to Daniels. When Daniels discovered title problems with other real property that Long had sold prior to her death, she asked the respondent to resolve the title problems. The respondent reviewed the documents but did not finalize the matter. The respondent admits that his failure to send the letters of administration to the personal representative and his failure to communicate with her regarding the legal matters she had referred to him violated DR 6-101(A)(3) (neglect of a legal matter).

E

The respondent was hired as counsel for the estate of Christine Lawson in June 1991. In March 1992, the respondent notified the personal representative of the estate, Frank Wojtaha, that almost all of the paper work in the probate case was finished and would be filed soon. In April 1992, the respondent again told Wojtaha that the documents were ready to be filed. When Wojtaha unsuccessfully tried to call the respondent, he discovered that the respondent's telephone had been disconnected and that the office was deserted. The personal representative obtained another attorney who finalized the estate in a timely manner. The respondent's failure to communicate

with the personal representative and to timely finalize the estate violated DR 6-101(A)(3) (neglect of a legal matter).

F

On August 22, 1991, Walter Sales retained the respondent to represent him in a Chapter 7 bankruptcy proceeding. The respondent and Sales agreed on a $667 flat fee to handle the matter, but the respondent subsequently demanded and received an additional $841.35 to complete the bankruptcy. The matter was submitted to the El Paso County Fee Dispute Arbitration Committee for binding arbitration. The Committee ordered the respondent to refund the $841.35, but the respondent did not comply. As the respondent has admitted, he charged his client a clearly excessive fee, contrary to DR 2-106(A), and also violated DR 9-102(B)(4) by failing to promptly return funds owed to the client.

Further, by failing to respond to the request for investigation filed in the Sales matter, the respondent violated C.R.C.P. 241.6(7) (failure to respond to a request by the grievance committee without good cause shown, or obstruction of the committee or any part thereof in the performance of its duties constitutes ground for lawyer discipline).

G

Jose Archuleta hired the respondent in May 1991 to represent him in a pending dissolution of marriage proceeding. The dissolution presented no custody issue and few property issues. Between May 1991, and February 1992, the respondent charged his client $8,752.30. The client paid the respondent $5,950 and signed a promissory note for another $1,300. The respondent has stipulated that at least $6,252 of the fee he charged Archuleta was clearly excessive.

Archuleta hired another lawyer who sent the respondent a letter seeking a refund of the excessive fee and a cancellation of the promissory note. When the respondent did not reply, the lawyer filed an action in county court against the respondent. The court entered a default

judgment against the respondent for $4,500 and ordered that the promissory note be canceled and that the respondent return the client's file. The respondent did not comply with the judgment and orders of the county court. The assistant disciplinary counsel has stipulated, however, that the respondent has now settled all monetary claims with Archuleta's bankruptcy estate and has returned the client's file and canceled the promissory note. The respondent admits that his conduct violated DR 2-106(A) (charging a clearly excessive fee) and Rule of Professional Conduct (R.P.C.) 1.16(d) (upon termination of representation, a lawyer shall take reasonable steps to protect a client's interests, including surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned); R.P.C. 3.4 (c) (knowingly disobeying an obligation under the rules of a tribunal); and R.P.C. 8.4(d) (knowingly engaging in conduct prejudicial to the administration of justice).

The respondent also stipulated that he failed to cooperate with the disciplinary investigator in this matter, contrary to C.R.C.P. 241.6(7).

The Nebraska Counsel for Discipline filed a motion for reciprocal disciplinary proceedings, and Kile W. Johnson was appointed referee.

On December 15, 1994, Respondent was ordered to show cause why he should not be the subject of appropriate discipline which could include disbarment. On January 13, 1995, he submitted a "Show of Cause" and subsequently submitted an "Amended Show of Cause" on March 30, 1995.

A pretrial conference was held by the referee on May 26, 1995. The referee entered an order directing that the trial of this matter would be held July 6, 1995. On June 19, 1995, the referee sent a notice to the relator and Respondent advising that if accommodation were necessary to participate in the July 6, 1995, trial, notice should be given to the referee so that appropriate arrangements could be made.

Trial was held on July 6, 1995. Evidence was adduced by the relator, and the referee continued the trial indefinitely to allow

the referee time to attempt to contact Respondent through the use of the telecommunications device for the deaf (TDD) number listed on Respondent's letterhead. Immediately following the hearing, the referee, with assistance of his secretary and an employee of the Nebraska Commission for the Hearing Impaired, contacted Respondent's TDD.

After awaiting a response from Respondent to the TDD transmission, the referee submitted his report on July 31, 1995. The referee found that Respondent had been found guilty of misconduct and suspended by the Colorado Supreme Court, and recommended that a concurrent 3-year suspension be imposed by this court.

ASSIGNMENTS OF ERROR

No exceptions were taken to the referee's report by either the relator or Respondent.

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. 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. *State ex rel. NSBA v. Ogborn*, 248 Neb. 767, 539 N.W.2d 628 (1995); *State ex rel. NSBA v. Dineen*, 235 Neb. 363, 455 N.W.2d 178 (1990).

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).

ANALYSIS

Respondent stipulated to the violations in Colorado and the conclusions of that court. He has not argued that his due process rights were violated or that the evidence was insufficient. We find that the complaint has been established by clear and convincing evidence.

Next, we must determine the appropriate discipline. 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. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995); *State ex rel. NSBA v. Veith, supra*.

A respondent bears the burden of showing that the discipline to be imposed upon him or her should be less severe than that imposed in the first state. *State ex rel. NSBA v. Dineen, supra*.

The majority of the violations to which Respondent stipulated involved negligence. This court has consistently held that an attorney who neglects a matter entrusted to him has failed to act competently and is guilty of unprofessional conduct. *State ex rel. NSBA v. Carper*, 246 Neb. 407, 518 N.W.2d 656 (1994); *State ex rel. NSBA v. Barnett*, 243 Neb. 667, 501 N.W.2d 716 (1993); *State ex rel. NSBA v. Copple*, 232 Neb. 736, 441 N.W.2d 894 (1989); *State ex rel. NSBA v. Doerr*, 216 Neb. 504, 344 N.W.2d 464 (1984); *State ex rel. NSBA v. Divis*, 212 Neb. 699, 325 N.W.2d 652 (1982).

In this state, Respondent did not satisfy his burden of showing that the discipline imposed in Nebraska should be less severe than that imposed in Colorado. In fact, aside from the filed "Show of Cause" and "Amended Show of Cause," he has all but ignored the other disciplinary proceedings against him in this state.

This is especially troublesome, because Respondent was originally charged in Colorado with neglecting duties and failing to cooperate with the disciplinary investigation. Thus, the proceedings in this state compound what transpired in Colorado. We find, therefore, that a 3-year suspension is not sufficient considering the inaction of Respondent in this state. The attitude of a respondent generally and the respondent's present or future fitness to continue in the practice of law are factors in the analysis of any discipline case. *Gleason, supra.* Respondent in this case has ignored his own disciplinary proceedings. This court should not allow such present neglectful and uncooperative practices to possibly harm the public in this state in the future.

It is also necessary that we consider mitigating factors in determining the appropriate discipline imposed on an attorney. *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987). Respondent claims that stuttering made it nearly impossible for him to communicate with his clients, which ultimately resulted in the charges against him. The flaw in Respondent's argument resides in his own "Amended Show of Cause," through which he demonstrates that he can competently express himself through the written word. He failed to respond to further disciplinary proceedings in this state when he had the opportunity to do so in writing. We therefore find that the evidence of Respondent's stuttering is not a sufficient mitigating factor to modify the degree of punishment we determine here.

CONCLUSION

After an independent assessment of the facts and an independent determination of Respondent's fitness to practice law, we find the referee's recommendation of a 3-year suspension inadequate. Respondent is disbarred from the practice of law in Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

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

BRENDA J. SULLIVAN, APPELLANT, V. STEVEN J. SULLIVAN, APPELLEE.

544 N.W.2d 354

Filed March 8, 1996. No. S-95-268.

1. **Divorce: Child Custody: Appeal and Error.** Determinations as to custody in dissolution proceedings are reviewed on appeal de novo on the record, but such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion.
2. **Evidence: Appeal and Error.** 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 court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Modification of Decree: Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
4. **Modification of Decree: Child Custody: Proof.** The burden is upon the party seeking a modification of decree affecting child custody to show that there has been a material change of circumstances.
5. **Modification of Decree: Words and Phrases.** In the context of marital dissolutions, a material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
6. **Child Custody.** Children are not chattels, and their custody should not be the subject of a continuous contest between divorced parents at the expense of their well-being.

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

Mary Rauth Winner and Elizabeth Stuht Borchers, P.C., of Marks Clare & Richards, for appellant.

Christopher A. Vacanti and Timothy D. Mikulicz, of Cohen, Vacanti & Higgins, for appellee.

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

LANPHIER, J.

In May 1994, the marriage of Steven J. Sullivan and Brenda J. Sullivan was dissolved. Custody of the Sullivans' two teenage children was split between the parties, and visitation was ordered in accordance with a settlement agreement drawn by the

parties. Custody of 17-year-old Andrew was placed with Steven Sullivan and custody of 13-year-old Amber was placed with Brenda Sullivan. In the months following the divorce decree, problems developed in the visitation schedule between Steven Sullivan and Amber. During a 6-week period in July, only one of three scheduled visitations actually took place. In September 1994, Steven Sullivan filed an application for a change, requesting custody of Amber. The district court for Sarpy County ordered the change of custody after a hearing in February 1995. The court held that Brenda Sullivan had failed to encourage Amber to participate in visitation with her father and had exhibited a surly and vindictive demeanor during the hearing. Therefore, the court ordered that Amber be placed in the custody of her father and that Brenda Sullivan pay child support. Brenda Sullivan timely appealed to the Nebraska Court of Appeals, and we removed the matter to our docket. We hold that the district court abused its discretion in holding that a material change in circumstances had occurred since the entry of the decree and that it would be in the best interests of the child to order a change in custody. Accordingly, the district court orders are reversed.

BACKGROUND

Appellee Steven Sullivan and appellant Brenda Sullivan were married June 15, 1973, in Greenfield, Iowa. The Sullivans have two children: Andrew was born December 29, 1977, and Amber was born March 14, 1981.

On May 16, 1994, the district court for Sarpy County entered a decree of dissolution of the marriage of the parties. At the time of the divorce, the parties resided in Gretna.

The court found both parents to be fit and proper persons to be awarded the care, custody, and control of the minor children. Brenda Sullivan was awarded the custody of Amber, and Steven Sullivan was awarded the custody of Andrew.

The court adopted the parties' settlement agreement regarding visitation. The decree ordered that Steven Sullivan was entitled to visitation with Amber every other weekend and alternating holidays. Brenda Sullivan's visitation schedule with Andrew was fixed at a minimum of one Sunday afternoon per

month, in consideration of Andrew's age, work schedule, and other activities.

Based upon the parties' gross income and pursuant to the Nebraska Child Support Guidelines, Steven Sullivan was ordered to pay child support in the amount of $57 per month. Brenda Sullivan was ordered to maintain health and accident insurance coverage for the children so long as the same was offered as a benefit of her employment.

The decree permitted Steven Sullivan to relocate Andrew to Greenfield or Des Moines, Iowa. After the decree was entered, Steven Sullivan and Andrew moved to Greenfield, where they lived with Steven Sullivan's girl friend, Cleta, and her 8-year-old son. Steven Sullivan married Cleta on January 1, 1995.

After Steven Sullivan and Andrew moved out of the family residence in Gretna, Brenda Sullivan invited a friend and her 10-year-old daughter to move in. The friend, identified in the record as Trisha, helped pay the rent.

Brenda Sullivan held full-time employment as a secretary. From approximately June to October 1994, she worked as a telemarketer on weeknights and on occasional weekend days. After school, Amber stayed with friends or remained at home alone or with Trisha.

In July 1994, 2 months after the decree, problems developed with Amber's visitation schedule. Amber was scheduled to visit her father three of the five weekends in July, including the Fourth of July. However, Amber had spent the week prior to July 4 with her maternal grandmother, and Amber accepted her grandmother's invitation to remain with her on July 4. Steven Sullivan testified that he refused to tell Amber that she must leave her grandmother and come with him.

Amber missed another scheduled visitation in July because she wanted to go to a birthday party for her mother's boyfriend, Mike Fontana. Amber testified that her mother never refused to let her visit her father and that if she "wanted to go see him I could, but I could stay if I didn't want to go or something."

On September 27, 1994, Steven Sullivan filed an application for modification of the decree. He alleged that since the time of the decree in May, there had been a material change in

circumstances which warranted modification of the custody arrangement. The alleged changes in circumstances were:

> a. [Brenda Sullivan] has repeatedly failed to comply with the visitation schedule set forth in said Decree, going so far as to allow [Steven Sullivan] only one weekend visitation with Amber J. Sullivan during a six week period.
>
> b. [Brenda Sullivan] is employed full time during the normal work week, and has taken on a "second" job which requires her to be away from home in the evenings and on weekends. [Brenda Sullivan's] work schedule leaves no time for her to spend in the care and upbringing of Amber J. Sullivan.
>
> c. When [Brenda Sullivan] is not working, she is spending time (and the night) with her boyfriend rather than with Amber J. Sullivan.
>
> d. [Brenda Sullivan] has a house guest that resides in the family residence. This house guest is left with the primary responsibility of raising Amber J. Sullivan because of [Brenda Sullivan's] work schedule and boyfriend. The house guest is a person with questionable values and character.
>
> e. Amber J. Sullivan demonstrates a deteriorating attitude. She has become "smart mouthed" and uninvolved in activities and friendships that were important to her in the past.
>
> f. [Brenda Sullivan] has shown a lack of concern in Amber J. Sullivan's health and welfare by failing to schedule doctor and dentist appointments that were necessary.
>
> g. [Steven Sullivan] has suffered a significant change in income, and is currently earning substantially less [than] at the time the above-referenced Decree was entered.

Steven Sullivan requested that he be awarded the custody of Amber and that the parties' child support obligations be determined anew.

The record indicates that Steven Sullivan's application for modification of custody was not the only legal action between the parties during the 4-month period following their divorce.

The district court's journal entries indicate that a motion for order to show cause was received and signed on June 7, 1994. On June 17, reciprocal contempt proceedings involving the payment of money and distribution of assets pursuant to the property agreement were instituted.

After one continuance, a hearing on the application for modification was conducted on February 7, 1995. Since Steven Sullivan's application had been filed, several changes occurred in Brenda Sullivan's household and life. Trisha and her daughter had moved out and Fontana and his two teenage sons had moved in. Brenda Sullivan had ceased working as a telemarketer.

Steven Sullivan, Brenda Sullivan, Andrew, and Amber testified at the February 7 hearing. At the hearing, Amber was questioned regarding her preferences. She stated that she preferred to live with her mother, but that she would not be sad if she lived with her father. During cross-examination, Steven Sullivan admitted that Amber had never expressed a desire to live with him in the past.

At the hearing, evidence was adduced regarding events subsequent to the filing of the application for a change in custody. The record indicates that a problem with visitation arose over the Thanksgiving weekend. Amber had spent some time with her father and brother, but she requested and received her father's permission to attend a family dinner at her maternal grandmother's home on Saturday. Later that day, Amber called from her grandmother's home and asked if she could remain there overnight. Steven Sullivan asked to speak to the grandmother and asked her to refrain from interfering with the visitation schedule in the future. Steven Sullivan then permitted Amber to spend the night with her grandmother.

Steven Sullivan testified that he had repeatedly asked Brenda Sullivan to take Amber to the dentist and the eye doctor, but that she had refused to discuss the matter with him. Steven Sullivan testified that Brenda Sullivan threatened to have Amber's teeth pulled out so that he would not ask her any more questions about the dentist. Brenda Sullivan admitted that she resisted discussing Amber's medical checkups with Steven Sullivan, because he used every opportunity to verbally abuse her.

At the conclusion of the modification hearing, the district court announced its findings from the bench. The court stated it would give due weight to Amber's stated desire to remain with her mother. The presence of Fontana and his sons in Brenda Sullivan's home was not found to be a concern.

However, the court found that the visitation between Amber and her father was not working. The court scolded Brenda Sullivan, noting that it expected more from a custodial parent with respect to recognizing the other parent's right of visitation than what she had provided. The court stated that Brenda Sullivan should not have allowed Amber to decide when she wanted to visit her father, but should have enforced the visitation schedule.

Speaking to Brenda Sullivan, the district court stated that appellate courts

> indicate that the demeanor of the witness is something that is peculiarly entrusted to the trial court, that is we are the ones, the trial judge is the one that gets to see the witnesses and they are sworn and testify and how rational and believable their explanation of their evidence is, and I have got to say that in those areas, in the demeanor and credibility of the witnesses, that Mr. Sullivan is head and shoulders above where you are. The demeanor that I get from you is a demeanor of, maybe I am not using the right word, vindictiveness or surliness, and I guess I recognize that people that get divorced are unhappy or they wouldn't get divorced, but to me what comes across is that the bitterness is just permeating your life, and I think that's — if something is not done it's going to eventually get on down to Amber. On the flip side of that I am sure you could have done more, but the demeanor of Mr. Sullivan, as he has testified, leads me to believe, at least he has made an honest effort, certainly more than a fifty percent effort, to resolve this bitterness that's evidently existing . . . .

The court concluded that Brenda Sullivan was not an unfit parent, but that Amber's best interests required a transfer of custody to her father. The transfer of custody was ordered to take place after the end of the school year, on June 1, 1995. The

court then recalculated child support and ordered Brenda Sullivan to pay $365 per month child support. Although the court stated it was concerned about reasonable visitation, it did not think it needed to specify a schedule. However, the court did order that visitation include, at the minimum, alternating holidays, birthdays, and Mother's Day and that the children should be encouraged to spend 3 to 4 weeks during the summer with their mother. Finally, the court ordered that both parties pay their own attorney fees. On June 9, 1995, Brenda Sullivan's motion for an order staying the change of custody was denied.

ASSIGNMENTS OF ERROR

Brenda Sullivan assigns as error the district court order awarding custody of Amber to her father in the absence of a material change of circumstances since the entry of the divorce decree and against Amber's wishes; the court's calculation of the amount of child support payable in that no deduction for health insurance covering the children was made; and the court's failure to award Brenda Sullivan a tax dependency exemption.

STANDARD OF REVIEW

Determinations as to custody in dissolution proceedings are reviewed on appeal de novo on the record, but such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994); *Hansen v. Hansen*, 240 Neb. 31, 480 N.W.2d 204 (1992). 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 court heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994). The burden is upon the party seeking the modification to show that there has

been a material change of circumstances. *Peterson v. Peterson*, 239 Neb. 113, 474 N.W.2d 862 (1991); *Schulze v.Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991). In the context of marital dissolutions, a material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Peterson v. Peterson, supra*; *McDougall v. McDougall*, 236 Neb. 873, 464 N.W.2d 189 (1991).

The court expressly held that Brenda Sullivan was a fit parent. Therefore, it must be determined if it is in the best interests of the child that there be a change of custody. *Hibbard v. Hibbard*, 230 Neb. 364, 431 N.W.2d 637 (1988).

After our de novo review of the record, we accept the trial court's conclusions that Amber's visitation schedule with her father was not working as well as it could have. We agree with the court's opinion that a custodial parent should recognize the other parent's right of visitation. Finally, as the trial court stressed, an appellate court does consider and give weight to the fact that the lower court had the opportunity to observe the witnesses. Therefore, we accept the trial court's assessment of Brenda Sullivan's demeanor. However, these findings and opinions do not constitute a material change in circumstance indicating that it was in Amber's best interests that a change of custody be ordered. We find that the trial court abused its discretion in ordering the modification of custody in this case.

In *Hibbard v. Hibbard, supra*, we recognized that visitation is a key ingredient in raising children after a divorce and that it is in a child's best interests to be with his or her respective parents to the utmost. Where the custodial parent had failed to comply with visitation orders for nearly 3 years and was uncommunicative and uncooperative, we found the denial of visitation to be a material change in circumstance.

All of the events in this case, as recounted above, occurred within 9 months after the entry of the divorce decree. The record indicates that the parties had ongoing differences regarding the division of their property and the care of their children.

The trial court correctly concluded that Brenda Sullivan did less than she should have to facilitate visitation between the father and daughter. However, the visitation problems complained of appear to be caused by the need to balance the needs of a young teenager, the interests of extended family, and a lack of communication between warring parents. Further, the visitation problems are not so severe as to justify a change of custody. Steven Sullivan complains that he missed two weekends in July with his daughter and that his Thanksgiving weekend was interfered with by the maternal grandmother. In the latter instance, Steven Sullivan conceded to the arrangement, but would have Brenda Sullivan intercede to urge Amber to visit him. The visitation problems recited could have been resolved in a number of less disruptive ways than by changing custody.

Amber testified that she wished to remain with her mother. Although Amber's wishes are not controlling, they should not have been disregarded. Children are entitled to a stable home. Children are not chattels, and their custody should not be the subject of a continuous contest between divorced parents at the expense of their well-being. *Hibbard v. Hibbard, supra*; *Miller v. Miller*, 196 Neb. 146, 241 N.W.2d 666 (1976); *Goodman v. Goodman*, 180 Neb. 83, 141 N.W.2d 445 (1966).

Brenda Sullivan also assigns as error the trial court's requirement that she pay $365 per month child support. Because we reverse the district court order regarding custody, we also reverse the court order regarding child support. We order that the original visitation and child support orders stated in the divorce decree be reinstated.

Brenda Sullivan's motion for attorney fees is denied.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. CHARNETTE V. WILLIAMS, APPELLANT.

544 N.W.2d 350

Filed March 8, 1996. No. S-95-287.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. **Search and Seizure: Police Officers and Sheriffs: Probable Cause: Weapons.** When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.
3. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs: Probable Cause: Weapons.** If, under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), a police officer is justified in conducting a protective weapons search based upon the officer's reasonable belief that a suspect may be armed and dangerous, such a weapons search would necessarily include the right to search a clenched fist.
4. **Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on the suppression of evidence, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but will uphold the trial court's findings of fact unless those findings are clearly erroneous.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

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

WRIGHT, J.

Charnette V. Williams was charged with two counts of possession of a controlled substance. Prior to trial, Williams filed a motion to suppress the evidence seized during a search of her person. The trial court overruled the motion to suppress, and thereafter, a stipulated bench trial was held. Williams was found guilty on both counts and sentenced to concurrent terms

of not less than 1 nor more than 2 years' imprisonment. Williams timely perfected this appeal.

SCOPE OF REVIEW

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

FACTS

At 4:45 p.m. on March 28, 1994, a boy walked into a satellite office of the Omaha Police Division and anxiously told Officer Michael McGee and other officers that "they're beating my mother up and they have knives." The boy asked the police to go with him and repeatedly told them to hurry because "they" were hurting his mother. The officers followed the boy approximately one-half block to 2404 North 30th Street. At that time, the police did not know who had the knives and did not have a description of the knives.

When the police arrived on the scene, people were standing on the front porch of the residence. The police entered an apartment and found several adults, teenagers, and children inside. Some of these people, including Williams, were involved in an argument. The police had not located any weapons up to this point.

At the suppression hearing, McGee testified that Williams told him that she and an adult male were arguing about an incident which had occurred the night before. During that incident, the man had allegedly thrown a beer bottle, which struck Williams' baby. McGee testified that Williams caught his attention because "[s]he was making a gesture with her right hand, placing it under her T-shirt, around her waistband, in a manner that is very common to hold on to a weapon or something . . . ." Williams was dressed in a pair of loose-fitting pants and a large, baggy T-shirt that was pulled out so it covered her waistband. McGee said that this behavior caused him concern and that he feared for his safety.

Williams was instructed to place her hands against a kitchen cabinet so a female officer could conduct a pat-down search for weapons. The pat down disclosed no weapons, but during the

course of the pat down, the officers observed that the fingers of Williams' right hand were fully extended, but her left hand was clenched in a fist. McGee testified that the boy's statement about knives, coupled with Williams' clenched fist, caused him to fear for his safety because he believed that Williams might be concealing a razor blade or other dangerous instrument in her hand. Williams was asked to open her hand several times, but she refused. The officers forced open Williams' hand and found two pills, which were determined to be Ritalin and Talwin, both controlled substances.

Officer Daniel Clark, who was also present for the search, testified at the hearing. Clark stated that he was concerned that Williams might have a weapon concealed in her hand and was concerned for his safety and the well-being of the other officers. Clark testified that he suspected Williams had a small knife or razor blade in her hand, but he also testified that the thought crossed his mind that Williams might be holding drugs. Clark stated that this idea was not discussed among the officers.

At the suppression hearing, the trial court found that the opening of Williams' fist was a permissible weapons search, and the court overruled her motion to suppress. Following a bench trial based upon stipulated facts and police reports, Williams was found guilty of two counts of possession of a controlled substance. She was sentenced to concurrent terms of 1 to 2 years' imprisonment on each count.

ASSIGNMENT OF ERROR

Williams asserts that the trial court erred in overruling her motion to suppress, claiming that the search of her person was beyond the scope and parameter of a lawful weapons search conducted for officer safety.

ANALYSIS

We consider whether the forcible opening of Williams' clenched fist was within the scope of permitted searches under the so-called "stop and frisk" rule articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In *Terry*, the Court noted that the U.S. Constitution forbids only unreasonable searches. Under the Fourth Amendment, the central issue is the reasonableness of the search. Thus, the *Terry*

Court balanced the governmental interest in the safety of law enforcement officers against the intrusion on individual rights that occurs during a search for weapons in a situation where probable cause to make an arrest is lacking.

> [T]here is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. . . .
>
> . . . [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Terry, 392 U.S. at 23–24. Balancing the officer's interest in self-protection against the individual's right to be free from an unreasonable search, the Court set forth a principle with regard to the scope of a weapons search which incorporated the concept of reasonableness.

> Thus [a search for weapons] must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion.
>
> . . . .
>
> Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual . . . .

> . . . .
>
> . . . The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

Terry, 392 U.S. at 26-29.

This court has adopted the *Terry* rule. See, *State v. Kimminau*, 240 Neb. 176, 481 N.W.2d 183 (1992); *State v. Caples*, 236 Neb. 563, 462 N.W.2d 428 (1990). In *Kimminau*, we clarified that the search must be " 'carefully limited' " to a search for weapons and that a search for both weapons and controlled substances is beyond the scope of a permissible *Terry* search. 240 Neb. at 181, 481 N.W.2d at 187. See, also, *State v. Evans*, 223 Neb. 383, 389 N.W.2d 777 (1986).

Our determination of whether the search of Williams' hand fits within the balance that the *Terry* rule established must be made upon the facts of this case. Williams was observed making a furtive gesture with her hand near the waistband of her pants. McGee testified that the gesture made him concerned about the officers' personal safety. While being patted down by a female officer, Williams clenched her left fist. McGee testified that this underscored his concern that Williams might be concealing a weapon in her hand. Clark testified that the officers present during the pat down noticed Williams' clenched fist and expressed their concern that she was concealing something in her hand. McGee had been informed that people in the apartment were brandishing knives. At the time of the pat down, the police had not identified which of the people in the apartment, if any, actually had a knife.

If, under *Terry*, a police officer is justified in conducting a protective weapons search based upon the officer's reasonable belief that a suspect may be armed and dangerous, such a weapons search would necessarily include the right to search a clenched fist. Common sense would not dictate otherwise. Weapons are normally held in one's hands. Hence, a search for weapons in a suspect's hands is reasonable under such circumstances. Otherwise, a suspect could avoid the detection of

a weapon by simply hiding it in his hand, where it remains ready for use.

In reviewing a trial court's ruling on the suppression of evidence, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but will uphold the trial court's findings of fact unless those findings are clearly erroneous. See, *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Thompson*, 244 Neb. 189, 505 N.W.2d 673 (1993). In this case, the police officers were investigating a situation where they had been told that an assault was taking place and knives were present. Prior to the search of Williams, no weapons had been located. The officers were concerned that Williams might be concealing a weapon in her fist. Therefore, the discovery of the contraband was the product of a permissible protective weapons search.

Williams argues that *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993), and *Weedon v. State*, 82 Md. App. 692, 573 A.2d 92 (1990), suggest that the search of her hand was not permitted under *Terry*. In *Dickerson*, an officer stopped an individual he suspected was trafficking drugs. During a pat-down search, the officer felt a lump in the individual's pocket. Suspecting the presence of a controlled substance, the officer manipulated the object with his fingers. The Court stated:

> Although the officer was lawfully in a position to feel the lump in the respondent's pocket, because *Terry* entitled him to place his hands upon respondent's jacket, the court below determined that the incriminating character of the object was not immediately apparent to him. Rather, the officer determined that the item was contraband only after conducting a further search, one not authorized by *Terry* or by any other exception to the warrant requirement. Because this further search of respondent's pocket was constitutionally invalid, the seizure of the cocaine that followed is likewise unconstitutional.

Dickerson, 508 U.S. at 379.

In *Weedon*, the defendant was stopped and frisked by a police officer. During the frisk, the officer felt in Weedon's groin area a boxlike object about 3 inches long and 2 inches wide. The

officer extracted the object by reaching into Weedon's pants. The object was a clear plastic box containing crack cocaine. The court held that the search was invalid, since the officer had no reason to believe that the small box-shaped object he felt was a weapon that posed a threat to him.

We find that *Dickerson* and *Weedon* are readily distinguishable from the facts in the case at bar. In *Dickerson* and *Weedon*, the controlled substances were concealed within the clothing of the defendants. In each case, it was not reasonable for the officer to believe that the object was a weapon. Nevertheless, the officer went forward with a search beyond the scope of a *Terry* frisk for officer safety. In the case at bar, the officers were not able to make any determination as to what Williams was concealing in her hand. It was not possible for the officers to discern whether the object was a weapon or a controlled substance. The search of Williams' hand was done to ensure that Williams did not have a weapon. Once Williams' hand was opened, the incriminating character of the controlled substances was apparent without a further search.

We find *People v. Shackelford*, 37 Colo. App. 317, 546 P.2d 964 (1976), to be persuasive authority with regard to the facts of this case. In *Shackelford*, the defendant was stopped because he matched the description of a robbery suspect. During a pat down, the defendant turned his left hand away to hide what he was holding. The officers, fearing that the defendant might be palming a weapon, scuffled with the defendant until several items fell out of his hand. One of the items was the victim's credit card. The court held that since the search was prompted by the defendant's suspicious and unusual movements, and was directed at the discovery of possible weapons, the items uncovered by the search were the product of a permissible protective frisk and were properly admitted.

CONCLUSION

From our review of the record, we cannot say that the trial court's overruling of Williams' motion to suppress was clearly erroneous. The judgments of conviction and sentences are affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. DON STENBERG, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, RELATOR, V. SCOTT MOORE, SECRETARY OF STATE OF THE STATE OF NEBRASKA, RESPONDENT.

544 N.W.2d 344

Filed March 8, 1996. No. S-95-710.

1. **Legislature: Contracts.** One legislature cannot bind a succeeding legislature or restrict or limit the power of its successors to enact legislation, except as to valid contracts entered into by it and as to rights which have actually vested under its acts, and no action by one branch of the Legislature can bind a subsequent session of the same branch.
2. **Constitutional Law: Legislature.** In Nebraska, the proposition that one legislature cannot bind a succeeding legislature is derived from the constitutional power of the Legislature to legislate.
3. ____: ____. The Legislature has plenary legislative authority except as limited by the state and federal Constitutions.
4. ____: ____. The Nebraska Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution.
5. ____: ____. Absent a constitutional restriction on the legislative power, one legislature cannot restrict or limit the right of a succeeding legislature to exercise the power of legislation.
6. **Constitutional Law: Legislature: Public Purpose.** Unless restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose.
7. **Legislature: Statutes: Intent.** An unconstitutional portion of a statute may be severed if (1) absent the unconstitutional portion, a workable statutory scheme remains; (2) the valid portions of the statute can be enforced independently; (3) the invalid portion was not an inducement to the passage of the statute; and (4) severing the invalid portion will not do violence to the intent of the Legislature.

Original action. Judgment for relator.

Don Stenberg, Attorney General, L. Steven Grasz, and Dale A. Comer for relator.

Patrick T. O'Brien, of Bauer & Galter Law Firm, for respondent.

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

WRIGHT, J.

This is an original action in which the relator, the Attorney General of the State of Nebraska, requests a declaratory

judgment regarding the constitutionality of 1993 Neb. Laws, L.B. 507, which has been codified at Neb. Rev. Stat. §§ 50-129 and 50-130 (Reissue 1993). L.B. 507 requires future legislation projected to increase total inmate population in state correctional facilities to include certain cost-estimate provisions in the legislation and requires that a separate appropriations bill be enacted in the same legislative session. The relator maintains that L.B. 507 is unconstitutional and that the Legislature has repealed L.B. 507 by implication.

FACTS

On June 20, 1995, the relator filed an application for leave to commence an original action, a statement of jurisdiction, and a petition for original action for declaratory judgment in this court seeking a declaratory judgment finding that L.B. 507 violates article III, §§ 1, 13, 14, and 22; article IV, § 15; and article II, § 1, of the Nebraska Constitution. We granted the relator's application to commence an original action.

The relator and the respondent, the Secretary of State of the State of Nebraska, have stipulated to the following facts:

On May 24, 1993, the 93d Legislature of the State of Nebraska passed L.B. 507, which became effective on May 27. Subsequently, the Legislature passed 1995 Neb. Laws, L.B. 371, which became operative on September 9, 1995. L.B. 371 may affect the total inmate population of the state correctional facilities. L.B. 371 does not include cost estimates in the legislation, as required by § 50-129, and no separate appropriations bill accompanied it.

The Legislature's fiscal analyst prepared an estimate regarding the fiscal impact of L.B. 371, which stated:

> 1. Second Degree Murder: The bill increases the minimum penalty from 10 to 20 years. . . . [T]he impact would be felt beginning in the 11th and subsequent years, when the average daily population would increase . . . .
>
> 2. Habitual Criminals: . . . The impact of this penalty enhancement will not be realized until approximately the year 2000. . . .
>
> 3. Deadly Weapon Offenses: . . . The increase in the number of inmates is estimated at 0 in FY [fiscal year]

95-96, 51 in FY 96-97 and 154 in FY 97-98 and FY 98-99.

4. Good Time Changes: . . . Previous Department of Corrections estimates showed a maximum impact of 515 inmates at the end of 5 years, or a minimum impact of '0', if all inmates participate in programs. . . .

ANALYSIS

The issues as framed by the relator are (1) whether L.B. 507 violates Neb. Const. art. III, §§ 1, 13, and 14, by impermissibly binding future legislatures and imposing additional requirements on future legislatures for valid enactment of legislation beyond the requirements established in the Constitution; (2) whether L.B. 507 violates Neb. Const. art. III, § 22, by impermissibly imposing requirements on future legislatures for valid enactment of appropriations for the expenses of the government beyond the requirements established in the Constitution; (3) whether L.B. 507 violates Neb. Const. art. IV, § 15, by instituting a legislative veto in contravention of the exclusive veto authority constitutionally vested in the Governor; (4) whether L.B. 507 violates Neb. Const. art. II, § 1, by purporting to declare validly enacted legislation null and void without judicial review; and (5) whether L.B. 507 was repealed by implication by the 94th Legislature with the passage of L.B. 371, which on its face is allegedly conflicting and repugnant to the requirements of L.B. 507.

Section 50-129 provides:

> (1) When any legislation is enacted after June 30, 1993, which is projected in accordance with this section to increase the total adult inmate population or total juvenile population in state correctional facilities, the Legislature shall include in the legislation an estimate of the operating costs resulting from such increased population for the first four fiscal years during which the legislation will be in effect. The estimate shall utilize the amounts estimated in the fiscal note prepared by the Legislative Fiscal Analyst for such legislation and the amounts estimated by the Department of Correctional Services pursuant to this section.

(2) The Department of Correctional Services shall submit its estimate of any such increased operating costs to the Legislative Fiscal Analyst and the budget division of the Department of Administrative Services along with the information it submits to such entities for purposes of preparing a fiscal note for the legislation. The estimate shall include a projection, based on the prior three-year average of data for similar crimes, of the number of additional adult and juvenile inmates or years of additional incarceration expected from the legislation.

(3) The Legislature shall provide by specific itemized appropriation, for the fiscal year or years for which it can make valid appropriations, an amount sufficient to meet the cost indicated in the estimate contained in the legislation for such fiscal year or years. The appropriation shall be enacted in the same legislative session in which the legislation is enacted and shall be contained in a bill which does not contain appropriations for other programs.

(4) Any legislation enacted after June 30, 1993, which does not include the estimates required by this section and is not accompanied by the required appropriation shall be null and void.

(5) For purposes of this section, operating costs shall include only adult inmate and juvenile per diem and medical expenses.

Section 50-130 provides:

Funds appropriated for increased correctional operating costs pursuant to section 50-129 shall be reserved and used as contingency funds by the Department of Correctional Services. The Legislature shall appropriate all contingency funds to a separate and distinct budget program. The budget division of the Department of Administrative Services may transfer appropriations from the contingency program to the budget program of any correctional facility upon written certification by the Director of Correctional Services that all adult inmate and juvenile per diem and medical expense funds appropriated by the Legislature have been exhausted. Contingency funds

> shall only be expended on adult inmate and juvenile per diem and medical expenses.

The relator argues that L.B. 507 is unconstitutional because it purports to make null and void future legislation that does not include the required estimates and appropriations. The relator asserts that L.B. 507 violates Neb. Const. art. III, §§ 1, 13, and 14, by impermissibly binding future legislatures and imposing additional requirements on future legislatures for valid enactment of legislation beyond the requirements established in the Constitution. The relator points out that L.B. 507 requires future legislation to include estimates regarding operating costs and to be accompanied by a specific itemized appropriations bill. In the absence of such items, the legislation would be null and void. See § 50-129(4).

Article III, § 1, vests the legislative authority of the State in a legislature consisting of one chamber. The people reserve for themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the Legislature. Article III, § 13, provides: "[N]o law shall be enacted except by bill. No bill shall be passed by the Legislature unless by the assent of a majority of all members elected . . . ." Article III, § 14, provides: "No bill shall contain more than one subject . . . . And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

We have not previously addressed the general rule concerning attempts by one legislature to bind or restrict succeeding legislatures. The general rule is set out in 82 C.J.S. *Statutes* § 9 at 24-25 (1953):

> One legislature cannot bind a succeeding legislature or restrict or limit the power of its successors to enact legislation, except as to valid contracts entered into by it, and as to rights which have actually vested under its acts, and no action by one branch of the legislature can bind a subsequent session of the same branch. . . .

This rule finds support in cases from other jurisdictions. In *Frost v. State*, 172 N.W.2d 575, 583 (Iowa 1969), Iowa Code Ann. § 313A.20 provided:

> "While any bonds issued by the commission remain outstanding, the powers, duties or existence of the commission or of any other official or agency of the state shall not be diminished or impaired in any manner that will affect adversely the interest and rights of the holders of such bonds. * * *"

The plaintiff contended that this was an illegal attempt to bind future legislatures and to freeze the Iowa State Highway Commission, both as to personnel and power, as it existed until all bonds were paid. The defendant argued that this section only announced the principle that the state could not pass any law impairing the obligation of a contract. It was conceded that the bonds constituted a contract between the commission and the bondholders and that the state could not impair such obligation. However, the court found that § 313A.20 would illegally restrict any future general assembly in enacting legislation relating to the commission, its activities, or its personnel during the life of the bonds. The court stated: "The authority of a legislature is limited to the period of its own existence. One general assembly cannot bind a future one." *Frost*, 172 N.W.2d at 583. The court declared § 313A.20 to be invalid for that reason.

In *Iowa-Nebraska L. & P. Co. v. City*, 220 Iowa 238, 247, 261 N.W. 423, 429 (1935), the court stated: "The power of the Legislature is derived from the Constitution and thereunder one *Legislature* cannot bind a *succeeding Legislature* . . . ."

The Supreme Court of Georgia has stated that one legislature " 'can not tie the hands of its successors, or impose upon them conditions, with reference to subjects upon which they have equal power to legislate.' " *Village of North Atlanta v. Cook*, 219 Ga. 316, 321, 133 S.E.2d 585, 589 (1963).

In *Atlas v. Board of Auditors*, 281 Mich. 596, 599, 275 N.W. 507, 509 (1937), the Supreme Court of Michigan stated:

> The power to amend and repeal legislation as well as to enact it is vested in the legislature, and the legislature cannot restrict or limit its right to exercise the power of legislation by prescribing modes of procedure for the repeal or amendment of statutes; nor may one legislature restrict or limit the power of its successors.

In Nebraska, the proposition that one legislature cannot bind a succeeding legislature is derived from the constitutional power of the Legislature to legislate. The Legislature has plenary legislative authority except as limited by the state and federal Constitutions. *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981); *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972). The Nebraska Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution. *State ex rel. Meyer v. County of Lancaster*, 173 Neb. 195, 113 N.W.2d 63 (1962). Therefore, absent a constitutional restriction on the legislative power, one legislature cannot restrict or limit the right of a succeeding legislature to exercise the power of legislation.

Because the Legislature may legislate upon any subject not inhibited by the Constitution, if this court were called upon to enforce the provisions of L.B. 507 against legislation enacted by a subsequent legislature, we would not have the authority to do so. The state Constitution is not a grant, but a restriction of legislative power. Consequently, courts can enforce only those limitations which the Constitution imposes. *Lenstrom v. Thone, supra*; *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956). Unless restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose. *Lenstrom v. Thone, supra*. L.B. 507 violates Neb. Const. art. III, §§ 1, 13, and 14, by attempting to restrict the constitutional power of a succeeding legislature to legislate.

An unconstitutional portion of a statute may be severed if (1) absent the unconstitutional portion, a workable statutory scheme remains; (2) the valid portions of the statute can be enforced independently; (3) the invalid portion was not an inducement to the passage of the statute; and (4) severing the invalid portion will not do violence to the intent of the Legislature. *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 527 N.W.2d 185 (1995); *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). We find that L.B. 507 is not severable and is unconstitutional in its entirety.

CONCLUSION

Having determined that L.B. 507 is unconstitutional for the reasons set forth above, we find that further consideration of the constitutionality of L.B. 507 under Neb. Const. art. III, § 22; Neb. Const. art. IV, § 15; and Neb. Const. art. II, § 1, is unnecessary. We also find it unnecessary to determine whether L.B. 507 was repealed by implication with the passage of L.B. 371 by the 94th Legislature.

Accordingly, it is the judgment of this court that L.B. 507 is unconstitutional and, thus, void and unenforceable.

JUDGMENT FOR RELATOR.

LANPHIER, J., concurring.

The majority holds that L.B. 507 violates the Nebraska Constitution. In so holding, the majority states that a legislature cannot restrict the constitutional power of a succeeding legislature to legislate. I agree that a legislature cannot limit the discretion of subsequent legislatures to revise, amend, or repeal an act. 1A Norman J. Singer, *Statutes and Statutory Construction* § 22.02 (5th ed. 1993). There are, however, qualifications. Succeeding legislatures *are* barred from interfering with contractual obligations already made even if they result from acts of a prior legislature. *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979). I fear the majority's use of broader language than is necessary may call into question the enforceability of valid obligations created by prior legislatures.

CAPORALE, J., joins in this concurrence.

EVELYN ELLIOTT AND SANDRA ELLIOTT, INDIVIDUALLY AND DOING BUSINESS AS ELLIOTT RANCH PARTNERSHIP, APPELLANTS AND CROSS-APPELLEES, V. FIRST SECURITY BANK, SUCCESSOR TO FIRST NATIONAL BANK IN MITCHELL, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

544 N.W.2d 823

Filed March 15, 1996. No. S-93-992.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Final Orders: Words and Phrases.** To be final, an order must dispose of the whole merits of the case and must leave nothing for further consideration of the court. Thus, when no further action of the court is required to dispose of a pending cause, the order is final. However, if the cause is retained for further action, the order is interlocutory.
4. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment is not a final order and thus is not appealable, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both of the motions and may determine the controversy which is the subject of those motions.
5. **Waiver: Words and Phrases.** A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
6. **Bankruptcy: Pleadings.** A bankruptcy stay is "automatic" because it is triggered upon the filing of a bankruptcy petition regardless of whether the other parties to the stayed proceeding are aware that a petition has been filed. Any act taken in violation of the automatic stay is void.
7. **Federal Acts: Fraud: Liability.** The federal Racketeer Influenced and Corrupt Organizations Act renders criminally and civilly liable any person who uses or invests income derived from a pattern of racketeering activity to acquire an interest in or to operate an enterprise engaged in interstate commerce; who acquires or maintains an interest in or control of such an enterprise through a pattern of racketeering activity; or who, being employed by or associated with such an enterprise, conducts or participates in the conduct of its affairs through a pattern of racketeering activity.
8. **Federal Acts: Fraud: Time: Other Acts.** The federal Racketeer Influenced and Corrupt Organizations Act requires that the pattern of racketeering activity

consists of at least two acts, one of which occurred after October 15, 1970, and the last of which occurred within 10 years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

9. **Federal Acts: Fraud: Intent.** The federal Racketeer Influenced and Corrupt Organizations Act requires that the defendant's state of mind in a civil prosecution be the same as that required in a criminal prosecution.
10. **Intent.** Intent may be inferred from the words and acts of a person and from the facts and circumstances surrounding his or her conduct.
11. **Fraud: Words and Phrases.** The existence of a single victim does not preclude the existence of a pattern of racketeering activity.

Appeal from the District Court for Sioux County: PAUL D. EMPSON, Judge. Reversed and remanded for further proceedings.

Kenneth Cobb, of Cobb, Hallinan & Ehrlich, P.C., for appellants.

Benjamin P. King, of Reed & King Law Office, for appellee.

CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

Evelyn Elliott and Sandra Elliott, individually and doing business as Elliott Ranch Partnership (debtors), filed suit against First Security Bank (bank) to recover damages for what the debtors claim was wrongful execution against their real property. The bank counterclaimed that the debtors engaged in racketeering activity in violation of federal law.

The debtors appeal a partial summary judgment entered by a district court in favor of the bank that dismissed the debtors' claims regarding (1) the amount of interest the debtors owed to the bank, (2) the amount of net proceeds received by the bank from sheriff's sales, (3) whether the bank wrongfully executed against the debtors' real estate, and (4) whether the debtors were deprived of the use of certain real estate.

The bank cross-appeals the district court's summary judgment, dismissing the bank's counterclaim which alleged that the debtors violated the federal Racketeer Influenced and Corrupt Organizations Act (RICO). See 18 U.S.C. §§ 1961 to 1968 (1982 & Supp. V 1987).

The facts and issues regarding the debtors' petition against the bank, as well as the trial court's partial summary judgment

in favor of the bank, will be treated in part I of this opinion. As to part I, we reverse the trial court's judgment, because the record fails to support the bank's contention that it is entitled to partial summary judgment on the debtors' petition.

The facts and issues regarding the bank's counterclaim against the debtors, as well as the trial court's summary judgment dismissing that counterclaim, will be treated in part II of this opinion. As to part II, we reverse the trial court's judgment, because the record fails to support the debtors' contention that they are entitled to summary judgment on the bank's counterclaim.

STANDARD OF REVIEW

Parts I and II of this opinion are reviews of two summary judgments. 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. *Western Sec. Bank v. United States F. & G. Co.*, 248 Neb. 679, 539 N.W.2d 15 (1995). 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. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995).

PART I

ASSIGNMENTS OF ERROR

Restated and summarized, the debtors claim that the district court erred (1) in sustaining the bank's motion for partial summary judgment and (2) in finding that the bank was justified in collecting interest from the time of a sheriff's sale of certain real estate until the date of confirmation of the sale.

FACTS

On July 24, 1987, Evelyn Elliott owed the bank $8,854.54 in principal and interest on her personal promissory note. A lawsuit by the bank to collect the amount due under Evelyn Elliott's note was pending in the Sioux County Court and was

scheduled to be tried following another hereinafter described lawsuit between the debtors and the bank. Evelyn Elliott's personal promissory note carried an annual interest rate of 12.75 percent.

Also on July 24, 1987, Elliott Ranch, a partnership, Evelyn and Sandra Elliott, as partners and guarantors, were indebted to the bank under two promissory notes (hereinafter referred to as Elliott Ranch notes) in the total principal sum of $226,639.94, plus accrued interest, for a total indebtedness of $257,429.51. A lawsuit to collect the amounts due under the Elliott Ranch notes was pending in the district court for Sioux County. These notes also bore annual interest rates of 12.75 percent. This case was scheduled to be tried on July 30 and 31.

On July 29, Elliott Ranch, a partnership, Evelyn and Sandra Elliott, as partners, individually and as guarantors, entered into a settlement agreement with the bank. Under the agreement, the bank settled the amount due it on the three promissory notes for $257,000 payable as follows: $34,108.62 upon execution of the agreement; $23,500 within 15 days of July 29; and the balance of $199,391.38 within 60 days of July 29.

The agreement further provided that certain consent judgments in favor of the bank in the original amounts of the notes plus interest could be and were, on July 31, 1987, entered in the pending lawsuits. On July 31, the Sioux County Court entered the parties' consent judgment which awarded the bank $8,854.54, with interest thereon at 12.75 percent per annum. On the same day, the district court for Sioux County entered the parties' consent judgment which awarded the bank $257,429.51, with interest at 12.75 percent per annum. Upon full payment pursuant to the settlement agreement, the bank agreed to file satisfactions of its judgments. The settlement agreement further provided that the bank could exercise its rights as a judgment creditor upon the debtors' failure to pay any installment due under the settlement agreement.

The debtors paid the first two installments as required by the settlement agreement. As to the third installment, the debtors gave the bank a certified draft dated September 14, 1987, from Mexico for $199,400, redeemable in current funds (credit) when presented to the drawee at its usual place of business.

The bank moved for determination of default and writ of execution in the district court for Sioux County. On December 1, 1987, the district court found that the debtors' method of payment of the final installment of the settlement was not valid and that, therefore, the debtors had defaulted under the terms of the settlement agreement. The court held that the bank was entitled to a writ of execution for the remaining judgment balance of $199,391.38, plus interest thereon, and that such writ should issue upon the bank's filing of a proper praecipe.

On July 27, 1988, the county court judgment of $8,854.54, together with interest thereon, in favor of the bank was transcribed to the district court.

On August 15, 1988, Elliott Ranch Partnership filed a chapter 11 bankruptcy in the U.S. Bankruptcy Court for the District of Nebraska. In the bankruptcy petition, under the list of real estate assets rather than under the list of personal property assets, Elliott Ranch Partnership listed only 500 head of cattle valued at $182,500.

In June 1989, the federal bankruptcy court sustained a motion by the bank for relief from the automatic stay regarding real estate in Sioux County owned by the partnership. In the same month, the bank caused the Sioux County sheriff to execute on real estate in Sioux County owned by Evelyn and Sandra Elliott as partners and caused the Scotts Bluff County sheriff to execute on real estate owned by Evelyn Elliott in Scotts Bluff County. The Scotts Bluff County sheriff executed on the real estate after being unable to locate personal property belonging to Evelyn Elliott on which to levy in Scotts Bluff County.

The record reflects that on May 26, 1987 (approximately 1 year after the debtors issued the three promissory notes but 2 months before the bank's collection lawsuits), Evelyn and Sandra Elliott formed the "S&G Living Trust" in which the cotrustees were Evelyn and Sandra Elliott. Approximately all of Evelyn and Sandra Elliott's assets, including the real estate in Scotts Bluff County and in Sioux County, were placed into the S&G Living Trust for their own benefit. The debtors never claimed that the trust was intended to, or did in fact, affect the bank's liens.

The real estate in Scotts Bluff County was sold to the bank at a sheriff's sale for $12,000. The bank never confirmed the sale and never entered into physical possession of the Scotts Bluff County real estate. Subsequently, the bank purchased the real estate in Sioux County for $108,500 at a sheriff's sale.

On September 7, 1989, the federal bankruptcy court dismissed the Elliott Ranch bankruptcy petition because of (1) Elliott Ranch's inability to effectuate a reorganization plan, (2) the large number of frivolous pleadings filed by Sandra Elliott, and (3) Sandra Elliott's willful disobedience of court orders.

Following the dismissal of the bankruptcy petition, the bank caused the Sioux County sheriff to execute on certain personal property owned by the debtors which had been listed in the bankruptcy proceeding and upon which execution had been automatically stayed by the filing of the bankruptcy petition. On October 18, 1989, pursuant to execution, the Sioux County sheriff sold cattle owned by Elliott Ranch and from that sale, $153,637.53 was applied to the bank's judgment. On November 28, also pursuant to an execution, the Sioux County sheriff sold additional cattle owned by the Elliott Ranch and $27,236.36 was applied to the bank's judgment.

One day prior to the October cattle sale, Sandra Elliott filed for personal bankruptcy. The bankruptcy petition listed under Sandra Elliott's personal property 358 head of cattle with a market value of $196,900. In her deposition, Sandra Elliott testified that in the course of her bankruptcy proceeding, she filed an adversary proceeding against the bank which alleged that the bank and the sheriff violated the automatic bankruptcy stay by conducting the sale of the debtors' cattle. Sandra Elliott testified that she dismissed that adversary proceeding. In her affidavit, Sandra Elliott testified that her federal court suits were dismissed without prejudice. On January 17, 1992, the U.S. Bankruptcy Court dismissed Sandra Elliott's bankruptcy petition.

The record reflects that sometime prior to the sheriff's cattle sales, Evelyn and Sandra Elliott transferred ownership of their cattle to a trust entitled "CE Producers." Assets which Evelyn and Sandra Elliott previously transferred to S&G Living Trust were also conveyed to CE Producers. According to Evelyn

Elliott, there was no difference between CE Producers and S&G Living Trust; the parties merely changed the name of the trust to CE Producers. The cattle sold at the October and November 1989 sheriff's sales bore brands registered to CE Producers.

On February 28, 1990, the district court for Sioux County confirmed the sheriff's sale of the Sioux County real estate. The bank continued to charge the 12.75-percent interest up to the time of the confirmation of the Sioux County real estate sheriff's sale. With the confirmation of the Sioux County sheriff's sale and the proceeds of the two cattle sales, the bank's consent judgments against the debtors were satisfied. The bank refunded approximately $18,000 to the debtors, representing proceeds from the sheriff's sales in excess of the bank's judgments, plus accrued interest.

On March 5, 1993, the debtors filed a second amended petition against the bank. In the first cause of action, the debtors alleged that (1) the bank received $169,990.53 from the sheriff's sale of cattle in October 1989, which satisfied the bank's judgment; (2) the bank overexecuted and breached the settlement agreement; (3) the bank deprived the debtors of use of the Scotts Bluff County real estate which was sold to the bank for $12,000, but upon which the bank never sought confirmation; (4) the bank wasted 100 tons of hay valued at $7,000 which was on the Sioux County real estate purchased by the bank; and (5) the bank damaged the credit and reputation of the debtors by refusing to release finance agreements pursuant to the settlement agreement. In a second cause of action, the debtors alleged that the bank fraudulently abused the process by levying execution and causing real estate of the debtors to be sold prior to exhausting debtors' personalty.

The bank filed a motion for partial summary judgment in which it claimed that (1) there was no dispute in the record that the interest rate on the judgment was 12.75 percent, (2) the debtors did not suffer loss of use of the Scotts Bluff County real estate from 1989 through 1991, (3) the bank did not wrongfully cause execution against real estate when personal property was available to satisfy its judgments, and (4) the net proceeds of the two cattle sales were $153,637.52 and $27,236.38, respectively.

The bank's motion for partial summary judgment did not address the debtors' claims regarding wasted tons of hay and the bank's refusal to release finance agreements alleged in the debtors' first cause of action.

The debtors also filed a motion for summary judgment. The debtors' motion claims that (1) the bank must apply the proceeds from the sheriff's sales of real estate on the date of the execution and not on the date of confirmation, (2) the settlement agreement is binding and does not authorize an interest rate charge or the right of the bank to make a claim pursuant to the promissory notes, and (3) the bank is liable for the value of the "wasted" hay on the Sioux County real estate.

On April 7, 1993, the trial court addressed both motions for summary judgment and sustained the bank's motion for partial summary judgment. The debtors appeal from that judgment.

The trial judge's minutes reflect that on July 13, 1993, following the trial court's sustaining of the debtors' motion for summary judgment in their favor as to the bank's counterclaim, which is addressed in part II of this opinion, counsel told the court that the case was over at the trial level and that no jury trial was to be had.

ANALYSIS

Initially, it is noted that the bank's motion for partial summary judgment did not address all issues claimed in the debtors' petition: namely, whether the bank wasted hay on the Sioux County real estate and whether the bank refused to release finance agreements pursuant to the settlement agreement. To be final, an order must dispose of the whole merits of the case and must leave nothing for further consideration of the court. Thus, when no further action of the court is required to dispose of a pending cause, the order is final. However, if the cause is retained for further action, the order is interlocutory. *Larsen v. Ralston Bank*, 236 Neb. 880, 464 N.W.2d 329 (1991).

In the case at bar, the inquiry does not end with whether the issues not addressed in the bank's motion for partial summary judgment are sufficient for the trial court to retain a cause of action. It is significant that the debtors filed a motion for

summary judgment in their favor on *their* petition, which was overruled by the district court in the same order in which the court sustained the bank's motion for partial summary judgment on the debtors' petition. Although the denial of a motion for summary judgment is not a final order and thus is not appealable, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both of the motions and may determine the controversy which is the subject of those motions. *State v. Union Pacific RR. Co.*, 241 Neb. 675, 490 N.W.2d 461 (1992), *modified on other grounds* 242 Neb. 97, 490 N.W.2d 461.

In this case, the debtors waived any intent to retain any issue for further action because counsel told the court that "this case is over at trial court level" and that "no jury trial [is] to be had" after the court sustained the debtors' motion for summary judgment against the bank's counterclaim. A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct. *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). As a result, the merits of the debtors' petition, in their entirety, are before this court.

Although it was not mentioned by either party, it is incumbent upon this court to address whether the trial court erred in awarding the bank summary judgment when there appears to be a material issue of fact as to whether cattle in which Sandra Elliott had an interest were sold at a sheriff's sale in violation of an automatic stay in her bankruptcy proceeding which was filed the day prior to the sale. The parties do not direct this court to any place in the record where the bankruptcy court granted relief from Sandra Elliott's automatic bankruptcy stay or where the sale was otherwise exempted from the stay. A bankruptcy stay is "automatic" because it is triggered upon the filing of a bankruptcy petition regardless of whether the other parties to the stayed proceeding are aware that a petition has been filed. *Constitution Bank v. Tubbs*, 68 F.3d 685 (3d Cir. 1995). Any act taken in violation of the automatic stay is void. *Parker v. Bain*, 68 F.3d 1131 (9th Cir. 1995). This prohibition applies equally to state courts and its officers. See *In re Graves*,

33 F.3d 242 (3d Cir. 1994). Since there is a material issue of fact as to whether the sheriff's sale of one debtor's interest in the debtors' cattle was valid, the trial court could not properly grant summary judgment in favor of the bank. Sandra Elliott's adversary proceeding in federal court which alleged a violation of the automatic bankruptcy stay was dismissed without prejudice well after the sale of the cattle. Such action could not retroactively annul any violation of the automatic stay.

Viewing the evidence in the light most favorable to the debtors, there is a genuine issue of material fact surrounding the sale of the debtors' cattle 1 day after Sandra Elliott's bankruptcy petition. Because there is a genuine issue of material fact as to the propriety of the sheriff's sale of the debtors' cattle, the trial court erred in sustaining the bank's motion for summary judgment and it must be set aside.

Because the summary judgment in favor of the bank is being set aside, it is not necessary to address the debtors' other assignments of error.

PART II

Assignments of Error

In its cross-appeal, the bank claims that the district court erred in determining that there is no material issue of fact with respect to the bank's counterclaim.

Facts

In its counterclaim, the bank alleged that the debtors engaged in a systematic and ongoing scheme to prevent the bank from recovering on its judgments and, therefore, were liable under RICO. The bank specifically alleged that the debtors (1) committed securities and mail fraud by tendering to the bank a nonredeemable draft, (2) defrauded a financial institution by transferring all or substantially all of their personal property and real estate to living trusts for the benefit of Evelyn and Sandra Elliott and selling personal property to a third party to prevent execution, (3) fraudulently filed false affidavits and frivolous petitions in the federal bankruptcy court to prevent the bank from recovering on its judgments, and (4) committed mail fraud by filing false statements to the Internal Revenue Service and making false demands to the bank for payment.

The debtors moved for summary judgment against the counterclaim. The debtors claimed that they (1) were not in or affected by interstate commerce, (2) did not intend to defraud the bank by paying a debt with a draft from a Mexican financial institution, (3) did not injure the bank by transferring assets to trusts because the bank had notice of the trusts and its judgment was satisfied, and (4) had a legal right to file bankruptcy petitions.

The district court sustained the debtors' motion for summary judgment, and the bank appeals from the dismissal of its counterclaim.

There is evidence in the record that the debtors normally sold their steer calves in Torrington, Wyoming.

The record reflects that Sandra Elliott filed in the federal bankruptcy court false judicial decrees discharging the federal bankruptcy court judge, a false default judgment against the bank ordering the bank to pay the debtors $900,000, and a false order canceling a scheduled hearing. The federal bankruptcy court found that her action served only to harass and delay the bank and the court. As a result, the bankruptcy court sanctioned Sandra Elliott, requiring her to pay the bank its costs and attorney fees.

The record further reflects that Sandra Elliott demanded payments from the bank and other third parties based upon false Internal Revenue Service forms, which were not sent to the Internal Revenue Service.

ANALYSIS

RICO renders criminally and civilly liable any person who uses or invests income derived from a pattern of racketeering activity to acquire an interest in or to operate an enterprise engaged in interstate commerce; who acquires or maintains an interest in or control of such an enterprise through a pattern of racketeering activity; or who, being employed by or associated with such an enterprise, conducts or participates in the conduct of its affairs through a pattern of racketeering activity. *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989); 18 U.S.C. § 1962.

Based upon the evidential record, a fact finder could determine that the debtors were engaged in interstate commerce

by selling their steers in Wyoming. Also to prevail under RICO, the bank must demonstrate that the debtors committed acts of racketeering activity, also known as predicate offenses. See *Delta Pride Catfish v. Marine Midland Bus. Loans*, 767 F. Supp. 951 (E.D. Ark. 1991). RICO requires that the pattern of racketeering activity consists of at least two acts, one of which occurred after October 15, 1970, and the last of which occurred within 10 years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. *H. J. Inc. v. Northwestern Bell Telephone Co., supra.*

The record reflects that there exists a genuine issue as to material facts establishing whether the debtors committed predicate offenses. As presented in part I of this opinion, in 1987 the debtors tendered a purportedly invalid Mexican draft to the bank as payment on the final installment of the settlement between the debtors and the bank. There is also evidence in the record from which a fact finder could find that in 1989 the debtors used U.S. mail to provide notice to the bank of false judicial decrees the debtors filed in the federal bankruptcy court and false demand letters made out to the bank. The debtors by affidavit claim that they acted in good faith and did not intend to commit the predicate acts alleged by the bank. RICO requires that the defendant's state of mind in a civil prosecution be the same as that required in a criminal prosecution. See *Babst v. Morgan Keegan & Co.*, 687 F. Supp. 255 (E.D. La. 1988). Intent may be inferred from the words and acts of a person and from the facts and circumstances surrounding his or her conduct. See *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995). Although the debtors claim they lack the necessary intent, a fact finder could find intent from their acts and surrounding circumstances.

The bank must prove that alleged predicate acts amount to or otherwise constitute a threat of continued criminal activity and that the predicate acts are related. It is this factor of continuity plus relationship which combines to produce a pattern. See *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

Continuity is both a closed and open-ended concept, referring either to a closed period of repeated conduct or to past

conduct that by its nature projects into the future with a threat of repetition. *H. J. Inc. v. Northwestern Bell Telephone Co., supra.* A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. *Id.*

From the evidence in the case at bar, a fact finder could find that the predicate acts did extend over more than a few weeks or months. From the evidential record, a fact finder could find that for a 2-year period, 1987 through 1989, the debtors consistently harassed and delayed the bank through false drafts, false court documents and court orders, and false demand letters.

As to the relationship factor, the criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. *Id.*

The debtors rely upon *Cross v. Simons*, 729 F. Supp. 588 (N.D. Ill. 1989) for the proposition that a single scheme to defraud a single victim does not establish a pattern of racketeering activity. However, the U.S. Court of Appeals for the Seventh Circuit, which *Cross v. Simons* relied upon, does not follow such a proposition. The existence of a single victim does not preclude the existence of a pattern of racketeering activity. *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 63 F.3d 516 (7th Cir. 1995). See, also, *Appley v. West*, 832 F.2d 1021 (7th Cir. 1987). Neither does a RICO claim require proof of multiple schemes. See *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989).

There exists a material issue of fact as to whether the debtors orchestrated an attempt to avoid payment on notes due the bank through deception and connivance. There is evidence in the record from which a fact finder could determine that the debtors used the U.S. mail to send the bank a false payment and court

documents to avoid payment and to unjustifiably demand $900,000 from the bank.

Giving the bank the benefit of all reasonable inferences deducible from the evidence, it cannot be said that the debtors are entitled to summary judgment as a matter of law.

CONCLUSION

The record fails to support that the bank is entitled to summary judgment as a matter of law regarding the debtors' petition. Likewise, the record fails to support that the debtors are entitled to summary judgment as a matter of law regarding the bank's counterclaim. We reverse the trial court's awarding of summary judgments and remand the matter to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, C.J., participating on briefs.

SANDRA K. FOX, APPELLANT, V. METROMAIL OF DELAWARE, INC., A DELAWARE CORPORATION, AND R.R. DONNELLEY & SONS COMPANY, APPELLEES.

544 N.W.2d 833

Filed March 15, 1996. No. S-94-379.

1. **Demurrer: Pleadings: Appeal and Error.** 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.
2. ____: ____: ____. In reviewing a ruling on a general demurrer, an appellate court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
3. **Demurrer: Pleadings.** If from the facts stated in the petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie.
4. **Judgments: Demurrer: Appeal and Error.** An order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken.

5. **Demurrer: Final Orders: Appeal and Error.** The sustaining of a general demurrer, not followed by a judgment of dismissal terminating the litigation, does not constitute a reviewable final order.
6. **Federal Acts: Insurance: Actions.** The Employee Retirement Income Security Act of 1974 has preempted state law with respect to actions brought to clarify rights to benefits or to enforce rights arising under a plan coming within the purview of the act.
7. **Federal Acts: Insurance: Actions: Courts.** A participant in, or beneficiary of, a plan regulated under the Employee Retirement Income Security Act of 1974 may seek to enforce her or his benefits and rights thereunder by instituting a civil action in either the state or federal courts.
8. **Federal Acts: Insurance: Jurisdiction.** Concurrent jurisdiction under the Employee Retirement Income Security Act of 1974 is vested in the state courts *only* with respect to a civil action commenced by a participant or beneficiary seeking to recover or clarify rights to benefits "under the terms of the plan," or to enforce rights "under the terms of the plan."
9. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.
10. **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.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Darrell K. Stock, of Snyder & Stock, for appellant.

Richard L. Spangler, Jr., of Woods & Aitken Law Firm, for appellees.

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

LANPHIER, J.

Sandra K. Fox, plaintiff-appellant, and her then fiance, Bret E. Fox, allegedly executed change of beneficiary forms at their place of employment, Metromail of Delaware, Inc., naming each other as beneficiary on certain life insurance policies. After their marriage, Bret Fox died and appellant discovered that her spouse's life insurance was still payable to his father. This action was brought in Lancaster County District Court by appellant, claiming that Metromail breached its fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. (1994) (specifically,

§ 1132(a)(1)(B)), by not properly processing the change of beneficiary forms. The insurance was paid into her husband's estate. Appellant paid a portion of the benefits to her father-in-law in return for his disclaiming any interest in the benefits. Appellant claims Metromail's breach of duty under ERISA resulted in her not receiving all of the benefits due her as a result of her husband's death. A demurrer was sustained in the district court on appellant's seventh amended petition. The court dismissed, finding that it did not have subject matter jurisdiction of the action under ERISA. We affirm.

BACKGROUND

Appellant stated in her seventh amended petition:

> FIRST CAUSE OF ACTION:
>
> Comes now the plaintiff, Sandra K. Fox, and for her first cause of action against the defendant, alleges as follows:
>
> 1. That plaintiff is a resident of Lincoln, Lancaster County, Nebraska; the defendants are Delaware Corporations authorized to do business in the State of Nebraska.
>
> 2. That all times pertinent hereto the plaintiff and her late . . . husband, Bret E. Fox, were employees of the defendant Metromail and entitled to, and qualified for, all benefits available to other employees in similar employment positions with the defendant. That in the month of January 1991 the defendant offered to its employees a new health and life benefit program which operated under the name "Choices".
>
> 3. That the defendant MetroMail [sic], as a benefit for its employees, undertook to act as agent for the employees in the handling and processing of insurance benefits with the insurer of the employees, John Hancock Insurance Company; that the defendant MetroMail [sic] undertook to handle, on behalf [of] the employees, all changes in the employees['] insurance program which were available to the employees and could be made by said employees.
>
> 4. That at all times pertinent hereto "Choices" was a duly organized and existing welfare benefit plan as defined

by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

5. That the Defendant R.R. Donnelley [&] Sons Company is Plan Administrator for "Choices" and that the defendant MetroMail [sic] of Delaware, Inc. is a solely owned subsidiary of R.R. Donnelley [&] Sons Company and at all times pertinent hereto acting as an agent, and on behalf of, the R.R. Donnelley [&] Sons Company as Plan Administrator.

6. That R.R. Donnelley & Sons Company is a fiduciary as defined by the Employment [sic] Retirement Income Security Act of 1974, 19 [sic] U.S.C.§ 1001 et seq. for the following reasons:

A) That R.R. Donnelley & Sons Company designated itself as the Plan Administrator which, pursuant to 29 U.S.C[.] § 1002 (14)(A), defines any administrator as a fiduciary, and/or;

B) R.R. Donnelley & Sons Company, through the defendant Metromail of Delaware, Inc. exercised discretionary authority or discretionary control respecting the management of the "Choices" plan, particularly by reason of its employees receiving, handling and processing all paper work regarding changes of benefits and beneficiaries with the employees of Metromail of Delaware, Inc.

7. That the plaintiff has exhausted her administrative remedies for the following reasons:

A. The defendants['] representatives were made aware of the facts set forth in this petition and refused to take any action;

B. The relevant portions of the "Choices" handbook . . . allow the plaintiff to pursue her remedies in Court without proceeding administratively;

C. That any further administrative proceedings would be futile.

8. That in . . . November 1990, the plaintiff, then known as Sandra K. Nuss, and her then fiance, Bret E. Fox, as employees of the defendant Metromail of Delaware, Inc. presented themselves at the Human

Resources Department for Metromail of Delaware, Inc. and properly and completely filled out new beneficiary cards in relation to the benefits to be paid under the "Choices" Insurance Program and named each other the beneficiary of those benefits; said completed beneficiary cards were delivered to employees of Metromail of Delaware, Inc. who were assigned to the Human Resources Department;

9. That in March of 1991, at the request of the Human Resources Department of Metromail of Delaware, Inc., Sandra K. Nuss and Bret E. Fox again presented themselves at the Human Resources Department and again fully and properly completed new beneficiary cards designating each other as the beneficiary of those benefits to be paid under the "Choices" insurance program, which included the life insurance benefits; that said completed beneficiary cards were delivered and presented to the employees of Metromail of Delaware, Inc. at the Human Resources Department;

10. That Sandra K. Nuss and Bret E. Fox were informed that the employees of the Human Resources Department would take the necessary steps to process such beneficiary cards in a manner which would result in the change of the named beneficiary of their respective benefit programs.

11. That on October 20, 1991, Bret E. Fox died, leaving the plaintiff as his widow.

12. That subsequent to October 20, 1991, the defendant informed the plaintiff that the only beneficiary documentation on file with the company was a beneficiary card, dated prior to 1990, naming Bret E. Fox's father, William E. Fox, as the beneficiary of the life insurance benefits provided by John Hancock Insurance Company, the insurer for the Choices program.

13. That there was payable under the applicable life insurance benefit to their employee Bret E. Fox, a life insurance benefit of Seventy-four Thousand Dollars ($74,000.00).

14. That William E. Fox disclaimed his interest in the aforementioned life insurance benefits but, in consideration of said disclaimer, the plaintiff was required to agree to pay a total of Twenty-four Thousand and No/100 ($24,000.00) of said benefits to William E. Fox and two other members of Bret E. Fox's family . . . ; that plaintiff received the remaining life insurance proceeds.

15. That the defendants breached, through the actions of [their] employees, their fiduciary duty of care pursuant to the Employment [sic] [Retirement] Income Security Act of 1974, 19 [sic] U.S.C[.] § 1001 et seq. to process the insurance benefit program of the employee Bret E. Fox in losing or failing to properly process the beneficiary cards completed by Bret E. Fox in November 1990 and March 1991.

16. As a result of the breach of the defendants, the plaintiff has lost benefits due her, by reason of the beneficiary card completed on two occasions by Bret E. Fox, in the sum of Twenty-four Thousand Dollars and No/100 ($24,000.00); that this action is brought pursuant to § 502 (a) (1) (B) of the Employment [sic] Retirement Income Security Act of 1974, 29 U.S.C. § 1132 (a) (1) (B) which allows a beneficiary to recover benefits due to them under the terms of a benefit plan.

SECOND CAUSE OF ACTION:

Comes now the plaintiff, Sandra K. Fox, and for her second cause of action against the defendant, alleges as follows:

1. That plaintiff hereby incorporates Paragraphs 1 through 10 of plaintiff's First Cause of Action.

2. That on October 5, 1991, the plaintiff and Bret E. Fox were married; that on October 16, 1991, the plaintiff went to the Human Resources Department for the defendant and completed the paperwork necessary to show a life change, that is, her marriage to Bret E. Fox as provided by the terms of the "Choices" program; that said paper work was completed, executed and delivered as directed by the employees at the Human Resources Department for the defendant Metromail of Delaware,

> Inc.; that at the time . . . the plaintiff requested said paper work, she was not advised in any manner whatsoever by said employees of the Human Resources Department as to the options available for her as to the nature and extent of life insurance coverage provided by the "Choices" Program at the time when a life change paper work was submitted.
>
> 3. That the defendants breached, through the actions of [their] employees, their fiduciary duty of care pursuant to the Employment [sic] Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. by failing to inform the plaintiff of the benefits available to her at the time of completing the paper work for a life change.
>
> 4. That as a direct and proximate result of the breach of the defendants and resulting loss of benefits, the plaintiff has lost benefits in the sum of Twenty Thousand Dollars and No/100 ($20,000.00); Twenty-four Thousand Dollars and No/100 ($24,000.00); that this action is brought pursuant to § 502 (a) (1) (B) of the Employment [sic] Retirement Income Security Act of 1974, 29 U.S.C. § 1132 (a) (1) (B) which allows a beneficiary to recover benefits due to them under the terms of a benefit plan.
>
> WHEREFORE, plaintiff prays for judgment against the defendant of her first cause of action in the sum of Twenty-Four Thousand Dollars ($24,000.00); and on her second cause of action in the sum of Twenty Thousand Dollars ($20,000.00); and attorney fees as provided by the Employment [sic] Retirement Income Security Act, plus court costs.

Metromail and Donnelley demurred. The court sustained the demurrer and dismissed the action.

ASSIGNMENTS OF ERROR

Appellant assigns as error:

1. The District Court erred in finding that jurisdiction of this matter is vested exclusively in the United States District Court.

2. The District Court erred in finding that plaintiff had not stated a cause of action under 29 U.S.C. § 1132(A)(1)(B).

3. The District Court erred in not allowing plaintiff to further amend her petition.

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.*, 248 Neb. 289, 534 N.W.2d 326 (1995); *Carlson v. Metz*, 248 Neb. 139, 532 N.W.2d 631 (1995); *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995).

In reviewing a ruling on a general demurrer, an appellate court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Proctor, supra*; *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (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).

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).

The sustaining of a general demurrer, not followed by a judgment of dismissal terminating the litigation, does not constitute a reviewable final order. *Barks, supra.*

ANALYSIS

To the extent relevant to this review, ERISA supersedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a). ERISA has therefore preempted state law with respect to actions brought to clarify rights to benefits or to enforce rights arising under a plan coming within the purview of ERISA. *Anderson v. HMO Nebraska, Inc.*, 244 Neb. 237, 505 N.W.2d 700 (1993).

Section 1132(e)(1) of ERISA states in relevant part:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have

> exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) . . . .

Section 1132(a)(1)(B), cited above in the jurisdiction section, states:

> (a) Persons empowered to bring a civil action
> A civil action may be brought—
> (1) by a participant or beneficiary—
> . . .
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]

This court has previously held that a participant in, or beneficiary of, an ERISA-regulated plan may seek to enforce her or his benefits and rights thereunder by instituting a civil action in either the state or federal courts. § 1132(a)(1)(B) and (e)(1). See *Anderson, supra*.

We have also stated that " '[c]oncurrent jurisdiction is vested in the state courts *only* with respect to a civil action commenced by a participant or beneficiary seeking to recover or clarify rights to benefits "under the terms of the plan," or to enforce rights "under the terms of the plan." ' " (Emphasis in original.) *Anderson*, 244 Neb. at 241-42, 505 N.W.2d at 705 (quoting *Duffy v. Brannen*, 148 Vt. 75, 529 A.2d 643 (1987)).

The present facts do not present a case of concurrent jurisdiction. In this case, after appellant's father-in-law, the named beneficiary, disclaimed his interest in the life insurance benefits, the benefits were paid to the estate of appellant's deceased husband. Appellant argues that a portion of the proceeds was eventually paid to the wrong party in settlement. The fact remains, however, that the plan did pay the benefits. Appellant accepted those benefits. Therefore, § 1132(a)(1)(B), providing for concurrent jurisdiction for the recovery of benefits or to enforce rights, does not apply. In such actions, state

courts have no concurrent jurisdiction. The federal courts have exclusive jurisdiction.

The district court appropriately sustained the demurrer.

When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Vanice v. Oehm*, 247 Neb. 298, 526 N.W.2d 648 (1995); *Pendleton v. Pendleton*, 247 Neb. 66, 525 N.W.2d 22 (1994); *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994).

It is clear in this case that no reasonable possibility exists that an eighth amended petition would correct the lack of subject matter jurisdiction. The court allowed appellant to amend her petition seven times. The district court noted that appellant, in her seventh amended petition, cited the correct jurisdiction section of ERISA under which she alleged damages, but she did not assert any facts which conformed to the jurisdiction requirement of that section. We have held that such action cannot cure lack of subject matter jurisdiction. Specifically, we have held that 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).

The district court stated in its March 22, 1994, order that "the 'facts' alleged in the petition do not set forth causes of action under [29 U.S.C. § 1132] (a)(1)(B). Therefore, jurisdiction of these claims is vested exclusively in the United States District Court. Since this court does not have jurisdiction over the claims, the action must be dismissed."

For the foregoing reasons, we affirm the district court's decision that it lacked ERISA subject matter jurisdiction.

CONCLUSION

Finding no merit in any of appellant's assignments of error, we affirm.

AFFIRMED.

PAULETTE M. TALBOT, APPELLANT, V. DOUGLAS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE.

544 N.W.2d 839

Filed March 15, 1996. No. S-94-418.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court is required to accept as true all 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. ____: ____: ____. In reviewing a ruling on a general demurrer, an appellate court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence that might be adduced at trial.
3. **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.
4. **Political Subdivisions Tort Claims Act: Immunity: Negligence.** The Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991 & Cum. Supp. 1992), eliminates, in part, the traditional immunity of subdivisions for the negligent acts of their employees.
5. ____: ____: ____. Political subdivisions retain their immunity under the Political Subdivisions Tort Claims Act against any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion be abused.
6. **Political Subdivisions Tort Claims Act: Words and Phrases.** The discretionary function exemption in the Political Subdivisions Tort Claims Act extends only to basic policy decisions and not to the exercise of discretionary acts at an operational level or to ministerial activities implementing policy decisions.
7. **Political Subdivisions Tort Claims Act: Negligence: Liability.** The State is liable for negligence of its employees at the operational level, where there is no room for policy judgment.
8. **Negligence: Words and Phrases.** When one under no obligation to act does undertake action, one must act with reasonable care.
9. **Political Subdivisions Tort Claims Act: Immunity: Liability.** Public officers are immune from tort liability for an act or omission involving the exercise of a judicial function; the immunity extends beyond judges and may apply to prosecuting attorneys or to a clerk of the court.
10. **Political Subdivisions Tort Claims Act: Immunity.** Quasi-judicial immunity attaches to a particular official function, not to particular offices.
11. **Political Subdivisions Tort Claims Act: Negligence: Proof.** To recover under the Political Subdivisions Tort Claims Act, a claimant must prove the four basic elements of negligence, which are duty, breach of duty, proximate causation, and damages.
12. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a

cause of action, a demurrer based on the failure to state a cause of action is to be overruled.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded for further proceedings.

Eric L. Klanderud, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

James S. Jansen, Douglas County Attorney, and Kristina B. Murphree for appellee.

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

LANPHIER, J.

Appellant, Paulette M. Talbot, was due a substantial sum of money from her former spouse in the form of delinquent child support and alimony. The Douglas County Office of Child Support Enforcement had been collecting current and delinquent support starting in 1987. Appellant learned her former spouse was to receive an inheritance. She asked an attorney, Michael Pace, in the Douglas County Office of Child Support Enforcement to enforce her rights against the inheritance, and Pace agreed to do so. Appellant further alleged that she relied on certain representations from Pace that he would represent her and that she, therefore, did not need to have another attorney. Later, it was determined the inheritance was paid before the attorney accomplished a court proceeding to attach the inheritance. Appellant brought suit against Douglas County under the Nebraska Political Subdivisions Tort Claims Act (Act), Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991 & Cum. Supp. 1992), for damages she allegedly sustained as the result of the negligent actions of Pace. Subsequently, appellant sought leave to amend her petition to add Pace as a party defendant. The district court for Douglas County sustained a demurrer filed by Douglas County on the basis that the county was immune from suit under the doctrines of the discretionary function exemption and quasi-judicial immunity. The court held appellant's motion to add Pace as a defendant was moot and dismissed her petition without leave to amend. Appellant timely

appealed to the Nebraska Court of Appeals, and we removed the matter to our docket. We reverse the district court orders, sustaining the demurrer and denying appellant's motion to add a party defendant, and remand for further proceedings.

BACKGROUND

With our standard of review for reviewing demurrers in mind, we accept as true the following facts alleged by appellant in her petition:

On January 2, 1980, the marriage of appellant and William Talbot III (Talbot) was dissolved by the district court for Douglas County. Talbot was ordered to pay child support and alimony to appellant.

Talbot became delinquent in making his support payments. In 1987, the Douglas County Office of Child Support Enforcement through its attorney, Pace, became involved in collecting current and delinquent payments from Talbot on behalf of appellant. Pace prepared and filed the necessary legal documents to pursue collection of the payments from Talbot. Pace continued to act to collect payments from Talbot through August 1992.

On October 30, 1991, Talbot's mother died, leaving Talbot heir to her estate. As of November 1990, Talbot owed appellant $19,800 in delinquent support. On November 18, 1991, appellant contacted Pace regarding the collection of child support and alimony from Talbot's share in the estate. Appellant alleges that Pace agreed to perform all legal work necessary to collect delinquent child support and alimony from the estate. Appellant alleges that Pace told her not to retain her own attorney.

Appellant alleges that she contacted Pace several times during the period of November 1991 to August 1992, requesting the status of her case. Each time, Pace assured appellant that he was taking the necessary actions to collect the delinquent payments from the estate.

In August 1992, Pace filed a petition for equitable garnishment on Talbot's share of the estate and also filed an application for a restraining order to prevent the personal representative from distributing Talbot's share. On August 13, 1992, the district court granted the restraining order.

Prior to the entry of the restraining order, the personal representative had already distributed Talbot's share of the estate to Talbot. Talbot received over $30,000.

For her cause of action, appellant alleges that Pace agreed to represent her in connection with collecting delinquent support payments from Talbot's share of the estate and that he was obligated to do so nonnegligently. Appellant avers that Pace was negligent in failing to diligently act to restrain the personal representative of the estate. As a direct and proximate result of Pace's negligence, appellant states she was damaged in the amount of $19,800.

Appellant alleges she filed a claim in accordance with the Act. Appellant states she filed her claim with the Douglas County clerk on March 16, 1993, and that the Douglas County Board of Commissioners denied her claim on June 15, 1993.

Appellant filed her amended petition on November 24, 1993, naming Douglas County as the sole respondent. On December 13, 1993, appellant filed a motion for leave to add Pace as a party defendant.

Douglas County filed a demurrer on December 14, 1993, on the grounds that (1) the court had no jurisdiction of the defendant or the subject of the action; (2) the appellant lacked legal capacity to sue; (3) there was a defect of parties, plaintiff or defendant; (4) several causes of action were improperly joined; and (5) the petition did not state facts sufficient to state a cause of action. Arguments were made on January 27, 1994, and the court took the matter under advisement.

On March 30, 1994, the district court entered an order sustaining Douglas County's demurrer and dismissing appellant's petition with prejudice. The basis of the district court's order was that Douglas County was immune to any liability because Pace's actions fell within the discretionary function exception to the Act and under the common-law doctrine of quasi-judicial immunity. The district court declared appellant's motion to add Pace as a party defendant moot.

Appellant timely appealed to the Court of Appeals. By order of this court, we removed the appeal to our docket.

ASSIGNMENTS OF ERROR

Appellant asserts that the district court erred (1) in finding that Pace's actions were within the scope of the discretionary function exception of the Act; (2) in finding that Pace's actions fall within the common-law doctrine of quasi-judicial immunity; (3) in declaring the motion to add a party defendant moot; and (4) in sustaining Douglas County's demurrer.

STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court is required to accept as true all 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. *Vowers & Sons, Inc. v. Strasheim*, 248 Neb. 699, 538 N.W.2d 756 (1995); *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505 (1995); *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995). An appellate court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence that might be adduced at trial. *Vowers & Sons, Inc. v. Strasheim, supra*; *Proctor v. Minnesota Mut. Fire & Cas., supra*; *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994).

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. *Seevers v. Potter, supra*; *George Rose & Sons v. Nebraska Dept. of Revenue*, 248 Neb. 92, 532 N.W.2d 18 (1995).

ANALYSIS

Discretionary Function Exemption

The Act eliminates, in part, the traditional immunity of subdivisions for the negligent acts of their employees. *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866 (1977). However, political subdivisions retain their immunity against "[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion be abused."

§ 13-910(2). If Pace's alleged actions comprise the exercise of a discretionary function, then Douglas County would be immune from liability.

The discretionary function exemption in tort claims acts extends only to basic policy decisions and not to the exercise of discretionary acts at an operational level. *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993).

> [T]he discretionary function or duty exemption . . . extends only to the basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. . . . In other words, the State is liable for negligence of its employees at the operational level, where there is no room for policy judgment.

Wickersham v. State, 218 Neb. 175, 180, 354 N.W.2d 134, 138-39 (1984).

In its order sustaining Douglas County's demurrer, the district court cited *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994). In that case, we extensively discussed the discretionary function exemption of the Act and analyzed previous Nebraska cases controlling the issue. Examples of discretionary functions discussed in *Jasa v. Douglas County* include the initiation of programs and activities, establishment of plans and schedules, and judgmental decisions within a broad regulatory framework lacking specific standards.

In *Hamilton v. City of Omaha, supra*, the plaintiff alleged that a police officer had acted negligently by failing to protect her after the officer had affirmatively assured her that he would do so. The city of Omaha demurred, in part, on the basis that the police officer's actions fell within the discretionary function exemption provided by § 13-910(2). We held that the police officer's actions in investigating plaintiff's complaint did not involve a basic policy decision which is immune from suit and that the officer's actions were properly characterized as the type of discretionary decisions exercised at an everyday level.

In *Koepf v. County of York, supra*, we held that the decision of a social worker to place a child in a particular foster home was not a basic policy decision precluding judicial inquiry into whether the decision was made negligently. Although the choice

of where to place the child and the determination of whether the foster home was safe was a matter entailing the exercise of some discretion, it was not a basic policy matter comprising a discretionary function exemption.

We cannot say that Douglas County possesses absolute immunity if the allegations contained in appellant's petition do not fall within the purview of the discretionary function exemption but are ministerial or operational activities.

Once Pace made the decision to attempt to collect the delinquent support from the estate, his actions moved from the possible province of policymaking and into the realm of operations. Having thus acted to implement that policy, Pace's conduct is operational and must be evaluated by the standard of reasonable care. When one under no obligation to act does undertake action, one must act with reasonable care. *Wickersham v. State, supra.*

Quasi-Judicial Immunity

In its order sustaining Douglas County's demurrer, the district court cited *Jeffres v. Countryside Homes*, 214 Neb. 104, 333 N.W.2d 754 (1983), and *Koch v. Grimminger*, 192 Neb. 706, 223 N.W.2d 833 (1974). These two cases address and apply the general rule that public officers are immune from tort liability for an act or omission involving the exercise of a judicial function. The immunity extends beyond judges and may apply to prosecuting attorneys or to a clerk of the court. Restatement (Second) of Torts § 895D (1979).

In *Koch v. Grimminger*, 192 Neb. at 714, 223 N.W.2d at 837, we held that "a public prosecutor, acting within the general scope of his official authority in making a determination whether to file a criminal prosecution, is exercising a quasi-judicial and discretionary function and that where he acts in good faith he is immune from suit for an erroneous or negligent determination."

Koch v. Grimminger does not provide absolute immunity to public prosecutors, rather it provides immunity to prosecutors who are exercising a quasi-judicial function. Immunity attaches to a particular official function, not to particular offices.

Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

Factually, *Koch v. Grimminger, supra*, is distinguishable from the case before us. In *Koch v. Grimminger*, the plaintiff alleged that a prosecutor intentionally and recklessly filed a criminal charge against him resulting in his false arrest and imprisonment. That is a quasi-judicial function. In the present case, appellant alleges that a county attorney chose to act as her attorney and was negligent in providing legal services on her behalf. Acting as such an advocate is not a quasi-judicial function.

CONCLUSION

" '[T]o recover under the Political Subdivisions Tort Claims Act a claimant must prove the four basic elements of negligence,' namely, the substantive elements of negligence, which are duty, breach of duty, proximate causation, and damages." *Millman v. County of Butler*, 235 Neb. 915, 927, 458 N.W.2d 207, 215 (1990). See, also, *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993); *Maple v. City of Omaha*, 222 Neb. 293, 384 N.W.2d 254 (1986). In determining whether a cause of action has been stated, the petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. *Carlson v. Metz*, 248 Neb. 139, 532 N.W.2d 631 (1995); *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994); *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994).

Appellant's petition contains factual allegations indicating that Pace was acting as an advocate representing her interests and therefore owed her a duty as an attorney, and that he breached that duty by failing to timely act, resulting in damages. The petition states a cause of action from the facts alleged. We cannot say that, as a matter of law, Douglas County is absolutely immune from suit based on the facts pled. The district court erred in sustaining Douglas County's demurrer and dismissing appellant's petition. Further, appellant's motion to add Pace as a party defendant was not moot, and it was error

to deny it. We reverse the orders, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF NOELLE F. AND SARAH F., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. DONALD F., APPELLANT.

544 N.W.2d 509

Filed March 15, 1996. Nos. S-94-842, S-94-843.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
2. **Time: Fees: Appeal and Error.** The notice of appeal and docket fee required by Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1994) are mandatory and jurisdictional and must be filed within 30 days of the entry of the judgment of the trial court.
3. **Legislature: Courts: Time: Appeal and Error.** When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.
4. **Motions for New Trial: Verdicts: Time: Appeal and Error.** The running of the time for filing a notice of appeal is terminated by only two events: the timely filing of a motion for new trial under Neb. Rev. Stat. § 25-1143 (Reissue 1989) or a motion to set aside the verdict or judgment under Neb. Rev. Stat. § 25-1315.02 (Reissue 1989).
5. **Affidavits: Fees: Appeal and Error.** An alternative to the deposit of a docket fee is permitted in proceedings in forma pauperis.
6. **Time: Fees: Appeal and Error.** The time for perfecting an appeal is controlled by Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1994), and the time for filing the docket fee is not extended by Neb. Rev. Stat. § 25-2308 (Reissue 1989).
7. **Jurisdiction: Affidavits: Appeal and Error.** Although jurisdiction is vested in an appellate court upon timely filing of a notice of appeal and an affidavit of poverty, some duties are still required of the lower court. Neb. Rev. Stat. §§ 25-2301 and 25-2308 (Reissue 1989) require the lower court to act if it determines that the allegations of poverty are untrue.

8. **Affidavits: Appeal and Error.** Ordinarily, a trial court's decision regarding the truthfulness or good faith of a litigant's poverty affidavit and notice of appeal will not be disturbed on appeal unless it amounts to an abuse of discretion.
9. **Jurisdiction: Affidavits: Fees.** An inadequate poverty affidavit does not waive the mandatory docket fee or vest jurisdiction.
10. **Affidavits: Fees: Appeal and Error.** A poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal by Neb. Rev. Stat. §§ 33-103 (Reissue 1993) and 25-1912 (Cum. Supp. 1994).
11. **Notice: Affidavits: Fees: Appeal and Error.** Although the filing of a poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal and an appeal is perfected when the appellant timely files a notice of appeal and a poverty affidavit, it is clear that in proceedings in forma pauperis the appellant must file an affidavit which is in fact true.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN and INBODY, Judges, and HOWARD, District Judge, Retired, on appeal thereto from the County Court for Boone County, GARY F. HATFIELD, Judge. Appeals dismissed.

Clark J. Grant and James M. Dake, of Grant, Rogers, Maul & Grant, for appellant.

No appearance for appellee.

Kathryn L. Mesner, guardian ad litem.

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

WRIGHT, J.

The appellant, Donald F., has petitioned this court for further review of the decision of the Nebraska Court of Appeals, which dismissed his appeals for lack of jurisdiction. The Court of Appeals found that the trial court did not abuse its discretion in ruling that Donald should not be permitted to proceed in forma pauperis, and the Court of Appeals dismissed Donald's appeals because he had failed to pay the required docket fees. We granted Donald's petition for further review.

SCOPE OF REVIEW

When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the

decisions made by the lower courts. *Payne v. Nebraska Dept. of Corr. Servs., ante* p. 150, 542 N.W.2d 694 (1996).

FACTS

On August 25, 1994, the Boone County Court, sitting as a juvenile court, ruled that Noelle F. and Sarah F. were children as described in Neb. Rev. Stat. § 43-247(3)(a) and (b) (Reissue 1993). On September 13, Donald filed notices of appeal regarding this decision and filed affidavits of poverty. On September 20, the State objected to Donald's request to proceed in forma pauperis, alleging that, as a matter of law, the poverty affidavits were deficient and challenging Donald's claim of indigence. The State's objection was set for hearing on September 29, which was 4 days after the deadline for filing the notices of appeal and paying docket fees.

At the hearing, the State asked the county court to take judicial notice of certain financial information contained in a Boone County District Court file pertaining to a legal separation involving Donald and his wife. Exhibit 6, a certified copy of the district court's docket sheet and the judge's notes from the separation proceeding, was received. The exhibit showed that pursuant to the Nebraska Child Support Guidelines, Donald was ordered to pay child support at the rate of $379 per month. Donald did not dispute the information presented by the State regarding his financial condition, nor did he offer proof regarding his financial condition. The county court then signed a journal entry which stated: "The Court finds that the Motion to Proceed Informa [sic] Pauperis is not well taken but that the County Court does not have jurisdiction to dismiss the appeal."

In his appeals to the Court of Appeals, Donald challenged the findings relating to the adjudication of his daughters, but did not seek review of the county court's decision denying his request to proceed in forma pauperis. In each case, the State filed with the Court of Appeals a motion to dismiss or, in the alternative, motion for summary affirmance, alleging that no docket fees had been deposited by Donald, that he had not complied with the jurisdictional requirements for filing an appeal, and that the cases should be summarily disposed. The Court of Appeals overruled the State's motions, and the State did not file an

appellate brief. The guardian ad litem filed an appellate brief but did not cross-appeal challenging Donald's right to proceed in forma pauperis.

The Court of Appeals stated: "Thus, pursuant to § 25-2308, when the trial court denies the motion to proceed in forma pauperis, '[t]he court may . . . permit the affiant to proceed upon payment of costs[, fees, or security],' thus effectively extending the time to pay docket fees." *In re Interest of Noelle F. & Sarah F.*, 3 Neb. App. 901, 905, 534 N.W.2d 581, 584 (1995). The Court of Appeals found that the trial court did not abuse its discretion in ruling that Donald should not be allowed to proceed in forma pauperis. The court held that "[g]iven the trial court's proper finding that [Donald's] requests to proceed in forma pauperis were not well taken and the fact that [Donald] has failed to pay docket fees in connection with these appeals, we dismiss the appeals." *Id.* at 908, 534 N.W.2d at 586.

ASSIGNMENT OF ERROR

Donald argues that the Court of Appeals erred and abused its discretion in dismissing his appeals.

ANALYSIS

We first review the applicable law. Neb. Rev. Stat. § 43-2,106.01 (Cum. Supp. 1994), provides:

> Any final order or judgment entered by a juvenile court may be appealed to the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals. The appellate court shall conduct its review within the same time and in the same manner prescribed by law for review of an order or judgment of the district court . . . .

The requirements for perfecting an appeal are set forth in Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1994). A notice of appeal and the docket fee required must be filed within 30 days after the judgment or final order. The notice of appeal and docket fee required by § 25-1912 are mandatory and jurisdictional and must be filed within 30 days of the entry of the judgment of the trial court. See *State v. Flying Hawk*, 227 Neb. 878, 420 N.W.2d 323 (1988).

In *Friedman v. State*, 183 Neb. 9, 11, 157 N.W.2d 855, 856 (1968), we stated: "When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly." The running of the time for filing a notice of appeal is terminated by only two events: the timely filing of a motion for new trial under Neb. Rev. Stat. § 25-1143 (Reissue 1989) or a motion to set aside the verdict or judgment under Neb. Rev. Stat. § 25-1315.02 (Reissue 1989). See § 25-1912(2). An appeal is deemed perfected and the appellate court has jurisdiction when the notice of appeal is filed and the docket fee is deposited; no other step shall be deemed jurisdictional. See § 25-1912(3).

An alternative to the deposit of a docket fee is permitted in proceedings in forma pauperis. See Neb. Rev. Stat. §§ 25-2301 to 25-2310 (Reissue 1989). Section 25-2301 provides:

> Any court . . . except the Nebraska Workers' Compensation Court . . . shall authorize the . . . appeal therein, without prepayment of fees and costs or security, by a person who makes an affidavit that he or she is unable to pay such costs or give security. . . . An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

Section 25-2308 provides: "The court may dismiss the case or permit the affiant to proceed upon payment of costs if the allegation of poverty is untrue, or if the court is satisfied that the action is frivolous or malicious."

We first address whether § 25-2308 extends the time to pay docket fees when the trial court has denied a motion to proceed in forma pauperis. From our review of § 25-1912 and §§ 25-2301 to 25-2310, we conclude that it does not. The time for perfecting an appeal is controlled by § 25-1912, and the time for filing the docket fee is not extended by § 25-2308.

Two questions remain regarding the status of these appeals: (1) Could the trial court proceed to determine the validity of the in forma pauperis proceeding after the notices of appeal and poverty affidavits had been filed? (2) Did the determination by the trial court that the poverty affidavits were not well taken cause the appeals not to be properly perfected? The answer to both questions is yes.

In *Flora v. Escudero*, 247 Neb. 260, 264-65, 526 N.W.2d 643, 647 (1995), we stated:

> Although jurisdiction is vested in the appellate court upon timely filing of a notice of appeal and an affidavit of poverty, some duties are still required of the lower court. . . . Sections 25-2301 and 25-2308 require the lower court to act if it determines that the allegations of poverty are untrue . . . .

The trial court may dismiss the case or permit the affiant to proceed upon payment of costs if the allegation of poverty is untrue, or if the court is satisfied that the action is frivolous or malicious. Ordinarily, a trial court's decision regarding the truthfulness or good faith of a litigant's poverty affidavit and notice of appeal will not be disturbed on appeal unless it amounts to an abuse of discretion. *Flora v. Escudero, supra*. See, also, *State v. Eberhardt*, 179 Neb. 843, 140 N.W.2d 802 (1966). We find that the trial court retained jurisdiction to determine the validity of the poverty affidavit.

In *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995), we stated that § 25-1912(3) provides that an appellate court obtains jurisdiction over an appeal when the notice of appeal and docket fee have been deposited in the office of the clerk of the district court. "An inadequate affidavit does not waive the mandatory docket fee or vest jurisdiction . . . ." *Schmailzl*, 248 Neb. at 316, 534 N.W.2d at 745. A poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal by Neb. Rev. Stat. § 33-103 (Reissue 1993) and § 25-1912. *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995). Thus, we conclude that if the poverty affidavit is not sufficient to meet the statutory requirements of § 25-2301 or is found to be untrue, the appeal has not been perfected. Although the filing of a poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal and an appeal is perfected when the appellant timely files a notice of appeal and a poverty affidavit, it is clear that in proceedings in forma pauperis the appellant must file an affidavit which is in fact true. An in forma pauperis affidavit which is found by the trial court to be not well taken is insufficient to perfect an appeal on the merits. See *State v. Schmailzl, supra*.

We are not permitted to review whether the trial court's decision regarding the poverty affidavits was an abuse of discretion because Donald did not appeal this determination and thus the issue was not preserved on appeal. The trial court having determined that the poverty affidavits were not well taken, Donald is not entitled to proceed with his appeals in forma pauperis.

Having failed to file valid poverty affidavits or timely deposit the docket fees required by § 25-1912, Donald has not properly perfected his appeals. Because Donald did not properly perfect his appeals and because no appeal was taken from the trial court's determination of Donald's in forma pauperis status, the Court of Appeals lacked jurisdiction to consider the appeals. As a result, this court also lacks jurisdiction to consider the appeals, and they must be dismissed.

APPEALS DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. NORMA E. LOPEZ, APPELLANT.

544 N.W.2d 845

Filed March 15, 1996. No. S-95-311.

1. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
2. **Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence.
3. **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 weigh the evidence. Such matters are for the trier 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.

4. **Trial: Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.
5. **Trial: Rules of Evidence: Expert Witnesses.** The helpfulness test subsumes a relevancy analysis. In making its determination, the court must proceed on a case-by-case basis. Its conclusions will depend on (1) the court's evaluation of the state of knowledge presently existing about the subject of the proposed expert testimony and (2) the court's appraisal of the facts of the case.
6. ____: ____: ____. Under the helpfulness standard, a court may exclude an expert's opinion which is nothing more than an expression of how the trier of fact should decide a case, and when an expert's opinion on a disputed issue is a conclusion which may be deduced equally as well by a trier of fact with sufficient evidence on the issue, the expert's opinion is superfluous and does not assist the trier in understanding the evidence or determining a factual issue.
7. ____: ____: ____. There are four questions a court considers to determine the admissibility of expert testimony under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989): (1) Does the witness qualify as an expert pursuant to rule 702? (2) Is the expert's testimony relevant? (3) Will the expert's testimony assist the trier of fact to understand the evidence or to determine a controverted factual issue? (4) Should the expert's testimony, even though relevant and admissible, be excluded in light of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989)?
8. **Trial: Rules of Evidence: Expert Witnesses: Appeal and Error.** A trial court's factual finding pursuant to Neb. Evid. R. 104(1), Neb. Rev. Stat. § 27-104(1) (Reissue 1989), concerning a determination whether a witness qualifies as an expert under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989), will be upheld on appeal unless clearly erroneous.
9. **Trial: Rules of Evidence: Expert 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.
10. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
11. ____: ____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
12. ____: ____. In determining the correctness of a trial court's ruling on a suppression motion, an appellate court will accept the factual determinations and credibility choices made by the trial court unless, in light of all the circumstances, such findings are clearly erroneous.
13. **Criminal Law: Police Officers and Sheriffs: Miranda Rights: Words and Phrases.** General onscene questioning as to the facts surrounding a crime does not constitute a "custodial interrogation."

14. **Right to Counsel: Waiver.** The general rule is that an accused may waive his or her right to counsel where such waiver is made intelligently and understandingly, with knowledge of the right to counsel.
15. **Motions to Suppress: Confessions: Proof.** The State has the burden to establish by a preponderance of the evidence that a defendant's statement was voluntary and not coerced.
16. **Confessions: Police Officers and Sheriffs: Due Process.** Coercive police conduct is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.
17. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
18. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law.
19. **Criminal Law: Motions to Dismiss: Evidence.** In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that can reasonably be drawn from the evidence, and every controverted fact resolved in its favor.
20. **Homicide: Intent: Juries.** The question of premeditation is for the jury.
21. **Juries: Discrimination: Prosecuting Attorneys: Proof.** To make a prima facie case of purposeful discrimination in the selection of a jury based on the prosecutor's use of peremptory challenges, the defendant must show (1) that he is a member of a cognizable racial group, (2) that the prosecutor has exercised peremptory challenges to remove from the panel members of the defendant's race, and (3) that facts and other circumstances raise an inference that the prosecutor used the challenges to exclude potential jurors based on their race. After the defendant has made a prima facie showing, the burden shifts to the State to provide a neutral explanation for challenging the jurors.
22. ____: ____: ____: ____. If the trial court does not state on the record that the defendant has met the burden of proving a prima facie case of discrimination in jury selection, it does so implicitly by asking the State to articulate its reasons for the questioned strikes.
23. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** A trial court's determination of the adequacy of the State's "neutral explanation" of its peremptory challenges will not be reversed upon appeal unless clearly erroneous.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

Kevin K. Knake and Thomas J. Gaul, Deputy Hall County Public Defenders, for appellant.

Don Stenberg, Attorney General, Jay C. Hinsley, and, on brief, Delores Coe-Barbee for appellee.

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

LANPHIER, J.

The defendant in this case, Norma E. Lopez, was charged with and tried in the district court for Hall County, Nebraska, for killing Sotero Gandarilla in the defendant's trailer. Following a jury trial, she was convicted of murder in the first degree and use of a weapon in commission of a felony. The defendant appeals, claiming as errors, in summary, that the district court erred in (1) not allowing certain proffered expert testimony from "Bud" Deats in the form of his conclusions upon reconstructing the crime scene, (2) overruling the defendant's motion to suppress statements made by her which were elicited in violation of her Fifth Amendment rights, (3) overruling the defendant's motion for a directed verdict, (4) not ruling that there was insufficient evidence to convict, and (5) overruling the defendant's objection to the State's striking the sole African-American juror on the panel. We affirm.

BACKGROUND

On March 25, 1994, the defendant had a party in her trailer home. During the course of the party, the defendant and a guest, Sotero Gandarilla, started to argue. The argument continued while the defendant and Gandarilla went into a bedroom in the defendant's home. The defendant's daughter was sitting in the bedroom, and the defendant asked the daughter to find the bullets for her gun. The daughter told the defendant that she did not know where the bullets were and then went to a neighbor's house for help.

Upon returning to the home of the defendant, the daughter heard a gunshot. Upon entering the bedroom, witnesses saw Gandarilla's body on the floor and the defendant holding a gun. During the melee which followed, witnesses stated, the defendant was at one time too drunk to dial the phone.

The police responded to a call of someone hearing a gunshot. An officer went to the defendant's home. The officer knocked and the defendant appeared. The officer asked if he could enter, and the defendant replied that he could not and that she would check the trailer for him. Soon after, the defendant returned to

the front door of the trailer and stated to the officer, "He's dead; he's been shot." She initially refused to give the name of the victim.

The officer asked, "Can I come in and check?" to which the defendant answered, "Yes, you can." The officer found the body. The officer asked her the identity of the individual on the floor and the defendant's name and her date of birth, to which the defendant responded, "What? Do you think I shot him?" At that point, the officer informed the defendant of her *Miranda* rights. The officer asked if the defendant waived her rights and wanted to talk to him, to which she replied, "Yeah." It appeared to the officer that the defendant had been drinking and had apparently urinated on herself, but that she understood the questions and the situation. Several times during the preliminary investigation, the defendant told the officer, "Why don't you just go ahead and shoot me?" When a probation officer arrived at the scene to take charge of the children of the defendant, the defendant stated to the officer (a white female), "You ain't taking my baby, you fucking white bitch."

At that point, Lt. Rodger L. Williams arrived to take over the investigation. A high-powered rifle with one spent round in its chamber was found in the bedroom.

The defendant was jailed. An interview of the defendant by Williams took place the next morning at 8 o'clock at the jail at the defendant's request. The defendant signed a *Miranda* rights waiver. During the interview, Williams asked if the defendant knew why the shooting had occurred, to which the defendant stated, "Yes, because I shot him for no goddamn reason. Just for . . . being drunk and stupid I know." In response to a question as to whether the events of the previous evening occurred because the defendant had been drinking, she responded, "Oh, no, no, no. I have been that drunk before and never pulled a gun on my old man." The ammunition for the gun was found following a search pursuant to a search warrant.

It was later determined that "[t]he death of Sotero Gandarilla [was] due to a perforating gunshot wound to the neck, which caused a marked destruction of the soft tissue of the neck, severed the internal carotid artery, severed the internal and external jugular veins and, also, severed the larynx."

EXCLUSION OF JUROR

During the voir dire before the trial, the State struck the only African-American on the panel. In response to questions, the prospective juror answered the following questions of the judge:

> THE COURT: All right. Thank you. Do you know any of the individuals, [juror], that I have gone through here?
>
> [JUROR]: Just the gentleman in the middle. I can't recall his name.
>
> THE COURT: All right. The gentleman in the middle we are going to call — we are going to put a handle on him. We are going to call him Mr. Knake.
>
> [JUROR]: Okay.
>
> THE COURT: All right. Do you know Mr. Knake?
>
> [JUROR]: Yes.
>
> THE COURT: Do you know him professionally?
>
> [JUROR]: Well, he handled a case for my son once.
>
> THE COURT: All right. You know him in his capacity as an attorney?
>
> [JUROR]: Yes.
>
> THE COURT: Did you have occasion to meet with him?
>
> [JUROR]: Yes.
>
> THE COURT: All right. About how long ago was this, [juror]?
>
> [JUROR]: Probably about three or four months ago.
>
> THE COURT: So somewhat recently?
>
> [JUROR]: Yeah.

Once the *Batson* challenge was raised, see *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the parties stipulated to the facts that the juror was of African-American descent, that the State struck her from the panel as exercising its sixth peremptory challenge, and that the juror was the only person of African-American descent on the 18-member panel.

The State articulated the following as neutral reasons for striking the juror:

> Your Honor, the Court is aware and the record will reflect [juror] was called as a replacement juror. She indicated she knew Mr. Knake [the defendant's defense counsel],

> although she didn't know him by name apparently, but indicated her son had been a client of Mr. Knake's.
>
> . . . .
>
> The other State's reasoning here, the other thing that was noticed, you know, with this type of situation you get into peoples' [sic] heads. Basically, [juror] throughout the proceedings was sitting with what I interpreted to be hostile body language. She had her arms crossed, did not appear to wish to look over at the State, was sitting with her legs crossed away from us, seemed to be adopting a defensive position during the time she was being questioned by the Court and the State.

The court stated:

> As the Court recalls, in the voir dire of [juror], she indicated the last few months, I believe, Mr. Knake, you have been employed as an attorney for a member of her family, I believe a son, in regards to criminal allegations filed against her son which she indicated that he was innocent of.
>
> I'm going to overrule the objection.

EXCLUSION OF PROFFERED EXPERT TESTIMONY

At trial, the court barred "crime scene reconstruction" testimony of Deats, a defense expert. The defense expert was allowed to testify in the areas of fingerprints, toolmarking, and ballistics. The defense attorney then asked the expert: "Q. Do you have an opinion based on your analysis of the distance from the floor to the rifle at the time the rifle was shot? A. Yes, I have an opinion. Q. Okay. What is that opinion?"

To this, the prosecution objected on foundation, and the court sustained. In his offer of proof, the defense attorney asked the expert if his opinion about the circumstances of the shooting was consistent with the victim lunging at the gun or trying to pull it out of somebody's hand, to which the expert replied, "It could be."

After trial, the jury returned a verdict of guilty on both counts.

A three-judge panel sentenced the defendant to life imprisonment on count I and to 10 to 15 years' imprisonment on count II.

ASSIGNMENTS OF ERROR

On July 19, 1995, the defendant had yet to file her brief, and yet moved to amend her assignments of error. This motion was granted on July 28, and defendant was given until August 16 to file her brief. On July 27, the defendant filed a brief and assigned as errors:

1. The trial court erred in refusing to allow the defense expert, "Bud" Deats, to testify about conclusions he reached.

2. The trial court erred in overruling Norma Lopez's motion to suppress statements because the statements were obtained in violation of Ms. Lopez's constitutional rights as guaranteed by the Fifth Amendment to the United States Constitution.

3. The District Court erred by overruling the defendant's motion for a directed verdict at the close of the State's evidence and at the close of all evidence by submitting the charge of first degree murder to the jury.

4. The evidence submitted was insufficient as a matter of law for a reasonable juror to find beyond a reasonable doubt that the defendant committed first degree murder based on the circumstantial evidence of intent found in the record.

5. The trial court erred in overruling the defendant's objection to the striking by the State of the sole African-American on the juror panel.

STANDARD OF REVIEW

An appellate court does not consider errors which are argued but not assigned. *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995); *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994).

A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. Moreover, on such a claim, an appellate court will not set aside a guilty verdict in a criminal

case where such verdict is supported by relevant evidence. *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995); *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995); *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (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 weigh the evidence. Such matters are for the trier of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995); *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995); *State v. Parks*, 245 Neb. 205, 511 N.W.2d 774 (1994).

ANALYSIS

EXPERT TESTIMONY

The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994).

The helpfulness test subsumes a relevancy analysis. In making its determination, the court must proceed on a case-by-case basis. Its conclusions will depend on (1) the court's evaluation of the state of knowledge presently existing about the subject of the proposed expert testimony and (2) the court's appraisal of the facts of the case. *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993).

Under the helpfulness standard, a court may exclude an expert's opinion which is nothing more than an expression of how the trier of fact should decide a case, and when an expert's opinion on a disputed issue is a conclusion which may be deduced equally as well by a trier of fact with sufficient evidence on the issue, the expert's opinion is superfluous and does not assist the trier in understanding the evidence or determining a factual issue. *Id.*

There are four questions a court considers to determine the admissibility of expert testimony under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989): (1) Does the witness

qualify as an expert pursuant to rule 702? (2) Is the expert's testimony relevant? (3) Will the expert's testimony assist the trier of fact to understand the evidence or to determine a controverted factual issue? (4) Should the expert's testimony, even though relevant and admissible, be excluded in light of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989)? *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

A trial court's factual finding pursuant to Neb. Evid. R. 104(1), Neb. Rev. Stat. § 27-104(1) (Reissue 1989), concerning a determination whether a witness qualifies as an expert under rule 702 will be upheld on appeal unless clearly erroneous. *State v. Reynolds, supra.*

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. Rule 702.

The proposed expert claimed he had testified in only one other case involving crime scene reconstruction in another jurisdiction, but he was not sure of the jurisdiction and could not remember the name of the case. Prior testimony is not a prerequisite for expertise. He testified that he would not be able to determine what people were doing at the crime scene, but would probably be able to determine in some cases how they were positioned. He stated that he knew of no professional standards for those undertaking crime scene reconstruction. At the conclusion of the testimony attempting to qualify Deats as an expert, the court stated that the defense had not made clear what expertise Deats possessed in the field of crime scene reconstruction.

The testimony of the defense's expert was allowed up to a point. The court found that the defendant's proposed expert qualified as an expert in the fields of fingerprint analysis, toolmarking, and ballistics. As a result, he was qualified to and allowed to testify in those areas. The trial court was not clearly erroneous in finding that Deats was not an expert in the field of crime scene reconstruction. Without sufficient foundation establishing Deats as an expert in crime scene reconstruction, the trial court did not abuse its discretion in excluding the

proposed testimony in response to the State's foundation objection. See *Paulsen v. State, ante* p. 112, 541 N.W.2d 636 (1996).

MOTION TO SUPPRESS

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994); *State v. Ranson*, 245 Neb. 71, 511 N.W.2d 97 (1994).

In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Grimes, supra*; *State v. Dyer, supra*; *State v. Ranson, supra*.

In determining the correctness of a trial court's ruling on a suppression motion, an appellate court will accept the factual determinations and credibility choices made by the trial court unless, in light of all the circumstances, such findings are clearly erroneous. *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993); *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993); *State v. Harris*, 244 Neb. 289, 505 N.W.2d 724 (1993).

The defendant claims that the trial court erred in denying her motion to suppress statements that she made to law enforcement and other persons at the scene of the crime and later in the morning to the police.

At the scene of the death, the defendant made pre- and post-*Miranda* statements to the officer who reported to a call about a shooting. As to the pre-*Miranda* statements, the defendant was clearly not in custody at that time. The officer had just arrived at the scene and was merely trying to investigate if there had been a shooting. General onscene questioning as to the facts surrounding a crime does not constitute a "custodial interrogation." See, *State v. Holman*, 221 Neb. 730, 380 N.W.2d 304 (1986); *State v. Mattan*, 207 Neb. 679, 300 N.W.2d 810 (1981).

As to the post-*Miranda* statements, those statements are required to be made voluntarily. The defendant argues that she was too intoxicated to make a voluntary statement. However, the defendant's statements at the time of the crime would indicate that she knew what was transpiring. She knew that the victim had been shot. She knew he was dead. She knew that she was probably a suspect. She repeatedly asked the police to just kill her then and there. The defendant also knew that she was having her children taken away. Finally, she refused to give the name of the victim. These facts demonstrate that the defendant was sufficiently able to comprehend and resist questions and that she gave voluntary answers. See *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983).

The next morning the defendant asked for a meeting with police. The defendant received and signed a *Miranda* warning waiver. The general rule is that an accused may waive his or her right to counsel where such waiver is made intelligently and understandingly, with knowledge of the right to counsel. *State v. Rogers*, 208 Neb. 464, 303 N.W.2d 788 (1981). In this case, the defendant wanted to talk, waited until the morning to ask for a meeting, and then waived her rights at the meeting she requested. The defendant then stated that she shot the victim.

There is no question that the State has the burden to establish by a preponderance of the evidence that a defendant's statement was voluntary and not coerced. *State v. Brewer*, 241 Neb. 24, 486 N.W.2d 477 (1992). In *State v. Haynie*, 239 Neb. 478, 490, 476 N.W.2d 905, 913 (1991), this court stated that "[c]oercive police conduct is a necessary predicate to the finding that a confession is not voluntary within the meaning of the due process clause of the 14th amendment." Whether a confession is voluntary is determined by considering all the circumstances. We find in this case that the totality of the circumstances shows initiation and the voluntary nature of the defendant's statements and that the interrogation did not violate the defendant's constitutional rights. It was not clearly erroneous to admit the statements of the defendant.

DIRECTED VERDICT AND SUFFICIENCY

In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994).

If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law. *State v. Hirsch, supra*.

In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that can reasonably be drawn from the evidence, and every controverted fact resolved in its favor. *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994).

Testimony from the defendant's daughter related that the defendant told her to "find the bullets." Other witnesses testified to entering the bedroom after hearing a gunshot and to seeing the body of the victim and the defendant holding a gun. Law enforcement officials recited admission after admission from the defendant. The cause of death of the victim was a gunshot wound to the neck by the gun which the defendant held, and bullets for the gun were found in her closet. The defendant and the victim had been arguing earlier and at the time of the shooting.

The question of premeditation is for the jury. See *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995). A directed verdict would have been improper. Construing the evidence in favor of the State, there was more than enough evidence for the jury to find premeditation and convict the defendant.

VOIR DIRE

To make a prima facie case of purposeful discrimination in the selection of a jury based on the prosecutor's use of peremptory challenges, the defendant must show (1) that he is a member of a cognizable racial group, (2) that the prosecutor

has exercised peremptory challenges to remove from the panel members of the defendant's race, and (3) that facts and other circumstances raise an inference that the prosecutor used the challenges to exclude potential jurors based on their race. After the defendant has made a prima facie showing, the burden shifts to the State to provide a neutral explanation for challenging the jurors. *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988). See *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

If the trial court does not state on the record that the defendant has met the burden of proving a prima facie case, it does so implicitly by asking the State to articulate its reasons for the questioned strikes. *State v. Rowe, supra.*

A trial court's determination of the adequacy of the State's "neutral explanation" of its peremptory challenges will not be reversed upon appeal unless clearly erroneous. *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991).

The State's articulated neutral reason for the strike was that the defendant's attorney represented the struck juror's son in another matter less than 6 months before. This court has affirmed various neutral reasons presented by the prosecution. See *State v. Walton*, 227 Neb. 559, 418 N.W.2d 589 (1988) (juror struck because she was unemployed, single, lived at a particular address, and did not have community ties; juror struck because she was possibly related to an individual previously prosecuted by the prosecutor's office; juror struck because he was married to a social services worker, in connection with whom the trial judge expressed the view that people working in that field have a tendency to place blame on others, all found neutral). See, also, *State v. Alvarado*, 226 Neb. 195, 410 N.W.2d 118 (1987) (juror who was struck because she was young and defense witnesses were young and because of unavailability of a juror background questionnaire for her, found neutral); *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987) (jurors struck because one knew about the case and her father had lived near the defendant and the other knew one of the potential witnesses, found neutral). We find that the reason articulated by the prosecution in this case is a sufficient neutral reason to avoid reversal on a "clearly erroneous" standard.

CONCLUSION

Finding the assignments of error of the defendant to be without merit, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. LLOYD F. GARBER, APPELLEE AND CROSS-APPELLANT.

545 N.W.2d 75

Filed March 15, 1996. No. S-95-647.

1. **Equal Protection: Statutes.** For the purpose of determining whether a legislative classification offends the Equal Protection Clause of U.S. Const. amend. XIV, if a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end; upon a showing that such a rational relationship exists, courts will uphold the legislation.
2. **Constitutional Law: Equal Protection: States: Statutes.** In the area of economics and social welfare, a state does not violate the Equal Protection Clause of U.S. Const. amend. XIV merely because the classifications made by its laws are imperfect; if the classification has some reasonable basis, it does not offend the U.S. Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.
3. **Equal Protection: Legislature.** The Equal Protection Clause of U.S. Const. amend. XIV does not require a legislature to choose between attacking every aspect of a problem or not attacking it at all; it is sufficient if the action is rationally based and free from invidious discrimination.
4. **Constitutional Law: Statutes: Appeal and Error.** In reviewing the constitutionality of a statute, an appellate court does not pass judgment on the wisdom or necessity of the legislation or on whether the statute is based upon assumptions which are scientifically substantiated.
5. **Equal Protection: Legislature.** Under the rational basis standard, the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause of U.S. Const. amend. XIV, a legislature is not required to adopt the best solution; it is sufficient if the solution adopted has some rational relationship to the state's objective.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Exception overruled.

Joseph M. Casson, Jefferson County Attorney, for appellant.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., and Joseph F. Chilen for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

Finding that the statutes under which the defendant-appellee, Lloyd F. Garber, was charged with two counts of odometer fraud unconstitutionally deprived him of the equal protection of the law guaranteed by U.S. Const. amend. XIV, the district court dismissed the information. The plaintiff-appellant, State of Nebraska, took exception to the ruling, and this court granted the State's application to appeal the aforesaid ruling to this court pursuant to the provisions of Neb. Rev. Stat. §§ 24-1106 and 29-2315.01 (Cum. Supp. 1994). Garber cross-appealed, claiming that the statutes are unconstitutional on other grounds as well as the equal protection ground. Inasmuch as we overrule the State's exception, we concern ourselves only with the State's challenge to the district court's equal protection ruling.

II. SCOPE OF REVIEW

The alleged unconstitutionality of a statute presents a question of law which must be determined by an appellate court independently from the conclusion reached by the trial court. *State v. Jones*, 248 Neb. 117, 532 N.W.2d 293 (1995); *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993).

III. QUESTIONED STATUTES

The statutes under which Garber was charged are Neb. Rev. Stat. §§ 60-132 and 60-133 (Reissue 1993). In relevant part, § 60-132 makes it unlawful to "[k]nowingly tamper with, adjust, alter, change, disconnect, or fail to connect an odometer of a motor vehicle, or cause any of the foregoing to occur, to reflect a mileage different than has actually been driven by such motor vehicle except as provided in section 60-133."

Section 60-133 provides:

> If any odometer is repaired or replaced, the reading of the repaired or replaced odometer shall be set at the reading of the odometer repaired or replaced immediately prior to repair or replacement and the adjustment shall not be deemed a violation of [§] 60-132 . . . except that when the repaired or replaced odometer is incapable of registering the same mileage as before such repair or replacement, the repaired or replaced odometer shall be adjusted to read zero and a notice in writing on a form prescribed by the Department of Motor Vehicles shall be attached to the left door frame, or in the case of a motorcycle to the registration certificate and all subsequent registration certificates, of the vehicle by the owner or his or her agent specifying the mileage prior to repair or replacement of the odometer and the date on which it was repaired or replaced and any removal or alteration of such notice so affixed shall be deemed a violation of such sections.

In addition, a number of other statutes also bear on the matter. The first of these is Neb. Rev. Stat. § 60-134 (Reissue 1993), which requires the transferor of a motor vehicle less than 10 years of age which was equipped with an odometer by the manufacturer to provide the transferee with a statement signed by the transferor which sets forth

> the mileage on the odometer at the time of transfer and (1) shall state that, to the transferor's best knowledge, such mileage is that actually driven by the motor vehicle, (2) if the transferor has knowledge that the mileage shown on the odometer is in excess of the designated mechanical odometer limit, shall include a statement to that effect, or (3) if the transferor has knowledge that the odometer reading differs from the actual mileage and that the difference is greater than that caused by odometer calibration error, shall state that the odometer reading does not reflect the actual mileage and should not be relied upon. If a discrepancy exists between the odometer reading and the actual mileage, a warning notice to alert the transferee shall be included with the statement.

Neb. Rev. Stat. § 60-301(14) (Reissue 1993), with certain exceptions not relevant to our inquiry, defines a motor vehicle as "any vehicle propelled by any power other than muscular power . . . ." Section 60-301(15) further makes clear that a motorcycle is a motor vehicle.

Neb. Rev. Stat. § 60-302(1) (Reissue 1993) decrees, again with certain exceptions not relevant here, that no motor vehicle "shall be operated or parked on the highways of this state unless such vehicle is registered in accordance with Chapter 60, article 3." It also provides that every owner "of a vehicle required to be registered shall make application for registration . . . . The application shall be a copy of a certificate of title . . . ."

Neb. Rev. Stat. § 60-106(6) (Reissue 1993) requires that one purchasing a motor vehicle obtain a certificate of title. Section 60-106(7) reads, in pertinent part:

> In all cases of transfers of motor vehicles . . . the application for a certificate of title shall be filed within thirty days after the delivery of such vehicle . . . . A licensed dealer need not apply for certificates of title for motor vehicles . . . but upon transfer of such vehicle . . . the licensed dealer shall give the transferee a reassignment of the certificate of title on such vehicle . . . or an assignment of a manufacturer's or importer's certificate.

Neb. Rev. Stat. § 60-312 (Reissue 1993) requires the issuance of a certificate of registration to such an applicant.

Penalties are provided for the violation of §§ 60-132, 60-133, and 60-134, as well as Neb. Rev. Stat. § 60-138 (Reissue 1993), and for operating an unregistered vehicle, in violation of § 60-302(1) and Neb. Rev. Stat. §§ 60-302.03 (Reissue 1993) and 60-348 (Cum. Supp. 1994).

IV. FACTS

At his arraignment, Garber stood mute, and the court entered a not guilty plea on his behalf. Garber then waived his right to a jury trial, and a bench trial was had, at which the following facts were stipulated:

Garber, a motorcycle dealer, caused one of his employees to switch the odometers on two motorcycles. Because the

odometers were sealed, they could not be altered or reset to zero.

The odometer on the first motorcycle read 102 miles, the actual distance the vehicle had been driven. That motorcycle had been sold and returned by the purchaser because the engine began seeping oil and the turn signal indicators were reversed. No registration certificate had been issued to the purchaser of the first motorcycle. The second motorcycle was identical to the first and had an odometer reading of .5 miles, again, the actual distance that vehicle had been driven. No registration certificate had been issued on this motorcycle.

After the odometers were switched, the second motorcycle was delivered to the purchaser in exchange for the first. The first motorcycle was then returned to Garber's inventory and offered for sale. No notice, as required by § 60-133, was attached to the registration certificate of either motorcycle by Garber because neither of the motorcycles had been registered.

Although not covered by the stipulation, there is no indication in the record that either of the odometers had been damaged or was in need of repair.

V. ANALYSIS

So far as is relevant to this inquiry, §§ 60-132 and 60-133 make it unlawful to replace a motorcycle odometer such that it gives a mileage reading which is different than the number of miles the motorcycle was actually driven. The statutes require that any replacement odometer be reset to zero and that a notice specifying the actual miles driven and date of replacement be affixed to the registration certificate.

Although in the memorandum accompanying its judgment the district court referred to the rights to both equal protection and due process, it analyzed only whether there was a rational basis for the distinction drawn in the methods of compliance and whether the different methods invidiously discriminate against a motorcycle dealer. These are both elements of the right to equal protection, and for that reason we engage only in an equal protection analysis.

In any equal protection challenge to a statute, the degree of judicial scrutiny to which the statute is to be subjected may be

dispositive. See, *Dallas v. Stanglin*, 490 U.S. 19, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny. Under this test, strict congruence must exist between the classification and the statute's purpose. The end the legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists. On the other hand, if a statute involves economic or social legislation not implicating a fundamental right or suspect class, courts will ask only whether a rational relationship exists between a legitimate state interest and the statutory means selected by the legislature to accomplish that end. See, *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976). Upon a showing that such a rational relationship exists, courts will uphold the legislation. *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985).

The language of §§ 60-132 and 60-133 makes it apparent that in enacting these statutes, the Legislature was concerned with preventing odometer fraud and elected to supplement the notice given in the statement required by § 60-134. Thus, the questioned statutes deal with an economic matter and do not impinge upon a fundamental right or create a suspect classification. We therefore examine the statutes under the rational basis standard of review.

As the U.S. Supreme Court noted in *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970):

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78. "The problems of government are practical ones and may justify, if they do

> not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U. S. 61, 69–70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U. S. 420, 426.

The Equal Protection Clause does not require a legislature to choose between attacking every aspect of a problem or not attacking it at all; it is sufficient if the action is rationally based and free from invidious discrimination. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977).

> Refined analysis and simplistic logic when applied to the practical impact of a particular classification produces many times an appearance of inequality and discrimination. . . . But the sharpness of the lines drawn does not create an irrationality of classification or an invidious discrimination. This is particularly true when the sword of legislative policy deals with broad problems of economics and social welfare.

Thompson v. Board of Regents of University of Nebraska, 187 Neb. 252, 256, 188 N.W.2d 840, 843 (1971). For these reasons, the rational basis standard "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961). In reviewing the constitutionality of a statute, we do not pass judgment on the wisdom or necessity of the legislation or on whether the statute is based upon assumptions which are scientifically substantiated. *Otto v. Hahn*, 209 Neb. 114, 306 Neb. 587 (1981). It is also to be noted that under the rational basis standard, the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause, a legislature is not required to adopt the best solution; it is sufficient if the solution adopted has some rational relationship to the state's objective. *Dallas v. Stanglin*, 490 U.S. 19, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989).

The claimed denial of equal protection arises because under § 60–133, the notice is to be affixed on the left doorframe of motor vehicles other than motorcycles, but in the case of

motorcycles, the notice is to be affixed to the registration certificate.

In order to determine whether there is a rational basis for the distinction § 60-133 draws in the methods of compliance, it becomes necessary to recall the provisions of other statutes. Section 60-106(7) exempts motor vehicle dealers from obtaining certificates of title, the instruments which, under the provisions of § 60-302(1), become the applications for the certificates of registration required for vehicles "operated or parked" on state highways.

Yet, the only means by which motorcycle dealers may comply with the notice requirement of § 60-133 is to register motorcycles on which odometer readings have been changed, irrespective of whether the vehicles are being either operated or parked on state highways. Other motor vehicle dealers may comply with the notice requirement of § 60-133 without registering vehicles which are neither so operated or parked. While the differing physical characteristics of motorcycles and other motor vehicles may justify requiring that the § 60-133 notice be affixed differently on motorcycles than on other motor vehicles, that circumstance cannot be said to provide a rational basis between the State's objective of preventing odometer fraud and the requirement that motorcycle dealers register vehicles under conditions which do not obligate other motor vehicle dealers to do so.

Inasmuch as §§ 60-132 and 60-133 thus offend the Equal Protection Clause of U.S. Const. amend. XIV, the State's exception is overruled.

EXCEPTION OVERRULED.

GRACE B. AINSLIE, APPELLEE, NEILON J. AINSLIE, APPELLANT.
545 N.W.2d 90

Filed March 22, 1996. No. S-94-216.

1. **Alimony.** In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 1993), a court setting alimony is to consider the income and earning capacity of each party, as well as the general equities of each situation.
2. ____. Disparity in income or potential income may partially justify an award of alimony.
3. ____. In entering a decree for alimony, the court may take into account all of the property owned by the parties at the time of entering the decree, whether accumulated by their joint efforts or acquired by inheritance, and make such award as is proper under all the circumstances disclosed by the record.
4. ____. The ultimate test for determining correctness in the amount of alimony is reasonableness.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and MUES, Judges, on appeal thereto from the District Court for Lancaster County, BERNARD J. MCGINN, Judge. Judgment of Court of Appeals affirmed.

Donald R. Witt and John W. Ballew, Jr., of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Virginia G. Johnson for appellee.

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

CAPORALE, J.

The respondent-appellant husband, Neilon J. Ainslie, appealed to the Nebraska Court of Appeals from the district court's February 11, 1994, dissolution decree, asserting that the district court erred in the amount and duration of the alimony it awarded him from the petitioner-appellee wife, Grace B. Ainslie, namely, the sum of $500 per month for a period of 12 months beginning January 1, 1994; $300 per month for a period of 12 months beginning January 1, 1995; and $200 per month for a period of 12 months beginning January 1, 1996. The Court of Appeals modified the alimony award so as to require the wife to pay the husband $500 per month until either she or he died or he remarried and, as so modified, affirmed the

decree of the district court. *Ainslie v. Ainslie*, 4 Neb. App. 70, 538 N.W.2d 175 (1995). The wife successfully petitioned for further review by this court; we now affirm the judgment of the Court of Appeals.

We begin by recalling that the awarding of alimony is a matter entrusted to the discretion of the trial judge and, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995).

The parties were married on March 26, 1954, and produced four children, all of whom had reached the age of majority at the time of the December 14, 1993, trial. During the course of their marriage, the parties moved 16 times; the wife arrived in Lincoln, Nebraska, in 1985 and the husband shortly thereafter. The parties separated on May 1, 1993.

The husband spent most of his married years working as a food service director in hospitals. After he moved to Lincoln, he found part-time employment delivering food to community centers for the elderly and also worked at a fast-food operation. After his separation from the wife, the husband worked in a fast-food operation at a resort in Wyoming where his son was the resident manager. However, that job only lasted 4 months because the resort closed down for the winter. At the time of trial, the husband was 65 years old, and his sole sources of income were Social Security benefits in the amount of $745 per month and a pension of $51 per month. His "bare-bones" expenses amount to $1,235, or $439 more than his Social Security and pension income.

The husband has undergone two surgeries for arterial sclerosis and has high blood pressure and high cholesterol. He has been taking medication for the high blood pressure, but does not take medication for the high cholesterol because it is too expensive.

The husband currently resides in an apartment which his son helped him obtain by providing him with the money for a security deposit. Prior to this, he had lived with a son in Omaha, a daughter in Kansas, and in the camper on his truck. He testified that without alimony he would be unable to continue living in his apartment. Indeed, even assuming that

the husband's expenses will remain constant throughout the remainder of his life, there is nothing to indicate that without alimony he will be able to meet them at any point in the future.

Although the Court of Appeals declares in its opinion that the wife was approximately 58 years old at the time of the trial, we cannot find anything in the record to substantiate that statement. What the record does establish, however, is that she graduated from high school in 1952. In any event, during the course of the marriage, she held a number of jobs, including babysitter, grocery store checker, typist, and medical records technician. By the time of trial, she had not worked for several years. She, too, has been in ill health, having had a hysterectomy, cataract surgery on both eyes, and two surgeries for heel spurs. In addition, she suffers from high blood pressure and high cholesterol, and has a bladder incontinence problem.

During the course of the marriage, the wife became the beneficiary of two separate trusts. The first she created in August 1985 from the approximately $200,000 she inherited from her mother. At no time were these funds deposited in an account which bore the husband's name. They were transferred directly from the estate to the trust, and the wife controls all of the distributions from that trust. She does not take all of the income that the trust produces, but, rather, receives an amount she considers adequate to live on and permits the rest to accumulate. As of June 30, 1993, the corpus of this trust was valued at $280,539.63. It produces an estimated annual income of $12,588.

The second trust was originally established by the wife's great-great-uncle. At the time of trial, the wife and her two brothers received the income that their mother originally received from this trust. The wife does not have any control over the distributions from this trust, but she receives $20,000 per year in income therefrom and has an undivided two-fifteenths interest in the corpus. Upon the death of a particular aunt, the wife will receive a distribution of her undivided two-fifteenths interest. As of June 30, 1993, the corpus of that trust was valued at $4,662,938.07, making the value of her undivided two-fifteenths interest $621,725.07.

The district court decree awarded the wife the vehicle in her possession, all personal property remaining in the marital residence except for a certain television set, and the real estate owned by the parties in Nebraska and Arkansas, subject to all indebtedness thereon. In addition to the television set, the husband was awarded his pension and the vehicle in his possession. The wife was ordered to pay the husband $7,000 for his portion of the equity in the marital residence.

The foregoing recitation of the relevant facts establishes that while the husband is impoverished and does not have enough to live on, the wife is not impoverished and has more than she needs.

Neb. Rev. Stat. § 42-365 (Reissue 1993) provides:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other . . . as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . .
>
> . . . The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

The next two statutory factors to consider are the duration of the marriage and the contributions to the marriage by each party, including contributions to the care and education of the children and interruption of personal careers or educational opportunities. The parties' marriage lasted almost 40 years. While the wife contends that the husband contributed nothing to the marriage, as exhibited by his alcoholism, gambling, and self-indulgent lifestyle, the record does not support such assertions. The record does show that the husband received treatment for alcoholism and Valium abuse. However, he

testified that he has not drunk since 1973 or 1974. He testified that he and his wife went on occasional trips to Las Vegas, where she played slot machines and he played poker, and that for the last 2 or 3 years he would play poker with some friends, with a "30-cent limit, half a dollar on the last card." He stated that he kept track of his winnings and losses at these poker games for a year, and the net difference between wins and losses was $1.

What is apparent from the record is that the parties raised four children, all of whom graduated from college. In addition, except for the period of time the husband underwent treatment in 1976, both parties were, until they moved to Lincoln, either employed or seeking employment. The wife admitted that the money the husband earned was used to pay the rent, mortgage, and life and medical insurance, and for entertainment and the vehicles. The record simply does not support the wife's claim that the husband contributed nothing to the marriage.

The fourth consideration is the ability of the supported party to engage in gainful employment. At the time of trial, the husband was at the typical age of retirement. He is now at least 67. His primary focus of employment has been in food service, but he testified that his most recent employment in the fast-food operation in Wyoming was too strenuous. Thus, the husband's ability to engage in gainful employment at this time in his life is limited, at best.

In addition to the specific criteria listed in § 42-365, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994); *Gale v. Gale*, 224 Neb. 803, 401 N.W.2d 501 (1987); *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986). Although the wife asserts in her brief that she "possesses no earning capacity which warrants an order that she pay alimony to [the husband]," brief for appellee at 17, she nevertheless receives income from two separate trusts: one provides her $20,000 per year and the other generates over $12,000 per year. While the amount of income generated from the two trusts is not enormous, the disparity in income between her and the husband is great. "Disparity in income or potential

income may partially justify an award of alimony." *Thiltges v. Thiltges*, 247 Neb. 371, 383, 527 N.W.2d 853, 861 (1995).

The wife argues, however, that as the two trusts are nonmarital property, they cannot be taken into consideration as a basis for an award of alimony. She is wrong. In *Hefti v. Hefti*, 166 Neb. 181, 184, 88 N.W.2d 231, 233 (1958), we wrote:

> "In entering a decree for alimony, the court may take into account all of the property owned by the parties at the time of entering the decree, whether accumulated by their joint efforts or acquired by inheritance, and make such award as is proper under all the circumstances disclosed by the record."

Accordingly, the wife's two trust funds, while not subject to division in a property settlement, may properly be taken into account when determining alimony.

The ultimate test for determining correctness in the amount of alimony is reasonableness. *Thiltges, supra*; *Kelly, supra*; *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). Under the circumstances, the alimony award by the district court was less than reasonable and an abuse of judicial discretion, which exists when the reasoning or rulings of a trial judge are clearly untenable such as to unfairly deprive a litigant of a substantial right and a just result. See *Adrian v. Adrian, ante* p. 53, 541 N.W.2d 388 (1995).

The judgment of the Court of Appeals is correct.

AFFIRMED.

FAHRNBRUCH, J., participating on briefs.

LARRY KRAMER, CHARLES VENDITTE, AND RON BRISCOE, IN THEIR OFFICIAL CAPACITIES AS TRUSTEES OF THE CITY OF OMAHA POLICE AND FIREMEN'S RETIREMENT SYSTEM, ET AL., APPELLANTS, V. WILLIAM MISKELL, GEORGE IRELAND, LEE TERRY, AND RAY HASIAK, IN THEIR OFFICIAL CAPACITIES AS TRUSTEES OF THE CITY OF OMAHA POLICE AND FIREMEN'S RETIREMENT SYSTEM, ET AL., APPELLEES.

544 N.W.2d 863

Filed March 22, 1996. No. S-94-225.

1. **Motions to Strike: Pleadings.** Whether a motion to strike a petition should be sustained and whether a petition should be dismissed are questions of law.
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 lower courts.
3. **Pleadings.** In this state, pleading practice is controlled by statute.
4. **Motions to Strike: Demurrer.** A motion to strike is not a substitute for a demurrer.
5. **Supreme Court.** It is not the office of the Nebraska Supreme Court to render advisory opinions.
6. **Judges: Recusal.** A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Reversed and remanded for further proceedings.

John P. Fahey and, on brief, Mary P. Clarkson and Robert W. Kortus, of Broom, Johnson, Fahey & Clarkson, for appellants.

James E. Fellows and Kent N. Whinnery, Deputy Omaha City Attorneys, for appellees Miskell et al.

Gary J. Nedved, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellee Mary Robbins.

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

CAPORALE, J.

Designating their petition as one both in error and in equity, the plaintiffs-appellants, Larry Kramer, Charles Venditte, and Ron Briscoe, in their official capacities as members of the board

of trustees of the City of Omaha Police and Firemen's Retirement System, and Tom Moen and Mark Lloyd, as members and beneficiaries of the system, on their own behalf and on behalf of others similarly situated, seek a declaration that the defendant-appellee Mary Robbins, a member and beneficiary of the system, was wrongly awarded disability pension benefits through the improvident votes of the defendants-appellees William Miskell, George Ireland, Lee Terry, and Ray Hasiak, acting in their official capacities as the other members of the board of trustees. The plaintiffs seek as well to temporarily and permanently enjoin the payment of any benefits to Robbins and also seek an order requiring the system to reconsider the matter in a proceeding free of conflicting interests. Robbins moved to strike the petition in its entirety on the ground that it constituted an impermissible collateral attack on the decision of the board of trustees. The trial judge sustained the motion and, after the plaintiffs elected to stand thereon, dismissed the pleading. Asserting that the trial judge erred in (1) sustaining Robbins' motion, (2) dismissing the petition, and (3) prejudging other aspects of the case, the plaintiffs appealed to the Nebraska Court of Appeals. We, on our own motion, in order to regulate the caseloads of the two courts, removed the matter to this court. We now reverse, and remand for further proceedings.

Whether a motion to strike a petition should be sustained and whether a petition should be dismissed clearly are questions of law. See *State ex rel. Goodnow v. O'Phelan*, 6 Wash. 2d 146, 106 P.2d 1073 (1940) (motions to compel election of remedies, to make more definite and certain, and, under certain circumstances, to dismiss present questions of law). On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Pettit v. State, post* p. 666, 544 N.W.2d 855 (1996).

According to the petition, the system, acting by and through its board of trustees, granted disability pension benefits to Robbins, a firefighter employed by the City of Omaha, the remaining defendant-appellee. The defendant trustees voted to grant the benefits, the plaintiff trustees to deny it.

The petition advances four bases for relief. The first rests on the claim that the award of disability pension benefits was contrary to the rules of the system because the back injury Robbins claims to have suffered did not arise out of and in the course of her employment with the city. The second rests on the claim that in some unspecified way the defendant trustees violated their fiduciary duties to the system. The third rests on the claim that the defendant trustees violated their fiduciary duties through a conflict of interest created by holding positions with the city, which has a financial interest adverse to that of the system because of a civil rights lawsuit pending between Robbins and her supervisor said to arise out of the event resulting in Robbins' claim for disability benefits. The fourth rests on the claim that the defendant trustees violated their fiduciary duty by accepting legal advice from the conflict-tainted attorneys for the city.

In addressing the issues presented in the first assignment of error, the claim that the trial judge erred in sustaining Robbins' motion to strike the petition, it must be recalled as an initial matter that in this state, pleading practice is controlled by statute. *Lammers Land & Cattle Co. v. Hans*, 213 Neb. 243, 328 N.W.2d 759 (1983).

The only pleadings generally allowed are (1) the petition by the plaintiff, (2) the answer or demurrer by the defendant, (3) the demurrer or reply by the plaintiff, and (4) the demurrer to the reply by the defendant. Neb. Rev. Stat. § 25-803 (Reissue 1989). However, two specific statutory provisions permit the filing of a motion to strike: Neb. Rev. Stat. §§ 25-833 and 25-913 (Reissue 1989). The first of these statutes provides:

> If redundant, scandalous or irrelevant matter be inserted in any pleading, it may be stricken out on motion of the party prejudiced thereby; and when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

§ 25-833. The second statute reads: "Motions to strike pleadings and papers from the files may be made with or without notice, as the court or judge shall direct." § 25-913.

We have held that thereunder, a motion to strike may be directed to "a petition filed in violation of a court's order or a rule of practice or procedure prescribed either by statute or by the court in which the petition is filed." *Hecker v. Ravenna Bank*, 237 Neb. 810, 823, 468 N.W.2d 88, 98 (1991).

Robbins' motion does not address any redundant, scandalous, or irrelevant allegations in the petition, nor does it seek to have the petition made more definite and certain. Thus, the motion does not fall within the purview of § 25-833. As there is no indication that the petition was filed in violation of a court order or a rule of practice, neither can it be said that the motion falls within the purview of § 25-913.

Robbins' contention that the plaintiffs' petition presents an impermissible collateral attack on the board's decision is properly raised by a demurrer, not a motion to strike. See Neb. Rev. Stat. § 25-806 (Reissue 1989). Because a motion to strike is not a substitute for a demurrer, *Hecker, supra*, the trial judge clearly erred in sustaining the motion.

The second assignment of error calls into question the trial judge's dismissal of the dual-faceted petition. We are at a loss to understand how striking an entire petition differs from dismissing the action. Can an action exist if there is no petition which initiates it? Obviously not; indeed, to ask that question is to illustrate the folly of fashioning one's own system of pleading.

In reality, the issues argued in connection with this assignment of error in essence concern whether the petition properly pleads a basis for relief in error, whether it properly pleads one or more bases for relief in equity, and whether all such bases may be pled in a single petition by some or all of the plaintiffs against some or all of the defendants. Having determined that the trial judge erred in striking the petition, those issues are not properly before us at this time.

Since it is not the office of this court to render advisory opinions, *State v. McCormick*, 246 Neb. 890, 523 N.W.2d 697 (1994), we decline to consider those issues.

The claim in the third and final assignment of error, that the trial judge erred as well by prejudging other aspects of the case, stems from the view the trial judge is said to have expressed

concerning what might constitute the appropriate record in the case and the view she expressed as to what would be the appropriate ruling in the pending demurrer of the city. The plaintiffs further urge that by virtue of said prejudgments, the trial judge should be disqualified from further participation in this litigation.

The issues presented by this assignment of error are also premature. As there have been no proceedings before the trial judge since she dismissed the petition, there has been neither a need nor an opportunity to first present to the trial judge the question of whether she should recuse herself. See *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995) (recusal motion initially addressed to discretion of judge to whom motion directed). Accord *State v. Richter*, 240 Neb. 913, 485 N.W.2d 201 (1992).

The judgment of the trial judge is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DONNA PETTIT, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLEE.

544 N.W.2d 855

Filed March 22, 1996. No. S-94-797.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Findings of fact made by the Workers' Compensation Court have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.

3. **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.
4. **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.
5. **Employer and Employee: Independent Contractor: Master and Servant: Contracts.** Ordinarily, the party's 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. By stating "where the inference is clear," this court means that there can be no dispute as to pertinent facts pertaining to the contract and the relationship of the parties involved and only one reasonable inference can be drawn therefrom.
6. **Workers' Compensation: Jurisdiction: Proof.** The plaintiff in Workers' Compensation Court must prove that she or he has employee status to invoke the jurisdiction of the court.
7. **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.
8. ____: ____. The right of control is the chief factor distinguishing an employment relationship from that of an independent contractor.
9. **Employer and Employee: Independent Contractor: Contracts.** The employer of an independent contractor may, without changing the status, exercise such control as is necessary to ensure performance of the contract in accordance with its terms.
10. **Workers' Compensation: Independent Contractor: Words and Phrases.** An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used. Such a person is not an employee within the meaning of the workers' compensation statutes.
11. **Employer and Employee: Independent Contractor.** The less skill required by a job, the greater the indication that the worker is an employee and not an independent contractor.

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 reversed, and cause remanded with direction.

William J. Ross, of Ross, Schroeder, Brauer & Romatzke, for appellant.

Don Stenberg, Attorney General, and Lynne R. Fritz for appellee.

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

FAHRNBRUCH, J.

The issue in this litigation is whether Donna Pettit, a chore provider of an aged and disabled individual under the Medicaid Waiver Program, was an employee of the Nebraska Department of Social Services (DSS) when she injured her lower back while providing chore services.

The Workers' Compensation Court found that Pettit did not prove that she was a DSS employee. Upon appeal, the Nebraska Court of Appeals reversed the Workers' Compensation Court and held that, as a matter of law, Pettit was a DSS employee when she was injured. *Pettit v. State*, 95 NCA No. 28, case No. A-94-797 (not designated for permanent publication).

The record fails to reflect that there was a clear inference as to whether Pettit was an employee or an independent contractor when she was injured. As a result, we reverse the holding of the Court of Appeals, because the employee-contractor issue was a question of fact and not a matter of law. We hold that there was sufficient competent evidence in the record to support the Workers' Compensation Court's determination that Pettit was not an employee of DSS.

ASSIGNMENTS OF ERROR

In substance, DSS claims that the Court of Appeals erred (1) in determining, as a matter of law, that Pettit was a DSS employee; (2) in failing to hold that the Workers' Compensation Court was not clearly wrong in finding that Pettit had failed to

meet her burden of proving that she was a DSS employee; and (3) in failing to follow precedent established in *State v. Saville*, 219 Neb. 81, 361 N.W.2d 215 (1985).

STANDARD OF REVIEW

A judgment, order, or award of the Worker's 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). See, also, *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995).

Findings of fact made by the Workers' Compensation Court have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. See *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995). 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. *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995).

On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts. *Stansbury v. HEP, Inc.*, 248 Neb. 706, 539 N.W.2d 28 (1995).

Ordinarily, the party's 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. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995); *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979). By stating "where the inference is clear," this court means that there can be no dispute as to pertinent facts pertaining to the contract and the relationship of the parties

involved and only one reasonable inference can be drawn therefrom. See, *Vontress v. Ready Mixed Concrete Co.*, 170 Neb. 789, 104 N.W.2d 331 (1960); *Mansfield v. Andrew Murphy & Son*, 139 Neb. 793, 298 N.W. 749 (1941).

FACTS

In July 1991, Pettit began providing chore services for Virginia Poels, a DSS client, as part of the Medicaid Waiver Program. Dorelle Wilson, a DSS resource developer for the Medicaid Waiver Program, testified that the Medicaid Waiver Program allowed low-income people to be cared for in their homes rather than in nursing homes. Twylla Stevens, a DSS case manager for the Medicaid Waiver Program, testified that DSS' role is one of an advocate between the client and the provider, ensuring that state and federal criteria and health and safety needs are met.

Wilson testified that in searching for chore providers, she would "tap everything that [she] could" and one time even "knocked door to door in a trailer park" recruiting chore providers.

Pettit held a respite care certificate from the Good Samaritan Hospital in Kearney. Pettit had previously worked various jobs, which included taking care of elderly people. None of her previous jobs of caring for the elderly were through DSS; rather, Pettit hired herself out directly to elderly clients.

Before she was engaged as a chore provider, Pettit talked to Poels by telephone. Poels approved of Pettit as her chore provider. Before providing services for a client, the chore provider must be approved by the client. The client has the authority to fire the chore provider.

Wilson informed Pettit that Pettit was an independent contractor and that she would not receive sick leave, vacation leave, or insurance. Wilson further informed Pettit that Poels was her employer. Stevens testified that she specifically told Pettit that Poels, not the State, was her boss and that Pettit was not covered by workers' compensation.

Pettit's 1992 W-2 form reflects that no federal income tax was withheld from Pettit's income. Poels filed with the Internal Revenue Service an Employer Appointment of Agent form

which designated her as an employer and DSS as her agent. Pettit's W-2 form designated Poels as Pettit's employer.

Pettit's job tasks were set out in a signed agreement between Pettit and DSS. The agreement did not allow Pettit to subcontract and included the required number of hours for Pettit to work at the accompanying pay rate of $5 per hour. In the agreement, Pettit agreed to provide service only as authorized in accordance with DSS standards, to apply to the client the same standards applied to private-paying persons, to permit monitoring and evaluation from government officials, to respect the client's right to confidentiality, and to accept responsibility for the client's safety and property. DSS provided Pettit with a handbook, which included defined activities to be carried out by Pettit. The DSS manual specified that Pettit would be responsible for providing supplies if the client did not provide them. The record reflects that Poels furnished the supplies for Pettit to clean Poels' home.

Pettit performed her work at Poels' home in Kearney. She began her chores between 7:30 and 8 a.m. and worked until all chores for that day were completed. Generally, Pettit's tasks would include assisting Poels (1) from her bed to her wheelchair, (2) in the bathroom, (3) in dressing and undressing, (4) in cleaning her home, (5) in grocery shopping and other errands, and (6) in routine walks. Pettit was also required to make certain that Poels took her medication. DSS informed Pettit of what needed to be performed. Poels and Pettit set up the daily routine of how to get the tasks accomplished. Poels generally scheduled and arranged her own appointments and errand trips. Stevens would make suggestions regarding certain tasks, such as the making of doctor appointments, and would visit with Pettit and Poels once a month. On one occasion, DSS reprimanded Pettit for leaving Poels alone while Poels was in the bathtub. When Pettit could not attend work, she notified DSS, which told Pettit to find a replacement.

To receive her salary, Pettit would complete a work calendar of the hours she worked and rate of pay and send it to Stevens. The calendar was signed by Pettit and Poels. Pettit was authorized a maximum of 40 hours of work per week, and she was responsible for keeping track of her hours. DSS paid Pettit

by mail. Pettit also received additional direct payment from Poels, which was a monthly set amount that the client was required to pay the provider. Poels paid Pettit approximately $360 per month in 1991 and approximately $390 per month in 1992.

On August 6, 1992, DSS terminated Pettit's employment because Poels' health and safety needs could no longer be met within the constraints of the Medicaid Waiver Program. Because Poels paid Pettit in advance, Pettit reimbursed Poels $300 for time that she had not worked.

Before her termination, Pettit suffered a herniated fifth lumbar disk while attempting to lift Poels into her wheelchair. Pettit sought workers' compensation from DSS as a result of the injury. In her petition, the issues in dispute were (1) whether Pettit was an employee of DSS, (2) whether Pettit was entitled to temporary total disability benefits, (3) whether Pettit had incurred permanent physical impairment or a decrease in her earning capacity, and (4) whether Pettit was entitled to additional compensation and attorney fees. The Workers' Compensation Court dismissed her petition, finding that Pettit had failed to prove by a preponderance of the evidence that she was a DSS employee. A Workers' Compensation Court review panel found that the trial court's findings were not clearly wrong and affirmed the dismissal.

Pettit appealed to the Court of Appeals. In addressing whether Pettit was an employee of DSS or an independent contractor, the Court of Appeals held that the right of control is the chief factor distinguishing an employer-employee relationship from that of an employer and independent contractor. The court found that the control by DSS over Pettit predominated all other facts and that Pettit was an employee of DSS as a matter of law.

DSS petitioned for further review, and we granted its petition.

ANALYSIS

Whether Pettit was an independent contractor or an employee of DSS presented the Workers' Compensation Court with a jurisdictional question. The plaintiff in Workers' Compensation

Court must prove that she or he has employee status to invoke the jurisdiction of the court. See *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991).

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. *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995).

The right of control is the chief factor distinguishing an employment relationship from that of an independent contractor. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995). Pettit was recruited to work for Poels by DSS. However, for Pettit to work for Poels was contingent upon Poels' approval. DSS could and did terminate Pettit when the Medicaid Waiver Program could not serve Poels' needs. The record, however, reflects that Poels also had control over Pettit and authority to terminate her services. The agreement between DSS and Pettit provided that Pettit must provide services in accordance with DSS standards, and the DSS' handbook defined the activities that Pettit needed to carry out. Pettit was observed once a month by DSS and was reprimanded for leaving Poels alone while Poels was in the bathtub. It was Pettit and Poels who set up the daily routine of how to accomplish tasks involving Poels, and it was Poels who arranged her schedule for appointments and errands. While DSS had control over the essential criteria that Pettit must meet, Pettit and Poels had control over the daily

routine of how to meet DSS' criteria. The employer of an independent contractor may, without changing the status, exercise such control as is necessary to ensure performance of the contract in accordance with its terms. *Larson v. Hometown Communications, Inc., supra.*

The agreement between DSS and Poels does not clearly denominate the relationship between the parties, and the record reflects a factual dispute as to whether DSS had such control over Pettit as to create a DSS employer-employee relationship. Clearly, more than one reasonable inference can be drawn from the facts as to whether Pettit was an employee or an independent contractor. Thus, the Court of Appeals erred in finding that Pettit was an employee as a matter of law.

Regarding the criterion of control, the record reflects that Poels had control over the hiring and firing of Pettit and that Pettit and Poels had control over the specific daily tasks. An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used. Such a person is not an employee within the meaning of the workers' compensation statutes. *Hemmerling v. Happy Cab Co., supra.*

The second criterion is whether Pettit was engaged in a distinct occupation or business. The record reflects that Pettit held a respite care certificate from the Good Samaritan Hospital in Kearney. Among her various jobs, she took care of elderly people. Her work in providing care for the elderly was not through DSS, but through direct agreements between Pettit and the elderly clients. Thus, Pettit had engaged in the distinct business of providing care for the elderly.

The third criterion concerns whether the DSS chore provider is an occupation done under the direction of the employer or by a specialist without supervision. As stated earlier, the record reflects that DSS provides the chore provider with general direction requiring the provider to meet government standards of care. However, the record also reflects that there is very little direct supervision of a chore provider by DSS. In fact, DSS only observed Pettit once a month. Therefore, Pettit, while

operating under DSS directives, was supervised more by Poels than by DSS.

The fourth criterion concerns the skill required by the occupation. The less skill required by a job, the greater the indication that the worker is an employee and not an independent contractor. *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995). Although Pettit had specific training and skills at providing care to the elderly, the record is not clear as to whether such skills were required. The record reflects that DSS would go to whatever resources necessary, including door-to-door inquiries, to find chore providers. Whether DSS would recruit individuals with no experience is not clear from the record. However, in the case at bar, Pettit had specialized training, providing an inference that she was an independent contractor.

The fifth criterion concerns who supplied the tools and the place for work. It is beyond dispute that Poels provided the supplies and that the work was performed at Poels' residence. According to the DSS manual, if Poels did not supply necessary tools, it would have been Pettit's responsibility to supply those tools. Clearly, under this criterion, Pettit's status appeared to be that of an independent contractor.

The sixth criterion regards the length of time for which Pettit was employed. Pettit's job was designed only toward accomplishing the sole task of being a chore provider for Poels. Thus, Pettit's job was terminated when Poels' condition deteriorated to the point that the Medicaid Waiver Program could no longer meet Poels' needs. That her job was of a short duration for the accomplishment of specific tasks provides the inference of an independent contractor.

The seventh criterion deals with whether Pettit was paid by the time she expended or by the job. Pettit was paid by the hour. Specifically, DSS paid Pettit $5 per hour. Poels also paid Pettit in advance. The record reflects that Poels paid Pettit by the time Pettit worked, because Pettit reimbursed Poels for time she had not worked after her job was terminated. Therefore, the seventh criterion weighs in favor of Pettit as an employee.

The eighth criterion concerns whether the chore provider service of the Medicaid Waiver Program is part of DSS' regular

business. DSS is not in the business of cleaning houses or transporting persons to doctors or stores, but, rather, it is in the business of paying for the services pursuant to welfare programs. See *State v. Saville*, 219 Neb. 81, 361 N.W.2d 215 (1985).

The ninth criterion concerns whether Pettit and DSS believed they were creating an agency relationship. The record reflects that DSS viewed its role as being an advocate between the client and the chore provider. DSS informed Pettit that she was an independent contractor and that Poels was her boss. Pettit's W–2 form related that Poels was Pettit's employer. The agreement between DSS and Pettit did not designate Pettit as employee or independent contractor. However, it is clear from the record that both parties understood that Pettit was an independent contractor.

The final criterion concerns whether DSS is in business. DSS is in the business of distributing funds, part of which come from the federal government and part of which are matching funds provided by the State, in order to permit welfare recipients to obtain needed services for which they could not otherwise pay. See *State v. Saville, supra*. As stated earlier, DSS is not in the regular business of providing chore services to elderly clients.

The only factor clearly favoring a finding that Pettit was an employee was that she was paid by the hour. The issue of control and all other relevant factors reflect that the trial court was not clearly wrong in finding that Pettit did not prove that she was an employee of DSS.

Because Pettit did not prove by a preponderance of the evidence that she was a DSS employee, the Workers' Compensation Court lacked jurisdiction to award workers' compensation benefits to her. As a result, we need not address DSS' third assignment of error.

CONCLUSION

In the case at bar, the facts were in dispute as to the relationship between the parties and more than one reasonable inference could be drawn. Pettit's status as an employee or an independent contractor was a question of fact, and the Court of Appeals erred in treating the issue as a matter of law. The

Workers' Compensation Court was not clearly wrong in finding that Pettit did not meet her burden of proving that she was an employee of DSS. We reverse the holding of the Court of Appeals and remand the cause to that court with direction to affirm the ruling of the trial court.

REVERSED AND REMANDED WITH DIRECTION.

RICHARD E. COX, APPELLEE, V. FAGEN INC. AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY, APPELLANTS.

545 N.W.2d 80

Filed March 22, 1996. No. S-95-673.

1. **Workers' Compensation: Words and Phrases.** Under the provisions of Neb. Rev. Stat. § 48-101 (Reissue 1993), an injury is accidental if either its cause was accidental in character or its effect was unexpected or unforeseen, it happened suddenly and violently, and the occurrence produced at the time objective symptoms of injury.
2. **Workers' Compensation: Proof: Words and Phrases.** There are two components to the "arising out of and in the course of employment" test; the term "arising out of" describes the accident and its origin, cause, and character, that is, whether it resulted from the risks arising within the scope of the employee's job; the term "in the course of" refers to the time, place, and circumstances surrounding the accident. The two phrases are conjunctive, and in order to recover under the Nebraska Workers' Compensation Act, a claimant must establish by a preponderance of the evidence that both conditions exist.
3. **Workers' Compensation: Proof.** The "in the course of" requirement tests the work connection as to the time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of employment and in the course of an activity whose purpose is related to employment.
4. **Workers' Compensation: Words and Phrases.** The "arising out of" employment requirement is primarily concerned with causation of an injury.
5. **Proximate Cause: Trial.** Determination of causation is ordinarily a matter for the trier of fact.
6. **Workers' Compensation: Appeal and Error.** Factual determinations by the Nebraska Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous.

7. **Workers' Compensation.** Injuries arising out of risks or conditions personal to the claimant do not arise out of the employment unless the employment contributes to the risk or aggravates the injury. When the employee has a preexisting physical weakness or disease, this employment contribution may be found in placing the employee in a position which precipitates the effects of the condition by strain or trauma.
8. ____. Preexisting disease or infirmity of the employee does not disqualify a claim under the "arising out of employment" requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought.
9. **Workers' Compensation: Proof.** In a workers' compensation case involving a preexisting condition, the claimant must prove by a preponderance of evidence that the claimed injury or disability was caused by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability. Such claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition no disability would have resulted.
10. **Workers' Compensation.** Neb. Rev. Stat. § 48-121(2) (Reissue 1993) of the Nebraska Workers' Compensation Act provides in part that for disability partial in character, the compensation shall be 66⅔ percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter; the statute does not provide for consideration of past wage history, whether the claimant was employed in a temporary position or otherwise.
11. ____. Whether a workers' compensation claimant has sustained a disability which is total or partial and which is temporary or permanent is a question of fact.
12. ____. Generally, whether a workers' compensation claimant has reached maximum medical improvement is a question of fact.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Douglas J. Peterson and Samantha B. Trimble, of Knudsen, Berkheimer, Richardson & Endacott, for appellants.

James R. Harris and Lee S. Loudon, of Harris Law Offices, for appellee.

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

PER CURIAM.

The Nebraska Workers' Compensation Court ordered the defendants-appellants, the employer Fagen Inc. and its workers' compensation carrier, St. Paul Fire and Marine Insurance Company, to pay the plaintiff-appellee, the employee Richard

E. Cox, benefits as detailed later herein because of injuries Cox sustained in putting on a pair of coveralls while at his workplace. The defendants thereupon appealed to the Nebraska Court of Appeals, arguing, in summary, that the compensation court erred in (1) concluding that Cox suffered a compensable injury, (2) calculating his wage rate, and (3) determining the benefits due him. On our own motion, we removed the appeal to this court.

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 judgment, order, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Pettit v. State, ante* p. 666, 544 N.W.2d 855 (1996); *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995); *Buckingham v. Creighton University*, 248 Neb. 821, 539 N.W.2d 646 (1995); Neb. Rev. Stat. § 48-185 (Reissue 1993).

FACTS

Cox began working for Fagen in September 1993 as an electrician. His duties included lifting large amounts of wire and pulling the wire through pipes, tasks which required frequent bending, walking, twisting, and climbing.

On December 27, 1993, Cox drove to a jobsite to check a temporary power board. When he arrived at the building, he got out of the truck, went inside, took off his one-piece coveralls, and inspected the board. Afterward, he went to put his coveralls back on; as he lifted his leg to do so, he felt a sharp pain in his back and fell against some crates. Cox testified that he had lifted his leg 3 to 3½ feet to put on his coveralls and that this process involved bending and twisting. A fellow employee came upon Cox after his injury and drove him to the office, where the injury was reported. Cox was then taken to a hospital emergency room for treatment.

Following his hospital treatment, Cox sought treatment from an orthopedist, who ordered a study of Cox's lumbar area, which was performed on January 31, 1994. The study indicated some bulging of two lumbar disks and a small protrusion of another lumbar disk which was touching the left anterior aspect of the thecal sac. Because the study indicated that Cox could have nerve trouble and was not getting any better with the treatment provided, the orthopedist referred Cox to a neurologist. The neurologist advised the orthopedist that Cox had a nerve root irritation in the low back and that the study was strongly suggestive of a herniated disk at L1-2. The orthopedist considered the neurologist's findings to be significant in that they probably indicated the cause of Cox's pain.

Prior to Cox's workplace injury, he had seen a chiropractor for treatment for pain in his low back and left leg. The chiropractor treated Cox from June 18 through July 6, 1992, and on March 10 and May 3 and 17, 1993. The orthopedist testified that the injuries Cox reported to the chiropractor were the same injuries that Cox sustained on December 27, 1993.

In March 1994, Fagen offered Cox what Fagen considered to be a light-duty job; as he needed the money, Cox decided to try it, despite the fact that the orthopedist had advised him to remain off work until May 31. On March 29, 1994, Cox reported to work. His duties included "terminating motors," an activity which required bending and twisting on a constant basis. After that day's work, Cox experienced pain in his back and had trouble sleeping, but reported to work the next day. There is conflicting testimony as to what then transpired, but it is undisputed that Cox did not return to work thereafter. Cox testified that after reporting to work the second day, he asked for a job that did not require as much twisting and bending, but that his request was denied and he went home. A former Fagen employee stated that the reason Cox wanted a different job was because it was too cold to terminate motors outside. On March 30, Cox wrote Fagen a letter offering to return if there was light-duty work, but never received a response.

The vocational rehabilitation analysis agreed to by Cox and Fagen, and subsequently approved by the compensation court,

called for Cox to attend school at Southeast Community College, pursuing a degree in electronics service technology.

The parties also agreed that an analysis of Cox's loss of earning capacity should be made. In performing the analysis, it was assumed that Cox was earning $600 per week at the time of his injury. Based upon the assumption that Cox was receiving $600 per week, the analyst concluded that Cox had suffered a 60-percent loss of earning capacity because of the injury he suffered on December 27, 1993. (The compensation court found that at the time of the injury, Cox was receiving an average weekly wage of $670.23.)

COMPENSABILITY OF INJURY

In urging that Cox did not sustain a compensable injury, the defendants assert that the injury did not result from an accident arising out of and in the course of employment, as required by Neb. Rev. Stat. § 48-101 (Reissue 1993). See, *Johnson v. Holdrege Med. Clinic, ante* p. 77, 541 N.W.2d 399 (1996); *Mauser v. Douglas & Lomason Co.*, 192 Neb. 421, 222 N.W.2d 119 (1974).

We have held that for purposes of the foregoing statute, an injury is accidental if either its cause was accidental in character or its effect was unexpected or unforeseen, and the injury happened suddenly and violently. *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d 157 (1980); *Wolfe v. American Community Stores*, 205 Neb. 763, 290 N.W.2d 195 (1980); *Eliker v. D. H. Merritt & Sons*, 195 Neb. 154, 237 N.W.2d 130 (1975). The occurrence must also produce at the time objective symptoms of injury. *Union Packing Co. v. Klauschie*, 210 Neb. 331, 314 N.W.2d 25 (1982). In addition,

> [t]he claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment.

Neb. Rev. Stat. § 48-151(2) (Reissue 1993).

Here, there is no question that the act of putting on his coveralls produced in Cox an effect which was unexpected or

unforeseen, which happened suddenly and violently, and which produced at the time objective symptoms of injury. Moreover, there is sufficient competent evidence in the record to support the trial judge's finding that Cox's injury was in fact caused by his employment. Thus, the evidence clearly establishes that an accident occurred, as that term is defined in § 48-101.

The question, then, is whether the accident arose out of and in the course of Cox's employment with Fagen. As recently reaffirmed, there are two components to the "arising out of and in the course of employment" test. The term "arising out of" describes the accident and its origin, cause, and character, that is, whether it resulted from the risks arising within the scope of the employee's job. The term "in the course of" refers to the time, place, and circumstances surrounding the accident. The two phrases are conjunctive, and the claimant must establish by a preponderance of the evidence that both conditions exist. *Johnson, supra*; *Union Packing Co., supra*.

The "in the course of" requirement has been defined as testing the "work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment." *Moore v. The Sisk Co.*, 216 Neb. 451, 454, 343 N.W.2d 767, 769 (1984). In his treatise, Professor Arthur Larson notes that the "course of employment embraces all activities connected with changing clothes before and after work . . . . Similar acts during work hours are also of course covered . . . ." 1A Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 21.61 at 5-54 and 5-56 (1995). As Cox was putting on the coveralls during work hours, his injury occurred in the course of employment. As a consequence, this requirement is satisfied.

That brings us to the "arising out of" requirement, which is primarily concerned with causation. Determination of causation is ordinarily a matter for the trier of fact. *Tarvin v. Mutual of Omaha Ins. Co.*, 238 Neb. 851, 472 N.W.2d 727 (1991); *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). Factual determinations by the compensation court will not be set aside on appeal unless such

determinations are clearly erroneous. *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995); *Aken v. Nebraska Methodist Hosp.*, 245 Neb. 161, 511 N.W.2d 762 (1994). In this case, the compensation court determined that the injury arose out of Cox's employment.

On appeal, the defendants assert the compensation court erred in deciding this causation issue against them. The defendants find significant the fact that Cox had a preexisting back condition and that when Cox sustained his injury, he was engaged in what the defendants termed "everyday activity." Even if we were to agree with the defendants' characterization that Cox was engaged in "everyday activity," the defendants nonetheless ask this court to ignore our prior holdings which are consistent with a majority of jurisdictions that have considered the issue.

Professor Larson describes situations such as Cox's as mixed risks—that is, where risks personal to the employee, such as a preexisting back condition, mix with those risks distinctively associated with employment. "The law does not weigh the relative importance of the two causes, nor does it look for primary and secondary causes; it merely inquires whether the employment was a contributing factor. If it was, the concurrence of the personal cause will not defeat compensability." 1 Larson & Larson, *supra*, § 7.40 at 3-14.

> Injuries arising out of risks or conditions personal to the claimant do not arise out of the employment unless the employment contributes to the risk or aggravates the injury. When the employee has a preexisting physical weakness or disease, this employment contribution may be found . . . in placing the employee in a position which [precipitates] the effects of the condition by strain or trauma.

Id., § 12.00 at 3-349. "Preexisting disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought." *Id.*, § 12.21 at 3-381.

Moreover, in a case where a claimant with a history of back problems reinjured his back while moving a refrigerator for his employer, this court held:

> In a workers' compensation case involving a preexisting condition, the claimant must prove by a preponderance of evidence that the claimed injury or disability was caused by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability. [Citations omitted.] However, a workers' compensation claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition no disability would have resulted.

Miner v. Robertson Home Furnishing, 239 Neb. 525, 531, 476 N.W.2d 854, 859 (1991).

We do not accept the defendants' characterization that Cox was performing "everyday activity" when he sustained his injury. Putting on coveralls over workboots and other heavy clothing at a jobsite is clearly not an everyday nonemployment activity. However, even if Cox's injury would have been sustained during what could fairly be considered "everyday activity," if this everyday activity constituted a risk contributed by employment, and the activity combined with a preexisting condition to cause injury, then compensation is due.

It cannot be said that the compensation court was clearly erroneous in the determination that Cox's injury was caused by his employment. It was Cox's employment which put him in the position which precipitated the trauma he suffered. At a minimum, Cox's employment combined with his preexisting condition to produce the disability for which he sought compensation. The medical evidence is such that the compensation court as the finder of fact could reasonably conclude that the act of putting on the coveralls caused the injury. In view of that medical evidence, it cannot be said that the compensation court erred in finding that Cox's injury arose out of his employment with Fagen.

WAGE RATE

In contending that the compensation court erred in failing to consider Cox's past wage history when calculating his loss of earning capacity benefits, the defendants argue that Cox's position with Fagen was only temporary and that, as such, his past wage history, in which he made less than he was making at Fagen, should have been considered.

Neb. Rev. Stat. § 48-121(2) (Reissue 1993) of the Nebraska Workers' Compensation Act provides in pertinent part: "For disability partial in character . . . the compensation shall be sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter . . . ." The statute does not provide for consideration of past wage history, whether the claimant was employed in a temporary position or otherwise.

The compensation court therefore did not err in considering only the wages Cox was receiving at the time of his injury; to do otherwise would have been to contradict the explicit wording of the statute.

BENEFITS DUE

Finally, the defendants claim that the compensation court erred in concluding that Cox was entitled to temporary total disability benefits after March 30, 1994, and to permanent partial disability benefits and vocational rehabilitation.

In urging that Cox was not entitled to temporary total disability benefits after March 30, 1994, the defendants point out that Fagen offered Cox a position that he could return to on March 29, 1994, which was within his physical limitations and that Cox quit that position the following day, thereby waiving any future claim for temporary total disability from that date.

The compensation court found that Cox continued to be temporarily totally disabled until May 25, 1994, the day he was released to work by the orthopedist. (Actually, the orthopedist stated in his deposition that he did not release Cox to work until May 31, 1994.) Whether a workers' compensation claimant has sustained a disability which is total or partial and which is temporary or permanent is a question of fact. *Schmid v. Nebraska Intergov. Risk Mgt. Assn.*, 239 Neb. 412, 476 N.W.2d

243 (1991); *Roan Eagle v. State*, 237 Neb. 961, 468 N.W.2d 382 (1991). Generally, whether a worker has reached maximum medical improvement is a question of fact. *Foreman v. State*, 240 Neb. 716, 483 N.W.2d 752 (1992). In addition, whether the job offered by Fagen to Cox was within Cox's physical limitations is also a question of fact.

The evidence adduced showed that the orthopedist did not release Cox to work until May 25, 1994, and Cox himself testified that the job provided him by Fagen was too strenuous, because it involved too much bending, twisting, and walking. He also testified that he requested a different position without such strain, but when such request was denied, he left. Based on this evidence, the compensation court's findings with respect to the period of Cox's temporary total disability cannot be said to be clearly erroneous.

The defendants also urge that "[a]ny future loss of earning capacity should be considered de minimus [sic] in light of the fact that [Cox] had the opportunity to return to [Fagen] earning the same rate of pay as an electrician." Brief for appellants at 31.

Thus, according to the defendants, the compensation court erred in awarding Cox permanent partial disability benefits and vocational rehabilitation. But as stated earlier, whether Fagen offered Cox a job on March 29, 1994, that was within his physical limitations was a question of fact. Implicit in the compensation court's finding that Cox was temporarily totally disabled through May 25, 1994, is that Cox did not have the opportunity to return to Fagen at the same rate of pay as an electrician. The compensation court therefore did not err in awarding Cox the benefits it awarded.

CONCLUSION

For the foregoing reasons, the award of the compensation court is affirmed. Cox is awarded the sum of $2,500 to be applied to the services of his attorneys in this court, including the appearance at oral argument.

AFFIRMED.

CAPORALE, J., dissenting.

I agree that the plaintiff employee, Richard E. Cox, suffered an injury as the consequence of an accident which arose "in the course of" his employment with the defendant employer, Fagen Inc. However, I respectfully dissent, because by characterizing the putting on of one's coveralls as something other than an everyday activity and oversimplifying the issues concerning the cause of the injury, the majority erroneously concludes that the evidence supports as well the finding of the Workers' Compensation Court that the accident also arose "out of" the employment. In doing so, the majority has transformed a system designed to compensate work-caused injuries into one which, except for heart attacks and strokes, compensates any injury which manifests itself at work, regardless of the cause.

In heart attack cases, *Leitz v. Roberts Dairy*, 237 Neb. 235, 465 N.W.2d 601 (1991), and stroke cases, *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984), where we recognize there is an element of personal risk involved, we have utilized the split test of legal and medical causation discussed in 1A Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 38.83(a) (1995). This test embraces two elements: (1) legal cause and (2) medical cause. *Leitz* states at 237 Neb. at 241, 465 N.W.2d at 605, quoting Larson, *supra*: " 'Under the legal test, the law must define what kind of exertion satisfies the test of "arising out of the employment." Under the medical test, the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused this [injury].' " See, also, *Smith, supra*. But see *Morton v. Hunt Transp.*, 240 Neb. 63, 480 N.W.2d 217 (1992) (disapproved split test in cases of carpal tunnel syndrome, as syndrome shares none of difficulties of etiology surrounding heart attacks). In *Sandel v. Packaging Co. of America*, 211 Neb. 149, 154-55, 317 N.W.2d 910, 914 (1982), we observed:

> "The exertion 'greater than nonemployment life' test has been applied by this court *only* in cases involving heart attacks allegedly caused by the activities or stress of employment. . . .

> "The rationale for the rule is discussed at some length in *Sellens* [*v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980)]. Where a person suffers from a preexisting condition which he claims is aggravated by his employment, he has an increased burden of proving causation. The exertion 'greater than nonemployment life' test is simply an application of the increased burden of proof required in preexisting condition cases to the unique problems of proving causation of a myocardial infarction. We find no reason to extend the rule to other cases where the proof of causation is not usually as complex."

(Emphasis in original.)

However, the enhanced degree of proof in preexisting condition cases was expressly overruled in *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). In addition, this court stated in *Leitz, supra*, that the "exertion greater than nonemployment life" test is not an application of the enhanced degree of proof, but, rather, a function of proximate or legal causation.

Larson's treatise correctly urges use of the split test of legal and medical causation in areas other than heart attack cases, observing that "what is being attempted here is a rule that will have general validity and practicality. . . . [T]here are cases on the books that make one wonder whether the cerebral hemorrhage or disc protrusion might not have been just as much the result of natural progression as any coronary thrombosis." 1A Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 38.83(e) at 7-340 (1995).

Thus, the split test of legal and medical causation is properly utilized whenever an employee contributes some personal element of risk to the performance of a task involved in daily living.

> " '[W]hen the employee contributes some personal element of risk . . . the employment must contribute something substantial to increase the risk. The reason is that the employment risk must offset the causal contribution of the personal risk. . . .' " . . . This is necessary to break any causal connection between the natural progression of the preexisting condition or disease

> and the injury at the workplace. Otherwise, the fact that the . . . injury occurred at work would be strictly fortuitous.

Leitz, 237 Neb. at 242, 465 N.W.2d at 606.

A number of courts have held that everyday activities performed at work which trigger preexisting conditions do not satisfy the legal causation requirement. *United Parcel Service v. Fetterman*, 230 Va. 257, 336 S.E.2d 892 (1985) (bending over to tie shoelace); *Southern Bell Tel. & Tel. Co. v. McCook*, 355 So. 2d 1166 (Fla. 1977) (employee, while sitting on toilet, bent over to pick up toilet tissue); *Barrett v. Herbert Engineering, Inc.*, 371 A.2d 633 (Me. 1977) (walking at normal gait to retrieve tools); *Board of Trustees v. Industrial Com.*, 44 Ill. 2d 207, 254 N.E.2d 522 (1969) (turning in chair); *Market Food Distrib., Inc. v. Levenson*, 383 So. 2d 726 (Fla. App. 1980) (bending over to pull out desk drawer); *Davis v. Houston General Ins. Co.*, 141 Ga. App. 385, 233 S.E.2d 479 (1977) (putting on coat); *Hansel & Gretel Day Care v. Indus. Comm'n*, 215 Ill. App. 3d 284, 574 N.E.2d 1244 (1991) (arising from chair); *Hopkins v. Industrial Comm'n*, 196 Ill. App. 3d 347, 553 N.E.2d 732 (1990) (turning in chair).

The basis for these holdings is that risk of injury in engaging in the various everyday activities by the injured claimants was not in any way peculiar to or increased by the employment, and the injuries resulted from hazards to which the employees would have been equally exposed apart from the employment or a risk personal to the employees. Thus, it is clear that the split test of legal and medical causation is the proper test to be applied in cases of injury resulting during the performance of everyday activities at work.

In order to satisfy the split test, the employee must first establish legal causation. "[T]he employee must prove that he or she suffered some work-related stress or exertion which is greater than that in the ordinary nonemployment life of the employee or any other person." *Leitz v. Roberts Dairy*, 237 Neb. 235, 242, 465 N.W.2d 601, 606 (1991). " ' "Note that the comparison is not with *this employee's* usual exertion *in his employment*, but rather with the exertions present in the normal

non-employment life of this or any other person." ' " (Emphasis in original.) *Id.*

In addition to establishing legal causation, the employee must establish medical causation. "[M]edical causation is established by a showing by the preponderance of the evidence that the employment contributed in some material and substantial degree to cause the injury." *Id.* at 244, 465 N.W.2d at 607.

The compensation court impliedly found that Cox brought an element of personal risk to the activity in that he had a preexisting back condition, specifically noting that Cox had been previously treated by the chiropractor and that the orthopedist stated that the injuries he treated after the accident were the same as the injuries the chiropractor treated. The compensation court went on to state that

> [the orthopedist] diagnoses the plaintiff's injury as a lumbar strain with nerve root irritation and opines that said injury and resulting permanent impairment of 7 percent and physical restrictions were caused by the accident of December 27, 1993 . . . . The Court finds from said evidence that the plaintiff did suffer an injury to his back as a result of an accident as defined by § 48-151(2) on December 27, 1993.

It is true that factual determinations by the compensation court will not be set aside on appeal unless such determinations are clearly erroneous. *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995); *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). However, as in any other case, an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Pettit v. State, ante* p. 666, 544 N.W.2d 855 (1996); *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995); *McGowan, supra.*

While the evidence supports a factual finding that Cox's injury was caused by the December 27 accident in the medical sense, that does not necessarily mean that the evidence is such as to establish a sufficient nexus between the injury and work-related activity so as to prove that the work-related activity was the proximate or legal cause of the injury.

Noteworthy in this regard is the orthopedist's testimony:

> Q. Doctor, if I came to you today and I said, Doctor, I went to put my suit on this morning and I put on my suit pants and I lifted up my left leg and I just felt like I got a stabbing pain in the low back, how would that history provide you with any diagnostic benefit?
>
> A. Well, I think the history that you got the back pain would give me a clue and I guess I would evaluate you from that standpoint on. I think people can get pinched nerves in their back from a variety of things that, you know, we don't realize that they put any stress on our backs.
>
> Q. So a variety of things could be several just everyday activities?
>
> A. Everyday activities.
>
> Q. Lifting your leg, crossing your leg, things of that nature?
>
> A. That's right.
>
> Q. Would it be significant to you if I — As we talked about this and you were trying to diagnose the cause of my pain in the low back, would it be significant to you if I said and, Doctor, you probably should know that about seven months earlier, I was experiencing low back pain and I've been treated by a chiropractor?
>
> A. I think that would be important, yes.
>
> Q. Why would that be important?
>
> A. Well, that would indicate to me that he was having back problems and it's very possible that they can get worse at any time.
>
> Q. Just from very simple daily activity; correct?
>
> A. That's right . . . .

As Larson notes, looking at only medical causation without resort to legal causation

> sometimes leads to a slighting of the need for precision in defining the legal rule, with the result that decisions may be based on statements by doctors that the exertion did or did not cause the [injury], although neither the doctors nor the lawyers may have had a clear and consistent concept of what "caused" meant in this setting.

1A Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 38.83(a) at 7-318 to 7-319 (1995). In *Bryant v. Masters Mach. Co.*, 444 A.2d 329, 336-37 (Me. 1982), the Supreme Judicial Court of Maine provided a detailed analysis of the need for the legal causation prong of the test:

> Absent the content provided by "legal cause," the causation requirement . . . would allow compensation for any disability that could be shown as a matter of medical or physical fact to have occurred because of the effect of ordinary activity upon a pre-existing condition during the course of employment. Such was clearly not the intent of the Legislature in using the "arising out of" language. It was intended that compensation should be available only where disability results from some sufficient causal relationship to the conditions under which the employee works. . . . This legal element of the causation requirement is the mechanism by which it becomes possible to distinguish between two types of disabilities: (1) that such happens to occur at work as a result of the employee's existent condition but without any enhancement of his susceptibility to its occurrence arising out of any conditions or requirements of the work activity or environment, and (2) that disability which occurs only because some condition of his employment increases the risk that he will sustain a disability above that level of risk which, because of his condition, he faces in his normal everyday life. Only by that mechanism can we distinguish the disability that is more likely than not produced, at least in part, by a risk related to the employment from one that is not produced in any way by such a risk. Thus, to meet the test of legal cause where the employee bears with him some "personal" element of risk because of a pre-existing condition, the employment must be shown to contribute some substantial element to increase the risk, thus offsetting the personal risk which the employee brings to the employment environment.

Cox brought to his employment a personal risk by way of a prior back condition and was engaging in an everyday activity when he was injured. The risk from that activity was not

peculiar to or increased by his employment. Furthermore, the injury to Cox's back resulted from a hazard (putting on clothes) that he would have been equally exposed to apart from the employment. Therefore, the legal causation prong of the split test is not satisfied; as a result, Cox's back injury of December 27, 1993, cannot be said to have arisen out of his employment.

In short, this is not a case in which Cox's fall caused the back injury, but, rather, a case in which the preexisting back condition caused the fall.

Accordingly, I would reverse the award of the compensation court and remand the cause for dismissal.

JANIE KNOWLTON, APPELLANT, V. MARY DEAN HARVEY, DIRECTOR, NEBRASKA DEPARTMENT OF SOCIAL SERVICES, AND THE NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLEES.
545 N.W.2d 434

Filed March 29, 1996. No. S-93-1095.

1. **Administrative Law: Judgments: Appeal and Error.** On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **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.
4. **Federal Acts: States: Public Assistance: Parent and Child.** The Aid to Families with Dependent Children program is a creation of federal statute administered by the states under a scheme of cooperative federalism. It is designed to furnish financial assistance, rehabilitation, and other services to needy children and the parents or relatives with whom they are living, to help maintain and strengthen family life, and to help families become self-supporting.

5. **Public Assistance: Parent and Child: Handicapped Persons: Expert Witnesses: Time.** The federal standard for determining incapacity for Aid to Families with Dependent Children purposes provides physical or mental incapacity of a parent shall be deemed to exist when one parent has a physical or mental defect, illness, or impairment. The incapacity shall be supported by competent medical testimony and must be of such a debilitating nature as to reduce substantially or eliminate the parent's ability to support or care for the otherwise eligible child and be expected to last for a period of at least 30 days. In making the determination of ability to support, the agency shall take into account the limited employment opportunities of handicapped individuals.
6. **Public Assistance: Parent and Child: Handicapped Persons: Time.** Nebraska's counterpart to the federal standard for determining incapacity for Aid to Families with Dependent Children purposes provides that physical or mental incapacity means any physical or mental illness, impairment, or defect which is so severe as to substantially reduce or eliminate the parent's ability to provide support or care for a child. The incapacity must be expected to last at least 30 days.
7. **Federal Acts: States: Public Assistance.** The manner in which a state administers a federal assistance program must be consistent with federal law.
8. **Constitutional Law: Federal Acts: States: Public Assistance.** A state eligibility standard that excludes persons eligible for assistance under federal Aid to Families with Dependent Children standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with direction.

Milo Alexander for appellant.

Don Stenberg, Attorney General, and Royce N. Harper for appellees.

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

FAHRNBRUCH, J.

Nebraska's Department of Social Services (DSS) found that Janie Knowlton was ineligible to continue receiving benefits under the Aid to Families with Dependent Children (AFDC) program.

Pursuant to Nebraska's Administrative Procedure Act, Knowlton filed in the district court for Douglas County a petition for judicial review of DSS' decision.

Although the district court correctly found that because of her migraine headaches Knowlton's ability to support and care for her children has been substantially reduced, the court erred in determining that Knowlton's disability would not last for a period of at least 30 days.

We hold that, under federal law, Knowlton is entitled to receive benefits under the AFDC program.

ASSIGNMENTS OF ERROR

Restated and summarized, Knowlton claims that the district court erred in finding that for the purposes of AFDC (1) "incapacity" requires that the claimant's symptoms, rather than an illness or condition causing the symptoms, must persist for a continuous period of at least 30 days, and (2) Knowlton is not incapacitated.

STANDARD OF REVIEW

On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings. *George Rose & Sons v. Nebraska Dept. of Revenue*, 248 Neb. 92, 532 N.W.2d 18 (1995). See Neb. Rev. Stat. § 84-918 (Reissue 1994). 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. *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (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. *Unland v. City of Lincoln*, 247 Neb. 837, 530 N.W.2d 624 (1995).

FACTS

Knowlton has had a long history of severe migraine headaches. In its brief, DSS recognizes that since 1989, Knowlton has received AFDC benefits. After a final hearing before DSS, its director on March 25, 1993, entered an order finding that Knowlton experiences migraine headaches for 3 to 5 days a week for 3 out of every 4 weeks. The director also found that these headaches were characterized by visual disturbances, nausea, vomiting, and blackouts, sometimes causing Knowlton to be bedridden for up to 5 days. Sometimes

the vomiting included blood. Knowlton testified that during the 6-month period before DSS' final hearing, she was hospitalized and received treatment twice and went to the Methodist Hospital emergency room in Omaha where she received treatment 17 times because of the severity of her headaches. She testified that she had called Methodist Hospital and that it verified the number of times she had been treated in its emergency room. Although the director was not present at the final DSS hearing and, therefore, did not observe Knowlton testify, the director discounted Knowlton's testimony because it was not totally corroborated in her primary physician's report. The DSS director found that in any given month, Knowlton saw her regular physician two or three times.

The record reflects that when Knowlton gets migraine headaches, she is unable to care for her children. Although Knowlton had not attempted any kind of employment for over a year and a half, she did attempt to engage in volunteer work at her children's school. She stopped her volunteer efforts because 50 percent of the time headaches and nausea prevented her from fulfilling her commitment. In her last remunerative employment, Knowlton provided care for children. She testified without objection and without contradiction that both of her physicians advised her that she could no longer engage in that type of employment.

DSS' State Review Team (SRT) had, since 1989, periodically reviewed Knowlton's eligibility and found her qualified to receive AFDC benefits. The most recent review was initiated in December 1992. As part of that review, SRT considered the first page of a purported December 1992 report of Dr. Robert R. Sundell, a neurologist who first treated Knowlton in 1990 after Knowlton suffered a stroke. Substantial portions of medical data purportedly provided by Dr. Sundell reveal that Dr. Sundell primarily had treated Knowlton for pain in her low back, right buttock, and right leg, all of which Dr. Sundell thought were independent of Knowlton's migraine headaches. Medical reports reflect that Knowlton's neurological problems were caused by two automobile accidents. The medical records further reflect that Dr. Robert Underriner was the primary physician treating Knowlton's migraine headaches and that Dr. Sundell was the

primary treating physician and consultant for Knowlton's neurological problems, although there were occasions when he prescribed and increased medication for Knowlton's headaches. Attached to the questionnaire purportedly returned to DSS by Dr. Sundell were medical notes and other related medical correspondence regarding Knowlton. A DSS questionnaire, which the record reflects was not signed by Dr. Sundell, consisted, in part, of six questions. The questions and answers are as follows:

> 1. Is the individual able to engage in his/her previous type [of] employment? unknown what former employment was. [S]ee below for other questions
>
> 2. Does he/she have the capacity to engage in any type of employment? yes
>
> 3. Is he/she able to participate with vocational rehabilitation at this time? yes . . .
>
> 4. In your opinion, is this individual disabled? no
>
> 5. When was the onset of this impairment? first saw in 1980 for headaches
>
> 6. How long do you expect the impairment to last? *indeterminant* [sic]

(Emphasis supplied.)

The six-question questionnaire does not contain Dr. Sundell's signature, but only the signature of a Theresa Baxter, apparently a DSS employee. The second page of the questionnaire is not included in the record. Furthermore, the record does not indicate which ailment or ailments are the basis for Dr. Sundell's purported answers.

Apparently, DSS found that Knowlton experienced migraine headaches 3 to 5 days a week for 3 out of every 4 weeks. Nevertheless, DSS' director determined that Knowlton was "not incapacitated" and terminated her AFDC benefits. Therefore, Knowlton petitioned DSS for a "fair hearing" to review that decision.

Before the final DSS hearing, Knowlton submitted to SRT a DSS questionnaire completed January 29, 1993, by Dr. Underriner, her primary care physician since, at least, 1980. In summarized responses to the identical questions asked of Dr. Sundell, Dr. Underriner found that (1) Knowlton was not able

to engage in her previous employment, (2) she did not have the capacity to engage in any type of employment or vocational rehabilitation, (3) she was disabled, (4) her impairment began over 10 years ago, and (5) he expected the duration of Knowlton's impairment caused by her migraine headaches would be permanent. Dr. Underriner further reported that Knowlton's prognosis and rehabilitation potential were "poor" due to her "severe" migraine headaches, which are accompanied by nausea and vomiting. In regard to the weakness in Knowlton's right side, Dr. Underriner stated that its anticipated duration was "unknown."

SRT's report to DSS' hearing officer noted that, regarding Dr. Underriner's questionnaire responses, Knowlton

> continues to have intermittent migraine headaches for which she receives medication. . . . [Knowlton's primary care physician's report] indicates that "when [Knowlton] has frequent migraine [she] is in bed for day+, needs injection due to vomiting." This did not indicate to the Review Team that this client has a medical condition incapacitating her for 30 days continuously as is required for ADC-I eligibility.

An administrative hearing was held, and the decision of SRT was affirmed in an order of the director of DSS dated March 25, 1993.

Knowlton petitioned the district court for Douglas County to review the decision of DSS' director. Knowlton alleged that DSS applied a definition of "incapacitated" which was contrary to both state and federal law and that the hearing officer's finding was unsupported by competent, material, and substantial evidence in view of the entire record, and was arbitrary and capricious.

The district court found that

> the description of the incapacity under both [federal and state] regulations is one which must substantially reduce the parent[']s ability to support or care for the child. Medical reports substantiate this aspect of the regulation, but there is no medical evidence that the disability is expected to last for a period of at least 30 days.

The district court affirmed DSS' determination that Knowlton was not incapacitated. Knowlton timely appealed the district court order to the Nebraska Court of Appeals. To control the caseloads of the appellate courts of Nebraska, we removed the case from the Court of Appeals' docket to our own.

ANALYSIS

The AFDC program is a creation of federal statute administered by the states under a scheme of cooperative federalism. See *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968). It is designed to furnish financial assistance, rehabilitation, and other services to needy children and the parents or relatives with whom they are living, to help maintain and strengthen family life, and to help families become self-supporting. See, 42 U.S.C. § 601 (1994); *Shea v. Vialpando*, 416 U.S. 251, 94 S. Ct. 1746, 40 L. Ed. 2d 120 (1974).

The federal standard for determining incapacity for AFDC purposes provides:

> "Physical or mental incapacity" of a parent shall be deemed to exist when one parent has a physical or mental defect, illness, or impairment. The incapacity shall be supported by competent medical testimony and must be of such a debilitating nature as to reduce substantially or eliminate the parent's ability to support or care for the otherwise eligible child and be expected to last for a period of at least 30 days. In making the determination of ability to support, the agency shall take into account the limited employment opportunities of handicapped individuals.

45 C.F.R. § 233.90(c)(iv) (1995).

Nebraska's counterpart to the above standard is found in the Nebraska DSS manual and provides that "[p]hysical or mental incapacity" means any physical or mental illness, impairment, or defect which is so severe as to substantially reduce or eliminate the parent's ability to provide support or care for a child. The incapacity must be expected to last at least 30 days. 468 Neb. Admin. Code, ch. 2, § 005.03A (1992).

The district court concluded that medical reports in the record substantiate that Knowlton's ability to support or care for her children remains substantially reduced. On appeal, DSS agrees with this conclusion. The record reflects substantial competent medical evidence to support the district court's conclusion that Knowlton's ability to support or care for her children has been substantially reduced.

However, the district court's finding that "there is no medical evidence that the disability is expected to last for a period of at least 30 days" is not supported by the record. Competent medical evidence in the record reflects that Knowlton has a long history of severe migraine headaches. She experiences headaches approximately 3 to 5 days a week, 3 out of every 4 weeks. These headaches are characterized by visual disturbances, nausea, vomiting, and blackouts, sometimes causing Knowlton to be bedridden for up to 5 days at a time.

When Knowlton's physicians were asked in the DSS questionnaire how long they expected her impairment to last, her primary care physician, Dr. Underriner, answered "permanently" and her neurologist, Dr. Sundell, purportedly answered "indeterminant [sic]." The record reflects that Dr. Sundell primarily treated Knowlton for neurological symptoms independent of the headaches. The record does not reflect that the answers to the DSS questionnaire purportedly from Dr. Sundell included Knowlton's complaint of migraine headaches for which he was not the primary treating physician. Thus, the record does not support the DSS and the trial court findings that Dr. Sundell determined that Knowlton's migraine headaches, as opposed to her neurological ailments, were of an indeterminate duration.

Moreover, "indeterminate" means that which is uncertain, or not particularly designated. Black's Law Dictionary 771 (6th ed. 1990). See Webster's Third New International Dictionary, Unabridged 1148 (1993). Of the two treating physicians, only Dr. Underriner considered Knowlton's impairment permanent on the basis of her severe migraine headaches. Dr. Underriner considered Knowlton's neurological ailments to be of an unknown duration. As to Dr. Sundell's purported report, there is great uncertainty as to whether his "indeterminate duration"

opinion referred to Knowlton's migraine headaches or to her neurological problems resulting from two motor vehicle accidents. There is also great uncertainty as to whether in Dr. Sundell's opinion any impairment that Knowlton has would last more or less than 30 days. As a result, Dr. Sundell's purported report does not support the decision of DSS and that of the district court to deny AFDC benefits to Knowlton.

It appears that the district court interpreted the term "disability" to mean the time periods when Knowlton was actually suffering from her migraine headaches and unable to provide care or support for her dependent children. This interpretation, and the resultant final order of the district court, evidences a misinterpretation of the 30-day duration requirement.

The 30-day requirement was added to the federal regulation effective November 22, 1974. In the notice implementing the 30-day requirement, the federal Department of Health and Human Services stated that there must be a causal relationship between the parent's incapacity and the child's deprivation of support or care. As to the 30-day requirement, the department stated that "[t]he 30 days is not intended to be a 'waiting period'. Expected duration is pertinent to 'causal relationship' and to 'substantially.' A condition lasting only a few days would not usually result in substantial deprivation." See 39 Fed. Reg. 34037 (1974).

There appears to be no state or federal court that has addressed the 30-day duration requirement for the purposes of determining AFDC incapacity. Several courts have, however, addressed an analogous issue in the context of Social Security and Supplemental Security Income (SSI) disability benefits. The definition of "disability" for the purposes of Social Security and SSI is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A) (1994).

In *Singletary v. Bowen*, 798 F.2d 818 (5th Cir. 1986), the claimant suffered from chronic schizophrenia and other mental

illness. Although he had been in and out of hospitals and mental institutions over a 10-year period, he had been employed for various short periods of time. The Social Security Administration denied the claimant's application for Social Security benefits because it determined that he had not met the 12-month duration requirement. The *Singletary* court reversed and remanded, finding that the statute requires that it is the impairment only that must last for a continuous period, not the time periods when a claimant is unable to work. The court noted that the "ability of a claimant to engage in work for limited periods of time certainly calls into question the severity of the impairment, but it does not necessarily determine whether the impairment, however severe, has lasted for at least 12 months." *Id.* at 821.

By the same reasoning, courts have found that symptom-free intervals of those suffering from mental illness do not necessarily compel a finding that a claimant is not disabled. See, *Yawitz v. Weinberger*, 498 F.2d 956 (8th Cir. 1974); *Klug v. Weinberger*, 514 F.2d 423 (8th Cir. 1975). These mental illnesses are marked with symptoms of an uncertain duration and are marked by an impending possibility of relapse. *Lebus v. Harris*, 526 F. Supp. 56 (N.D. Cal. 1981). Because of the nature of these illnesses, courts have concluded that a claimant whose claim is based on a mental condition does not have to show a 12-month period of impairment unmarred by any symptom-free interval. See *Singletary v. Bowen, supra*. See, e.g., *Miller v. Heckler*, 747 F.2d 475 (8th Cir. 1984); *Dreste v. Heckler*, 741 F.2d 224, 226 n.2 (8th Cir. 1984).

The reasoning applied by the above federal courts in construing the duration requirement and defining "disability" for the purposes of Social Security or SSI is applicable to the instant case.

Under the district court's interpretation of the 30-day duration requirement, a claimant suffering an illness which does not manifest its symptoms for a continuous period of 30 days would be ineligible for AFDC benefits. This is so, regardless of the claimant's substantial reduction in ability to care for or support a dependent child. Under the district court's rationale, a claimant suffering from epilepsy who experiences a pattern of

seizures separated by periods of remission could never be deemed incapacitated for the purposes of AFDC. This is true, regardless of the claimant's inability to support or care for a dependent child, unless the claimant was in a state of continuous seizure for a period of 30 days. Such a result would clearly be in conflict with the aims of the AFDC program which, among other things, is to encourage the care of dependent children in their own homes by parents who experience a substantial reduction in their ability to care for or support their dependent children. See, 42 U.S.C. 601; 45 C.F.R. § 233.90(c)(iv). The federal regulation governing the definition of incapacity for the purposes of AFDC focuses on the effect of the parental incapacity on the ability to support or care for dependent children and emphasizes a substantial reduction or an elimination of the support ability. See, *Tappen v. State, Dept. of Health and Welfare*, 98 Idaho 576, 570 P.2d 28 (1977); *Timmons v Social Services Dept*, 89 Mich. App. 330, 280 N.W.2d 515 (1979). In Knowlton's case, both DSS' and the district court's interpretations focus on whether the symptoms of a disability are apparent for 30 continuous days, rather than whether the disability itself exists for a period of 30 days. By imposing this symptomatic 30–day requirement on Knowlton, regardless of the substantial reduction of Knowlton's ability to provide care or support for her children, the district court impermissibly narrowed the definition of incapacity for the purposes of AFDC.

The manner in which a state administers a federal assistance program must be consistent with federal law. See, e.g., *Shea v. Vialpando*, 416 U.S. 251, 94 S. Ct. 1746, 40 L. Ed. 2d 120 (1974). A state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. *Townsend v. Swank*, 404 U.S. 282, 92 S. Ct. 502, 30 L. Ed. 2d 448 (1971); *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968).

The decision of the district court for Douglas County affirming DSS' denial of AFDC benefits to Knowlton is reversed because the denial does not conform with the law, is not supported by competent evidence, and is unreasonable. The

district court is directed to reinstate Knowlton's eligibility for AFDC benefits as of the date her eligibility was terminated.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., not participating.

KAY M. SHILLING, APPELLANT, V. STAN L. MOORE, APPELLEE.
545 N.W.2d 442

Filed March 29, 1996. No. S-94-005.

1. **Judgments: 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: Appeal and Error.** Generally, procedural matters are dictated by the law of the forum. As a result, law of the forum generally governs standard of review of the trial court's summary judgment.
3. **Federal Acts: Health Care Providers: Presumptions: Appeal and Error.** Congress has mandated a standard of review in 42 U.S.C. § 11112(a) (1988) that a professional review action shall be presumed to have met the preceding standards necessary for the protection set out in § 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.
4. **Federal Acts: Physicians and Surgeons: Damages: Immunity.** Congress enacted the Health Care Quality Improvement Act to provide for effective peer review and interstate monitoring of incompetent physicians and granted qualified immunity from damages for those who participate in peer review activities.
5. **Federal Acts: States: Statutes.** A federal statute preempts state law which is less restrictive than federal law.

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

Randall J. Shanks for appellant.

Thomas J. Shomaker and Edward F. Noethe, of Sodoro, Daly & Sodoro, P.C., for appellee.

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

FAHRNBRUCH, J.

Dr. Kay M. Shilling, a psychiatrist, appeals the summary judgment dismissal of her libel lawsuit against Dr. Stan L. Moore, Immanuel Medical Center's psychiatry department chairperson.

In her petition filed in the district court for Douglas County, Shilling alleges that Moore maliciously made a false report to the credentials committee at Immanuel Medical Center (IMC) that stated that Shilling was unfit to perform her duties as an IMC staff physician. Shilling's petition further alleges that the credentials committee recommended to IMC's executive committee that her application for reappointment to IMC's medical staff be denied. She further alleges that IMC's executive committee subsequently recommended the denial of her application for reappointment to IMC's medical staff and denied her further admitting privileges at IMC as of March 31, 1992.

Upon review of the record, we affirm the dismissal of Shilling's lawsuit.

ASSIGNMENTS OF ERROR

Restated, Shilling claims that summary judgment was improper because genuine issues as to material facts exist concerning whether Moore was immune from liability for defamation under (1) the federal Health Care Quality Improvement Act, 42 U.S.C. § 11101 et seq. (1988 & Supp. V 1993) (HCQIA), and (2) Nebraska law.

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*, 248 Neb. 221, 533 N.W.2d 898 (1995).

Procedural matters are dictated by the law of the forum. *Calvert v. Roberts Dairy Co.*, 242 Neb. 664, 496 N.W.2d 491 (1993). As a result, law of the forum generally governs standard of review of the trial court's summary judgment. See, *Mt. Juneau Enterpr. v. Juneau Empire*, 891 P.2d 829 (Alaska 1995); *Griffin v. Summit Specialties, Inc.*, 622 So. 2d 1299 (Ala. 1993). See, also, *Harter v. Ozark-Kenworth, Inc.*, 904 S.W.2d 317 (Mo. App. 1995); *CSX Transportation v. Franklin Indus.*,

213 Ga. App. 778, 445 S.E.2d 861 (1994); *Billman v. Missouri Pacific R. Co.*, 825 S.W.2d 525 (Tex. App. 1992). However, Congress has mandated a standard of review in 42 U.S.C. § 11112(a) that a professional review action shall be presumed to have met the preceding standards necessary for the protection set out in § 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

Courts have held in regard to 42 U.S.C. § 11112(a) that an objective preponderance of the evidence standard applies to summary judgments. See, *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318 (11th Cir. 1994); *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992); *Smith v. Our Lady of the Lake Hosp.*, 639 So. 2d 730 (La. 1994). See, also, *Goodwich v. Sinai Hospital*, 103 Md. App. 341, 653 A.2d 541 (1995).

In *Austin v. McNamara*, 979 F.2d at 734, the U.S. Court of Appeals for the Ninth Circuit found that the summary judgment inquiry for actions involving HCQIA is best stated as follows: "Might a reasonable jury, viewing the facts in the best light for [the plaintiff], conclude that [she or] he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of [42 U.S.C.] § 11112(a)?" The *Austin* court further found that § 11112(a)'s reasonableness requirements were intended to create an objective standard rather than a subjective good faith standard.

FACTS

Shilling is a licensed psychiatrist who had been granted staff privileges at IMC in 1984. At all times relevant to Shilling's allegations, Moore was chairperson of the department of psychiatry at IMC. As such, Moore was primarily responsible for monitoring the psychiatrists on IMC's staff.

In or about January 1992, IMC's credentials committee was engaged in a review of Shilling's reapplication for medical staff privileges. IMC's credentials committee requested that Moore make an assessment of Shilling as to the quality and standard of her practice.

On January 28, an IMC psychiatric nursing staff unit manager made a written report to the hospital's quality review

committee, requesting that it review the medical chart of one of Shilling's patients. Shilling had diagnosed the patient as suffering from a bipolar disorder. The psychiatric nursing unit manager stated in her report that all of the medical chart's documentation related to chemical dependence and not psychiatric problems. The report expressed concern that there was no documentation to support a bipolar diagnosis. As a result of this request for review, IMC's utilization review committee assigned a physician peer reviewer to examine the patient's chart.

On January 31, the physician peer reviewer wrote in his report that "none of the 'issues' documented by the physician indicate a need for inpatient care . . . [patient] care is very unusual, there is a strong question of appropriate [diagnosis] *and this chart constitutes another in a great many cases of questionable practice of this M.D.*" (Emphasis supplied.)

At Shilling's request, the case was reviewed again by another physician on February 3 who concluded that the primary problem was substance abuse and that the patient was not psychotic. Shilling then requested that a third physician review the case. That physician, in a report dated February 4, wrote, "[r]efer to dept. chair . . . take provider off case . . . personality disorder and substance abuse . . . *care appears incompetent.*" (Emphasis supplied.)

IMC's utilization review committee then asked Moore to review the care being provided to the patient. Moore contacted Shilling on February 6 to notify her that he would be performing an independent medical evaluation of the patient. After examining the patient on February 6, Moore wrote in the patient's medical chart "[*m*]*ental status reveals no evidence of psychosis. Does not meet diagnostic criteria for bipolar Disorder . . . Will discuss* [*with*] *attending M.D.*" (Emphasis supplied.) Immediately after making this entry, Moore spoke with Shilling regarding his conclusion.

On February 9, Moore and Shilling spoke via telephone. In an affidavit submitted to the trial court, Shilling testified that during the February 9 phone conversation, Moore told her that she had no patient care problems, but that she would be placed

on concurrent case review because Moore did not like her attitude.

In contrast, Moore stated in his deposition that during that phone conversation,

> I attempted to explain at some length my concern over the past year of quality review and utilization review concerns and what I perceived as her inappropriate response to feedback received from U.R. and Q.R., more specifically I informed her she could use this feedback in a very positive manner to improve her practice . . . .

On February 19, Moore submitted his assessment report concerning Shilling that had been previously requested by the credentials committee as part of its review of Shilling's application to renew her staff privileges at IMC. There is nothing in the record to reflect, nor does Shilling allege, that Moore revealed his report to any other person or body other than IMC's credentials committee.

Moore's report reflects that *in his opinion*, Shilling did not possess the necessary skills and experience to perform appropriately and was not qualified for the staff privileges requested. Moore reported that "[i]n reviewing the past year's [utilization review] and [quality review] record, concerns ha[d] been expressed regarding the ability to diagnose accurately, use psychopharmacologic agents appropriately and document patient care accurately in the medical record."

In his answer to Shilling's petition, Moore admitted that on March 23, IMC's executive committee recommended denial of Shilling's application for reappointment to the medical staff and denied her admitting privileges at IMC as of March 31.

Moore filed a motion for summary judgment, which was granted, and Shilling's petition was dismissed. Shilling timely appealed that disposition to the Nebraska Court of Appeals. In order to control the dockets of the two appellate courts, we removed this appeal from the Court of Appeals' docket to our own.

ANALYSIS

Congress enacted HCQIA to provide for effective peer review and interstate monitoring of incompetent physicians and

granted qualified immunity from damages for those who participate in peer review activities. See 42 U.S.C. § 11101. In furtherance of the latter goal, HCQIA provides that if a "professional review action" (as defined in HCQIA) meets certain due process and fairness requirements, see 42 U.S.C. § 11112, then

> [n]otwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false.

42 U.S.C. § 11111(a)(2). HCQIA then provides:

> For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken—
>
> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).
>
> A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

42 U.S.C. § 11112(a).

On appeal, Shilling contends that Moore's assessment report to the credentials committee was false and that he knew it was false. As evidence of this, Shilling claims there was a discrepancy between what Moore allegedly told her in their February 9 telephone conversation and what he subsequently wrote in his assessment report submitted to IMC's credentials committee. In sum, Shilling argues that because Moore allegedly told her in their February 9 telephone conversation that she had no patient care problems, and later indicated in his report that concerns had been expressed regarding Shilling's ability to diagnose accurately, use psychopharmacologic agents appropriately, and document patient care accurately in the medical record, a factual dispute is created as to whether Moore's report was false and whether he knew it was false.

Whether a material issue of fact is raised by the above alleged discrepancy is immaterial to our review. In order to overcome HCQIA's rebuttable presumption of immunity, Shilling must show, by a preponderance of the evidence, that Moore's assessment report was false and that he knew it was false. See, 42 U.S.C. §§ 11111(a)(2) and 11112(a); *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318 (11th Cir. 1994); *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992).

The record reflects that toward the latter part of January 1992, there was a sharp disagreement and a prolonged professional exchange between Shilling and several other doctors over the proper diagnosis and treatment of a particular patient. Four different reviewers, including Moore, disagreed with Shilling's diagnosis and/or treatment of the patient. All of the reviewers' findings and their concerns, including Moore's, were communicated to Shilling prior to the February 9 telephone conversation.

Moore's February 19 report reflects concerns raised by Shilling's peer reviewers regarding the above-mentioned patient. Moore stated that to his knowledge, Shilling "has been unable to work in a consistently cooperative fashion with nursing personnel, Utilization Review and Quality Review [personnel]." Moore stated that Shilling had been the subject of complaints from physicians, nurses, and other employees. *He also stated that Shilling had not been the subject of complaints*

by patients or medical staff committees. Moore, when asked whether Shilling had failed to comply with applicable bylaws and policies of IMC, stated that Shilling "has been unable to be in compliance with Article 111, Section G which requires that every practitioner 'must demonstrate the ability to work harmoniously with others in a manner consistent with quality medical care and the orderly operation of the hospital and medical staff.' "

In response to the question, "In your opinion, is there any privilege currently held by the physician for which [she] does not possess the necessary skills and experience to perform appropriately," Moore answered "yes." The form then read: "If yes, what course of action do you recommend?" Moore's answer in full was: "In reviewing the past year's UR and QR record, concerns have been expressed regarding the ability to diagnose accurately, use psychopharmacological agents appropriately and document patient care accurately in the medical record." Moore also evaluated Shilling's professional judgment; clinical competence; and cooperativeness, ability to work with others, as "unfavorable." He reported that Shilling was not qualified for the privileges she requested based upon "extensive and excessive Utilization Review, Quality Review and nursing concerns which are inconsistent with the standard of medical practice at Immanuel Medical Center." Moore reported that Shilling's basic medical knowledge, technical skill, medical record currency, and participation in medical staff affairs were "favorable." Moore stated that he had reviewed Shilling's "QA file" and "National Practitioner Data Bank Information."

Even if one were to assume that Moore had, in fact, stated in the February 9 telephone conversation that Shilling had no patient care problems, the discrepancy with Moore's subsequent report to the credentials committee created by that assumption is still not sufficient to show, by a preponderance of the evidence, that Moore's assessment report was false and that he knew it was false. Nor would this constitute sufficient evidence to show that Moore's comments in his assessment and report were not provided "in the reasonable belief that the action was in the furtherance of quality health care." See 42 U.S.C. § 11112(a).

Even if all of the evidence is viewed most favorably toward Shilling, the bare allegation that Moore once stated in the February 9 telephone conversation that Shilling had no patient care problems simply does not meet the evidentiary burden required to overcome the shield of immunity that HCQIA provides to medical peer reviewers.

As to Shilling's second assignment of error, Neb. Rev. Stat. §§ 71-2047 and 71-2048 (Reissue 1990), in sum, provide that all communications to medical staff or utilization review committees are privileged. HCQIA and the holdings in *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318 (11th Cir. 1994), and *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992), afford greater protection in defamation actions to persons and medical peer reviewers than does state law. A federal statute preempts state law which is less restrictive than federal law. See *Ferry v. Ferry*, 201 Neb. 595, 271 N.W.2d 450 (1978). See, also, *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992). Accordingly, we need not address Shilling's second assignment of error.

We affirm the summary judgment of the district court dismissing Shilling's petition.

AFFIRMED.

LINDA R. VENTER, APPELLEE, V. DEAN N. VENTER, APPELLANT.
545 N.W.2d 431

Filed March 29, 1996. No. S-94-430.

1. **Divorce: Appeal and Error.** An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Divorce: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
3. **Property Division: Alimony.** While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property

division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in Neb. Rev. Stat. § 42-365 (Reissue 1993) make it appropriate.

4. ____: ____. The ultimate test for determining the appropriateness of the division of property, as well as alimony, is reasonableness as determined by the facts of each case.
5. **Attorney Fees.** Attorney fees are recoverable in Nebraska only where provided by statute or allowed by custom.
6. **Divorce: Attorney Fees.** The award of attorney fees in a dissolution action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

John W. Ballew, Jr., of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Kent F. Jacobs, of Blevens & Jacobs, for appellee.

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

WRIGHT, J.

This is an appeal from an action for dissolution of marriage. Appellant, Dean N. Venter, challenges certain orders contained in the divorce decree entered by the district court for Seward County dissolving his marriage to appellee, Linda R. Venter.

SCOPE OF REVIEW

An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995).

In an action for dissolution of marriage, the award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. See *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994).

FACTS

Appellant and appellee were married on October 25, 1980. The marriage produced two children. Appellee filed a petition for legal separation on June 22, 1993. Appellant filed a cross-petition for dissolution of marriage on August 2, 1993.

For 11 years, appellant operated Venter Consulting, where he works as a vocational rehabilitation consultant. Appellee contributed to the business by handling the bookkeeping, billing, and general business responsibilities. The income from appellant's business is derived from monthly billings to clients. These billings become accounts receivable and are reported on his income tax returns when such accounts are received. The district court determined that the assets of Venter Consulting, including the accounts receivable, were marital property and valued the assets at $15,000. Appellant was awarded the entire $15,000 value of the business in the property division.

One of the parties' other assets was a one-half share in an Angus bull. The parties had paid $1,825 for their interest in the animal. The animal was subsequently purchased at auction by appellee's father for $1,108.08. An auctioneer for the Columbus Sales Pavilion testified that the sale price represented the fair market value of the animal. The district court valued each party's interest in the animal at $525.

The district court denied appellant's request for attorney fees, and ordered appellant to pay $1,000 in attorney fees to appellee.

ASSIGNMENTS OF ERROR

Appellant asserts that the district court erred in (1) assigning value to the accounts receivable of appellant's business, (2) valuing the Angus bull, and (3) awarding attorney fees to appellee.

ANALYSIS

Accounts Receivable

We must first determine whether the accounts receivable were marital property. Appellant asserts that the district court improperly included Venter Consulting's accounts receivable in the marital estate. Appellant argues that the accounts receivable

represent only earning capacity or expectations of income and should not be considered marital property.

Appellant relies upon *Andersen v. Andersen*, 204 Neb. 796, 285 N.W.2d 692 (1979), in which the husband anticipated a $20,000 consulting fee for work not yet performed. We held that earning capacity or expectations of income are not to be considered in the division of property. *Andersen* is factually distinguishable from the present case because in *Andersen* the husband had not yet performed the work. The fee was a potential future earning, not an account receivable, because it was contingent upon the husband's obtaining and performing the work. Here, appellant has performed the work and is simply waiting to receive payment.

Our de novo review of the record shows that the district court determined appellant's earning capacity based upon figures compiled by appellant. If appellant is on a cash basis, his billings become accounts receivable as soon as they are sent out, but do not become income until they are collected. On a cash basis, the accounts receivable in question would not have been included in the figures compiled by appellant because at the time of the trial the receivables were not income.

Appellant argues that his accounts receivable have continued in the same cycle of billing and collection over the past 11 years and that, therefore, it is obvious that the district court anticipated that appellant would continue with the same pattern of adjusted gross income in its determination of child support and alimony. Appellant claims the district court erred in relying on the accounts receivable as part of his income for child support and alimony and making them subject to division as a marital asset.

Appellant also relies upon *In re Marriage of Hubert v. Hubert*, 159 Wis. 2d 803, 465 N.W.2d 252 (Wis. App. 1990), in which the appellate court considered whether the husband's accounts receivable were properly classified as anticipated income rather than assets subject to property division. The husband's corporation had some $400,000 in accounts receivable with a stipulated net present value of $192,125. The trial court reasoned that if the receivables were treated as a divisible asset, the husband's cash-flow would be adversely

affected and he would not have the income to fulfill his professional and personal obligations. The appellate court concluded that this analysis was a proper exercise of the trial court's discretion and affirmed the trial court's holding that the accounts receivable should be treated as anticipated income.

We decline to adopt any rule that expressly permits or denies a trial court's consideration of accounts receivable as a marital asset for division in a dissolution action. Alimony and distribution of property rights have different purposes.

> While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

Neb. Rev. Stat. § 42-365 (Reissue 1993). The ultimate test for determining the appropriateness of the division of property, as well as alimony, is reasonableness as determined by the facts of each case. See *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995). Under the facts of this case, the district court did not abuse its discretion by including the accounts receivable in the marital estate.

Valuation of Angus Bull

Next, appellant assigns as error the district court's valuation of an Angus bull which was part of the marital estate. Half of the animal was owned jointly by the parties, and half was owned by appellee's father. Appellant argues that his interest in the animal was valued at the sale price of $525, when it should have been valued at $1,615 based upon a tax valuation from the Seward County assessor's office.

The sale of the animal took place at a recognized sale barn at a time when breeding stock was normally sold. The sale was properly advertised, and an auctioneer testified that the sale price represented the fair market value of the animal. The district court's determination of this value was not clearly

erroneous. See *Lockwood v. Lockwood*, 205 Neb. 818, 290 N.W.2d 636 (1980).

ATTORNEY FEES

Finally, appellant assigns as error the district court's award of attorney fees. Appellant asserts that the district court erred in requiring him to pay attorney fees and in denying his request for attorney fees.

Attorney fees are recoverable in Nebraska only where provided by statute or allowed by custom. *Murrell v. Murrell*, 232 Neb. 247, 440 N.W.2d 237 (1989). It is the custom to award attorney fees in appropriate circumstances in divorce cases. *Id.* The award of attorney fees in a dissolution action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. *Id.*

In actions for dissolution of marriage, an award of attorney fees is reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge. See *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). We find no abuse of discretion in the district court's award of attorney fees.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. KEVIN DEAN RANDALL, APPELLANT.

545 N.W.2d 94

Filed March 29, 1996. No. S-94-1192.

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. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is 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.
4. **Homicide: Intent.** Malice is an element of second degree murder.
5. **Indictments and Informations: Homicide: Intent: Appeal and Error.** The omission of malice as an element of second degree murder in an information constitutes plain error.
6. **Postconviction: Homicide: Intent: Appeal and Error.** The failure to include malice as an element in an adjudgment of guilt of second degree murder may be raised as plain error on direct appeal or on a motion for postconviction relief.

Appeal from the District Court for Saunders County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

Thomas J. Klein, Deputy Saunders County Public Defender, for appellant.

Don Stenberg, Attorney General, J. Kirk Brown, and, on brief, Delores Coe-Barbee for appellee.

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

PER CURIAM.

Kevin Dean Randall appeals from the Saunders County District Court's judgment overruling his motion for postconviction relief from an accepted plea of guilty to a charge of second degree murder. We reverse the district court's order and remand the cause with directions to grant Randall a new trial because the information charging Randall with second degree murder did not include malice as an element of the crime.

BACKGROUND

The State charged Randall with first degree murder for the November 22, 1979, death of Wayne Armstrong. On March 18, 1980, Randall pled guilty to second degree murder (Neb. Rev. Stat. § 28-304 (Reissue 1989)) pursuant to a plea agreement with the State. The amended information charged that Randall committed murder in the second degree by causing the death of Armstrong, intentionally, but without premeditation. The amended information made no reference to Randall's actions being committed with malice. The district court accepted Randall's plea of guilty to the amended charge.

Randall was sentenced to serve not less than 30 years' nor more than life imprisonment. He appealed his sentence, claiming error for being given an indeterminate sentence. Upon review, this court reversed, and remanded for resentencing. *State v. Randall*, 208 Neb. 248, 302 N.W.2d 733 (1981). On remand, Randall was sentenced to life imprisonment.

On August 5, 1994, Randall filed a second amended motion for postconviction relief seeking to set aside his conviction for second degree murder. Randall's motion alleged that the information on which he was convicted and sentenced failed to establish the prima facie elements of murder in the second degree and that he received ineffective assistance of counsel. The district court denied Randall's second amended motion for postconviction relief, and he appeals.

ASSIGNMENTS OF ERROR

Randall argues that the district court erred in not granting his second amended motion for postconviction relief because (1) his conviction is void in that the amended information on which he was convicted for second degree murder failed to contain the prima facie element of malice, and (2) he received ineffective assistance of counsel.

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. Barfoot*, 248 Neb. 335, 534 N.W.2d 572 (1995); *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222

(1995). The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial. *Id.*

An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is 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. *Id.*

ANALYSIS

This court has addressed numerous times whether a defendant is entitled to postconviction relief from a second degree murder conviction when malice as an element has been omitted from the information or jury instructions. We have repeatedly held that malice is an element of second degree murder. See, e.g., *State v. Barfoot, supra*; *State v. Lowe*, 248 Neb. 215, 533 N.W.2d 99 (1995); *State v. Plant*, 248 Neb. 52, 532 N.W.2d 619 (1995); *State v. Eggers*, 247 Neb. 989, 531 N.W.2d 231 (1995); *State v. Wilson*, 247 Neb. 948, 530 N.W.2d 925 (1995); *State v. Williams, supra*; *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994); *State v. Ladig*, 246 Neb. 542, 519 N.W.2d 561 (1994); *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994); *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

The omission of malice as an element of second degree murder in an information constitutes plain error. *State v. Barfoot, supra*; *State v. Ladig, supra*; *State v. Manzer, supra*. The failure to include malice as an element in an adjudgment of guilt of second degree murder may be raised as plain error on direct appeal or on a motion for postconviction relief. See, *State v. Barfoot, supra*; *State v. Plant, supra*; *State v. Williams, supra*.

Randall pled guilty to second degree murder based on an information which failed to include malice as an essential element of the crime. The defective information constituted plain error which requires the granting of Randall's motion for

postconviction relief. See, *State v. Barfoot, supra*; *State v. Ladig, supra*; *State v. Manzer, supra*. Accordingly, we reverse the judgment of, and remand the matter to, the district court with directions to grant Randall a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

FAHRNBRUCH, J., concurring.

I agree with the majority opinion, but write separately to respond to the dissent. The dissenting opinion contends that an information which omits a necessary element of the crime charged does not necessitate a new trial in this case because Randall's guilty plea was counseled and voluntary.

We have held that the failure of an information to state a crime may be raised at any time. *Nelson v. State*, 167 Neb. 575, 94 N.W.2d 1 (1959). If an information for second degree murder does not include the element of malice, the defendant has not been charged with a crime. *State v. Lowe*, 248 Neb. 215, 533 N.W.2d 99 (1995); *State v. Plant*, 248 Neb. 52, 532 N.W.2d 619 (1995). Thus, the defect in the charging document against Randall is not a matter of mere form. Rather, the information to which Randall pled guilty does not, on its face, charge him with a crime. An information so defective that it omits an essential element of the crime itself so as to charge no crime at all is fatally defective of such a fundamental character as to make the indictment or information wholly invalid and not subject to waiver by the accused. See *In re Interest of Durand. State v. Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980). That Randall pled guilty to a fatally defective information does not lessen the constitutional deprivation of his being convicted and sentenced on an information that does not charge him with a crime.

WRIGHT, J., dissenting.

I dissent from the opinion of the majority. Basing his claim on *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994), Randall claims the amended information, which did not charge malice as an element of second degree murder, failed to establish a prima facie element of the crime.

Grimes held that

> [t]he essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Ettleman*, 229 Neb. 220, 425 N.W.2d 894 (1988); *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986); *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). This has been the law in this state since 1983.

246 Neb. at 483, 519 N.W.2d at 515.

Effective January 1, 1979, the Legislature defined the crime of second degree murder as the intentional killing of another without premeditation. See Neb. Rev. Stat. § 28-304 (Reissue 1989). On November 22, 1979, Randall and his accomplices beat the victim and placed him in the trunk of a car. They later removed him from the trunk, beat him repeatedly over the head with a metal bar, and then threw him off a bridge into the water.

Randall was charged with first degree murder, but pursuant to a plea agreement, he pled guilty to second degree murder. Randall asserts that his conviction is void because the amended information did not contain the element of malice and because he received ineffective assistance of counsel. At the time of his conviction, neither this court nor the Legislature recognized malice as an element of second degree murder. Randall has not shown that his counsel was ineffective or how he could have been prejudiced by pleading guilty to second degree murder to avoid a first degree murder conviction and the possibility of a death sentence.

Randall now asks for the opportunity to present a reason for murdering the victim. If he had a just excuse for the killing, he should have gone to trial; instead, he pled guilty to a lesser charge. He is not entitled to a new trial. His plea was counseled and voluntary. I see no justifiable reason to grant Randall a new trial.

CONNOLLY and GERRARD, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. CAROL NORQUEST BROZOVSKY, APPELLANT.

545 N.W.2d 98

Filed March 29, 1996. No. S-94-1193.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Notice: Proof.** Proof of proper notice is an element of the State's prima facie case pursuant to Neb. Rev. Stat. § 2-955(3)(a) (Reissue 1991).
3. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed.
4. **Governmental Subdivisions: Notice.** In order to prove notice as required by Neb. Rev. Stat. § 2-955(3)(a) (Reissue 1991), it must be shown that the county control authority made a finding of uncontrolled noxious weeds and issued proper notice to the defendant or delegated its statutory duty to the weed control superintendent to make such findings and to give such notice.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for York County, BRYCE BARTU, Judge, on appeal thereto from the County Court for York County, GARY F. HATFIELD, Judge. Judgment of Court of Appeals reversed.

Bruce E. Stephens for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

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

CONNOLLY, J.

Carol Norquest Brozovsky was found guilty by the county court for York County of 15 counts of failing or refusing to control noxious weeds pursuant to Neb. Rev. Stat. § 2-955(3)(a) (Reissue 1991). The county court sentenced Brozovsky to 60 days' probation. The State filed error proceedings in the York County District Court, pursuant to Neb. Rev. Stat. § 29-2317 (Reissue 1989), alleging that probation was not a permissible sentence for violations of § 2-955(3)(a). Brozovsky also

appealed, alleging there was insufficient evidence to justify a finding of guilty on any of the charges of which she was convicted. The district court held that there was sufficient evidence to support the convictions and that the county court lacked subject matter jurisdiction to sentence Brozovsky to probation for an infraction conviction. As a result, the district court vacated Brozovsky's sentence and remanded the case to the county court for resentencing.

Brozovsky appealed the district court's decision to the Nebraska Court of Appeals. The State filed a motion for summary affirmance pursuant to Neb. Ct. R. of Prac. 7B(2) (rev. 1992), which was sustained, and the judgment was affirmed without opinion. See *State v. Brozovsky*, 3 Neb. App. xxix (case No. A-94-1193, Apr. 17, 1995). We have granted Brozovsky's petition for further review pursuant to Neb. Rev. Stat. § 24-1107 (Cum. Supp. 1994). Because there is an absence of evidence in the record to show that Brozovsky was served with proper notice, we conclude there was insufficient evidence to support a finding of guilty on any of the charges of which she was convicted. We therefore reverse.

BACKGROUND

On June 11, 1993, Randy Campbell, the noxious weed superintendent for York County, observed approximately "a thousand plus" uncontrolled noxious weeds, i.e., musk thistle, on property owned by Brozovsky. On that date, Campbell sent Brozovsky a legal notice by certified mail informing her of the uncontrolled musk thistle. The notice stated in part the specific section of land that was infested with musk thistle, the method of control recommended, and a warning that if within 15 days from June 26 the musk thistle had not been brought under control, she might, upon conviction, be subject to a fine of $100 per day for each day of noncompliance, up to a maximum of 15 days of noncompliance. The notice also stated that she could request a hearing within 15 days to challenge the existence of a noxious weed infestation on her property.

On June 28, 1993, Campbell went back onto Brozovsky's property for a second inspection and found that "very minimal digging had occurred, but there was still hundreds and hundreds

and hundreds of plants uncontrolled." On July 10, Campbell returned to the property for a final inspection and found that "there was still hundreds and hundreds of plants uncontrolled and going to seed," and that there was no evidence that these plants had been sprayed. As a result, the York County Attorney filed a complaint against Brozovsky in county court, alleging that violations of § 2-955(3)(a) commenced on June 26 and continued thereafter on each day to and including July 9.

Brozovsky was subsequently convicted of 15 counts of failing or refusing to control noxious weeds and was placed on 60 days' probation by the county court. On appeal, the district court found that there was sufficient evidence to sustain the convictions and that the county court lacked subject matter jurisdiction to sentence Brozovsky to probation for an infraction conviction. As a result, the district court vacated Brozovsky's sentence and remanded the case to the county court for resentencing. Brozovsky appeals.

ASSIGNMENTS OF ERROR

Brozovsky assigns three errors: (1) The district court erred in finding there was sufficient evidence to justify a finding of guilty on any of the charges of which she was convicted, (2) the district court erred in vacating and setting aside the county court's sentence of probation, and (3) the district court erred in finding the county court lacked subject matter jurisdiction to sentence her to probation.

SCOPE OF REVIEW

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. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994).

ANALYSIS

Brozovsky first alleges the district court erred in concluding there was sufficient evidence to justify a finding of guilty on any

of the charges of which she was convicted. As part of her sufficiency of the evidence argument, Brozovsky alleges that the notice issued by Campbell was not valid and that, therefore, each charge against her is void. Section 2-955(1)(b) states in pertinent part:

> Whenever any *control authority* finds it necessary to secure more prompt or definite control of weeds on particular land than is accomplished by the general published notice, it shall cause to be served individual notice upon the owner of record of such land at his or her last-known address, giving specific instructions and methods when and how certain named weeds are to be controlled.

(Emphasis supplied.)

Brozovsky argues the State failed to prove that the York County board of commissioners, sitting as the county weed control authority, made a finding that it was necessary to give notice to secure more definite control of noxious weeds on her land. Brozovsky is correct in her assertion that proof of proper notice is an element of the State's prima facie case pursuant to § 2-955(3)(a). That section states in pertinent part:

> A person who is responsible for an infestation of noxious weeds on particular land under his or her ownership and who refuses or fails to control the weeds on the infested area within the time designated in the *notice delivered by the control authority* shall, upon conviction, be guilty of an infraction . . . .

(Emphasis supplied.)

Brozovsky is also correct in her assertion that the State did not adduce any evidence that the York County weed control authority made a finding that it was necessary to give notice to secure more definite control of the noxious weeds on her land. However, the Noxious Weed Control Act provides exceptions to the performance of the duties it requires of the control authority. Neb. Rev. Stat. § 2-954(2)(b) (Reissue 1991) states that "[a] control authority may *cooperate* with any person in carrying out its duties and responsibilities under the act." (Emphasis supplied.) Section 2-954(3)(b) states in pertinent part that "[u]nder the direction of the control authority, it shall be the

duty of every weed control superintendent to . . . perform such other duties as *required* by the control authority in the performance of its duties." (Emphasis supplied.)

While it is uncontroverted that Campbell sent Brozovsky legal notice by certified mail on June 11, 1993, the record is absent of any showing that the control authority delegated to Campbell its statutory duty to make findings and to issue notice. It is a fundamental principle of statutory construction that penal statutes are to be strictly construed. *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995). As a result, we conclude that Brozovsky was prejudiced by the State's failure to prove an element of the crime charged—that Brozovsky was served proper notice after a finding of uncontrolled noxious weeds by the control authority or by the superintendent as required by the control authority. Because we conclude there was insufficient evidence to support the convictions, we need not discuss the other errors assigned by Brozovsky.

CONCLUSION

We conclude there was insufficient evidence to support a finding of guilty on any of the charges of which Brozovsky was convicted.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. LAWRENCE E. CONKLIN, APPELLANT.

545 N.W.2d 101

Filed March 29, 1996. No. S-95-339.

1. **Judgments: Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
2. **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.

3. **Judgments: Appeal and Error.** In a bench trial of a criminal case, the trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.
4. **Standing: Warrantless Searches.** Before one may challenge a nonconsensual search without a warrant, one must have standing in a legal controversy.
5. **Constitutional Law: Search and Seizure: Standing.** Analyzing standing requires 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.
6. **Constitutional Law: Search and Seizure.** The test used to determine if the defendant has an interest protected by the Fourth Amendment is whether the defendant has a legitimate expectation of privacy in the premises.
7. **Statutes.** A motion to quash is a proper procedural method for challenging the facial validity of a statute.
8. **Pleas: Waiver.** All defects that may be excepted to by a motion to quash are taken as waived by a defendant pleading the general issue.
9. **Constitutional Law: Statutes: Pleas.** Challenges to the constitutionality of a statute as applied to the defendant are properly preserved by a plea of not guilty.
10. **Due Process: Criminal Law: Statutes: Notice.** Due process requires that a penal statute supply adequate and fair notice of the conduct prohibited and also supply an explicit legislative standard defining the proscribed conduct, to prevent arbitrary and discriminatory enforcement at the discretion of law enforcement officials.
11. **Statutes: Standing.** In order to have standing to attack a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute.
12. **Statutes: Appeal and Error.** The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision.
13. **Constitutional Law: Ordinances: Presumptions: Proof: Appeal and Error.** In passing upon the constitutionality of an ordinance, an appellate court begins with a presumption that the ordinance is valid; consequently, the burden is on the challenger to demonstrate the constitutional defect.
14. **Statutes: Words and Phrases.** Headings, captions, or catchlines supplied in the compilation of statutes do not constitute any part of the law.

Appeal from the District Court for Douglas County, MICHAEL W. AMDOR, Judge, on appeal thereto from the County Court for Douglas County, LYN V. FERER, Judge. Judgment of District Court affirmed.

Phillip G. Wright, of Quinn & Wright, for appellant.

Herbert M. Fitle, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for appellee.

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

CONNOLLY, J.

Lawrence E. Conklin was charged with disorderly conduct in violation of Omaha Mun. Code, ch. 20, art. III, § 20-42 (1993) and carrying a concealed weapon in violation of Omaha Mun. Code, ch. 20, art. VII, § 20-192 (1993). Conklin filed a motion to quash, alleging that the municipal code sections under which he was charged are vague and overbroad unless restricted to acts committed in public. Conklin also filed a motion to suppress the evidence obtained from the apartment in which Conklin was arrested. The trial court denied both of Conklin's motions, and the district court affirmed. Conklin appeals. We affirm.

I. FACTUAL BACKGROUND

On March 26, 1994, Officer Margaret Fowler was on duty and in uniform when she was dispatched to a disturbance at 2211 Howard Street, apartment No. 41, in Omaha, Nebraska. According to the testimony of Fowler, upon entering the building, she heard a loud thump "like someone pounding a hammer" emanating from one of the upstairs apartments. Accompanied by Officer David Rieck, she proceeded to the apartment from which the noise emanated.

As to what happened at this point, Fowler's and Conklin's testimonies differ. Fowler testified that finding the hollow core door slightly ajar, she knocked on the door two or three times; at which time, the door swung open so that she could see into the apartment. Conklin, who was visiting apartment No. 41, playing cards and drinking beer, claims that, in fact, the door was locked with three separate locks and that the officers forced the door open. Conklin testified that when the door opened, he was sitting on a bed in the apartment, admittedly holding a knife. However, Conklin insists that when the officers entered, he immediately dropped the knife at his feet while still sitting on the bed.

Fowler testified that when the door swung open, she saw the defendant standing four to five paces from the doorway in a fighting stance, holding a large butcher knife, and preparing to throw it toward the door. The officers drew their weapons and

told Conklin several times to drop the knife. When he dropped the knife, they instructed him to lie on his chest in a prone position. While Fowler secured the knife, Rieck handcuffed Conklin and searched him, finding another knife in his left rear pocket. Conklin testified that he lived next door to apartment No. 41, in apartment No. 43, and had visited apartment No. 41 on several previous occasions on social visits. Although he identified the person who lived in apartment No. 41 as Patricia, he did not know her last name.

Conklin moved to suppress all evidence seized by the officers as the product of an illegal search. Furthermore, after entering a plea of not guilty, the defendant moved to quash the information and charge on the grounds that §§ 20-42 and 20-192 of the Omaha Municipal Code are vague and overbroad.

The trial court denied both motions. Conklin appealed to the district court for Douglas County, which affirmed the county court's rulings and found that the evidence at trial was sufficient to convict Conklin of disorderly conduct and carrying a concealed weapon. Conklin appeals.

II. ASSIGNMENTS OF ERROR

Conklin assigns as error the trial court's failure (1) to sustain his motion to suppress, (2) to find that the evidence presented at trial was insufficient as a matter of law to convict him of disorderly conduct or carrying a concealed weapon, and (3) to find that §§ 20-42 and 20-192 are vague, overbroad, and uncertain and are unconstitutional violations of due process of law.

III. STANDARD OF REVIEW

Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995); *State v. Skalberg*, 247 Neb. 150, 526 N.W.2d 67 (1995), *overruled on other grounds, State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323; *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994).

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. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (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).

In a bench trial of a criminal case, the trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Hill v. City of Lincoln, ante* p. 88, 541 N.W.2d 655 (1996); *State v. Kunath, supra*; *State v. Masters, supra*.

IV. ANALYSIS

1. STANDING

Before one may challenge a nonconsensual search without a warrant, one must have standing in a legal controversy. *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993); *State v. $15,518 in U.S. Currency*, 239 Neb. 100, 474 N.W.2d 659 (1991). As we recently held in *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995), analyzing standing requires 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. The test used to determine if the defendant has an interest protected by the Fourth Amendment is whether the defendant has a legitimate expectation of privacy in the premises. *Id.*

In *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990), we held that an overnight guest has an expectation of privacy in his host's home, which expectation society is willing to recognize as reasonable, and, therefore, has standing to assert Fourth Amendment violations. See, also, *Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990). However, we have, thus far, declined to extend the holding of *Walker* beyond the situation of the overnight guest. See, *State v. Cody, supra*; *State v. Baltimore, supra*; *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991).

In *State v. Baltimore, supra*, we found no standing for a defendant who was within the searched premises at the time the police entered the home, despite the fact that at the time of the search, he possessed a key to the premises. In finding no

standing, we held that "nothing indicates that Baltimore, even with a key to the house, had a legitimate expectancy of freedom from others' entering [the] house . . . ." *Id.* at 573, 495 N.W.2d at 928.

In *State v. Cody, supra*, while caring for his mother's pets during a long period while she was away, the defendant periodically stayed in one bedroom of his mother's house and entered the shed on the property in which the pet food was stored. We found that Cody did not have a legitimate expectation of privacy in either the shed or the bedroom in which he stayed. Therefore, Cody could not raise a Fourth Amendment challenge.

Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Dake, supra*; *State v. Skalberg, supra*; *State v. Dean, supra*.

We find that the facts of the present case are less persuasive for standing than the facts presented in *Baltimore* and *Cody*. Conklin was an occasional guest at apartment No. 41, possessed no interest in the property, and had no freedom to exclude anyone from the premises. Under the reasoning of *Baltimore* and *Cody*, he does not demonstrate a legitimate expectation of privacy in apartment No. 41. As Conklin had no legitimate expectation of privacy in the apartment, we conclude that the motion to suppress was properly denied.

2. Validity of §§ 20-42 and 20-192

Conklin claims in his motion to quash that §§ 20-42 and 20-192 of the Omaha Municipal Code are unconstitutionally vague and overbroad, both on their face and as applied to him. However, we do not consider Conklin's facial challenges, because they were not properly raised.

Under Nebraska law, a motion to quash is a proper procedural method for challenging the facial validity of a statute. *State v. Kelley, ante* p. 99, 541 N.W.2d 645 (1996); *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980). See, also, Neb. Rev. Stat. § 29-1808 (Reissue 1989).

Conklin filed a motion to quash on June 7, 1994; however, he had previously entered a plea of not guilty on April 11. All

defects that may be excepted to by a motion to quash are taken as waived by a defendant pleading the general issue. *State v. Bocian*, 226 Neb. 613, 413 N.W.2d 893 (1987). See, also, Neb. Rev. Stat. § 29–1812 (Reissue 1989). Furthermore, when Conklin filed his motion to quash, he did not withdraw his plea to the general issue. As long as the plea of not guilty remained upon the record, the motion to quash was not timely filed, because Conklin had already waived the defects alleged in the motion to quash. See, *State v. Bocian, supra*; *State v. Etchison*, 190 Neb. 629, 211 N.W.2d 405 (1973) (holding that because defendant did not request leave to withdraw plea, motion to quash was properly denied). Therefore, Conklin waived his facial challenges by filing his motion to quash after entering his plea, without requesting leave to withdraw the plea.

Challenges to the constitutionality of a statute as applied to the defendant are properly preserved by a plea of not guilty. *State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993). See, also, *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991). Therefore, we must determine whether §§ 20–42 and 20–192 of the Omaha Municipal Code are constitutional as applied to Conklin.

(a) Vagueness Challenge

This court has previously held that " '[d]ue process requires that a penal statute supply adequate and fair notice of the conduct prohibited and also supply an explicit legislative standard defining the proscribed conduct, to prevent arbitrary and discriminatory enforcement at the discretion of law enforcement officials.' " *State v. Schmailzl*, 243 Neb. 734, 736, 502 N.W.2d 463, 465 (1993) (quoting *State v. Monastero*, 228 Neb. 818, 424 N.W.2d 837 (1988)).

However, in order to have standing to attack a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute. *State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (1985); *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984).

Section 20–42 reads as follows: "**Disorderly conduct.** It shall be unlawful for any person purposely or knowingly to cause inconvenience, annoyance or alarm or create the risk

thereof to any person by: (a) Engaging in fighting, threatening or violent conduct; or (b) Using abusive, threatening or other fighting language or gestures."

Conklin's conduct was clearly proscribed by this ordinance. Conklin "purposely or knowingly" caused alarm or created the risk thereof to the officers, Fowler and Rieck, by holding the knife aloft in such manner as could be construed as threatening. When the door to the apartment opened and Fowler and Rieck looked in the door, Conklin was in a threatening enough posture to give them cause to draw their weapons. As the district court judge stated when reviewing this case, "[T]here is no dispute that the officers felt sufficiently threatened to draw their firearms on the defendant, and that defining moment speaks volumes about what it was that transpired on that night." As Conklin's conduct was clearly proscribed by the ordinance, he has no standing to challenge § 20-42 as vague as applied to his conduct.

Section 20-192 provides: "**Carrying concealed weapon.** It shall be unlawful for any person except an authorized law enforcement officer purposely or knowingly to carry a weapon concealed on or about his person."

We have previously considered the constitutionality of § 20-192 in *State v. Pierson, supra*. In *Pierson*, the defendant was convicted of carrying a concealed weapon in violation of § 20-192, and challenged the ordinance as unconstitutionally vague. This court held that while due process of law requires that criminal statutes be clear and definite, it is not necessary for a penal statute to be written so as to be beyond the mere possibility of more than one construction. *Id.* Furthermore, we recognized that the prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. *State v. Pierson, supra*; *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980).

In *Pierson*, where one knife found to be a concealed weapon was a folding knife with a 3½-inch blade, we held that § 20-192 was not unconstitutionally vague in light of the definition of "weapon" found in Omaha Mun. Code, ch. 20, art. VII, § 20-191 (1993). Section 20-191 provides that a weapon includes any instrument "the use of which is intended

or likely to cause death or bodily injury." We held that an ordinary person could determine with reasonable certainty (1) whether the use of a particular instrument as a weapon is likely to cause death or bodily injury or (2) whether the person intended to use the instrument to cause death or bodily injury. Whether the accused knew that using the particular weapon is likely to cause death or bodily injury is a question of fact to be resolved by the trier of fact. *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991).

In a bench trial of a criminal case, the trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Hill v. City of Lincoln, ante* p. 88, 541 N.W.2d 655 (1996); *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995); *State v. Masters*, 246 Neb. 1018, 524 N.W.2d 342 (1994).

The knife found in Conklin's pocket is a folding knife with a blade approximately 3 inches in length. In light of our previous holding in *Pierson* that a knife with a 3½-inch blade was a weapon, we hold that it was not clearly erroneous for the trial judge to conclude that Conklin knew that a knife of this size was likely to cause death or bodily injury if it was used as a weapon. Thus, we conclude that § 20-192 gave Conklin sufficient notice that carrying such a knife concealed in his pocket was proscribed; therefore, as applied to the facts in this case, § 20-192 is not vague.

(b) Overbreadth of §§ 20-42 and 20-192

What remains to be determined is whether the ordinance is overbroad in its application to Conklin. In passing upon the constitutionality of an ordinance, an appellate court begins with a presumption that the ordinance is valid; consequently, the burden is on the challenger to demonstrate the constitutional defect. *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378, 470 N.W.2d 760 (1991). In order to succeed in his overbreadth challenge, Conklin must demonstrate that §§ 20-42 and 20-192 impinge on constitutionally protected conduct. We conclude that they do not.

With regard to § 20-42, we determine that the State has a legitimate interest in proscribing fighting, threatening, or

violent conduct, whether in private or in public, and that proscribing such conduct infringes upon no constitutionally protected conduct.

Furthermore, while Conklin was a guest in the apartment, Rieck found a knife concealed in Conklin's left rear pocket and charged him with violating § 20–192. The State has a legitimate interest in proscribing the carrying of concealed weapons in order to protect the safety of citizens and law enforcement officers. We find that carrying a knife in one's pocket while a guest in another's home is not constitutionally protected conduct. Thus, we reject Conklin's overbreadth argument with regard to § 20–192 and leave for another day the question of whether the ordinance would be overbroad if applied to persons in their own homes.

3. Sufficiency of Evidence

Conklin alleges that the evidence presented at trial was insufficient as a matter of law to convict him of disorderly conduct or carrying a concealed weapon. The basis of his argument with regard to § 20–42 is that the disorderly conduct ordinance, § 20–42, comes under article III, which is entitled "**OFFENSES AGAINST THE PUBLIC PEACE,**" and Conklin was in a private residence apartment building at the time of the arrest.

Headings, captions, or catchlines supplied in the compilation of statutes do not constitute any part of the law. *In re Estate of Peterson*, 230 Neb. 744, 433 N.W.2d 500 (1988); *Lawson v. Ford Motor Co.*, 225 Neb. 725, 408 N.W.2d 256 (1987). Neb. Rev. Stat. § 49–802(8) (Reissue 1993). Furthermore, as the State argues, maintenance of the public peace does not necessarily require offenses to be committed in public. Public peace, in this sense, is that tranquility enjoyed by the citizen of a community where good order reigns. It represents quiet, orderly behavior between individuals and the government. See *Newby v. Woodbury County District Court*, 259 Iowa 1330, 147 N.W.2d 886 (1967).

Conklin argues that there was insufficient evidence to convict him of carrying a concealed weapon pursuant to § 20–192, because he has proved an affirmative defense under Omaha

Mun. Code, ch. 20, art. VII, § 20-194 (1993), that "he was engaged in a lawful business, calling or employment and the circumstances in which he was placed at the time were such as to justify a prudent person carrying a weapon for his own defense . . . ." The basis for Conklin's claim is his testimony that he had just left work. Ostensibly, he used the knife found on his person to open packages of meat at his place of employment, Skylark Meats.

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. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (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). In a bench trial of a criminal case, the trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Hill v. City of Lincoln, ante* p. 88, 541 N.W.2d 655 (1996); *State v. Kunath, supra*; *State v. Masters, supra*. We find that the trial court did not err in determining that an affirmative defense was not available in this case, and we, therefore, affirm its decision.

V. CONCLUSION

As Conklin did not have a legitimate expectation of privacy in 2211 Howard Street, apartment No. 41, the trial court properly denied his motion to suppress. Additionally, Conklin's motion to quash was not timely filed; therefore, he waived any challenge to the facial constitutionality of the ordinances by filing a plea of not guilty. Furthermore, §§ 20-42 and 20-192 are not unconstitutionally vague and overbroad. Finally, we conclude that there was sufficient evidence with which to convict Conklin, and we, therefore, affirm.

AFFIRMED.

WHITE, C.J., not participating in the decision.

IN RE INTEREST OF TODD T., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, AND DEPARTMENT OF SOCIAL SERVICES, APPELLANT, V. SAINT JOSEPH CENTER FOR MENTAL HEALTH, APPELLEE.

545 N.W.2d 711

Filed March 29, 1996. No. S-95-354.

1. **Juvenile Courts: Appeal and Error.** The standard of review for a juvenile case is de novo on the record; under this standard, an appellate court is required to reach its conclusion independent of the trial court's findings.
2. **Statutes: Legislature: Intent: Appeal and Error.** In discerning the meaning of a statute, an appellate court determines and gives 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.
3. **Juvenile Courts: Costs.** Under Neb. Rev. Stat. § 43-290 (Reissue 1993), a juvenile court can order a child under its jurisdiction to receive medical, psychological, or psychiatric study or treatment. The juvenile court can order the costs of the study or treatment to be paid by the child's parent or guardian; if the child has been committed to the custody of the Department of Social Services, the court can order the department to pay for the study or treatment.

Appeal from the Separate Juvenile Court of Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed.

Don Stenberg, Attorney General, Royce N. Harper, and Shawn Elliott, Special Assistant Attorney General, for appellant.

James S. Jansen, Douglas County Attorney, and John E. Huber for appellee State.

Lyman L. Larsen and Conal L. Hession, of Kennedy, Holland, DeLacy & Svoboda, for appellee Saint Joseph Center for Mental Health.

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

WHITE, C.J.

This appeal arises from a dispute over a hospital bill. The Nebraska Department of Social Services (DSS) contests an order of the separate juvenile court of Douglas County, Nebraska, to pay for a preadjudication evaluation at a private hospital. Because the statutory reasons by which DSS might be

held financially liable are not satisfied by the facts of this case, we reverse.

On August 29, 1994, the Douglas County Attorney filed a delinquency petition against Todd T., pursuant to Neb. Rev. Stat. § 43-247(2) (Reissue 1993), alleging that Todd was a juvenile who had committed an act that would constitute a felony in Nebraska. Specifically, the petition alleged that Todd had taken or exercised control over movable property belonging to another, and valued at $1,500 or more, with the intent to deprive that person of the property. Todd first appeared in court on September 21 for a detention hearing before Judge Douglas F. Johnson. DSS was not present, nor was its presence requested, at the detention hearing. Todd was accompanied by his parents and represented by the Douglas County public defender.

During the hearing, counsel for Todd informed the trial judge that Todd's mother had hospitalized Todd 1 month earlier at the Saint Joseph Center for Mental Health (St. Joseph's) and that Todd had attended a partial-care program at St. Joseph's following his release. Counsel for Todd asked the court to order a preadjudication examination at St. Joseph's pursuant to Neb. Rev. Stat. § 43-258 (Cum. Supp. 1994). Specifically, Todd's lawyer stated that Todd's parents had spoken with his treating physician at St. Joseph's and that the hospital would "have a bed waiting for this young man" if the court assented to the preadjudication examination.

The court hesitated to order hospitalization, stating:

> When I send a person to St. Joe's, what they're wondering about is funding. Other than you may have Medicaid, you've got to apply and you've got to get certified to get in. And I've got to be careful with the limited resources and the budget that we've got to work with.
>
> I can tell you right now with St. Joe's, I believe, not including any doctors' services, just to be there and have a space is $600 a day.

Todd's mother responded that Todd's physician had confirmed that the hospitalization would be paid by medicaid. The court then asked for a letter of confirmation from Todd's physician

and continued the hearing pending receipt of information as to the payor for Todd's hospitalization.

Todd's detention hearing resumed the next day, September 22, before Judge Samuel P. Caniglia. Again, DSS was not present and was not a party to the hearing. Counsel for Todd presented the court with a letter faxed from St. Joseph's, which letter ostensibly discussed payment for Todd's hospitalization. As neither counsel for Todd nor the Douglas County Attorney offered the letter into evidence, the letter is not part of the record in this case, and its contents are not known. The record indicates that the court read the letter and, pursuant to its representations, agreed to a preadjudication evaluation at St. Joseph's. The court's written order provided that Todd was to be taken to St. Joseph's that day and that upon Todd's release from St. Joseph's, he was to be returned to and detained at the Douglas County Youth Center. The order further provided that "the cost shall be borne by Medicaid." Todd was transported to St. Joseph's, where he remained for about 2 weeks.

Ultimately, all charges against Todd were resolved on December 27, when the trial court committed Todd to the custody of the Nebraska Department of Correctional Services for incarceration at the Youth Rehabilitation and Treatment Center in Kearney, Nebraska; the court terminated its jurisdiction with that order. DSS still had not become involved in Todd's case.

On February 17, 1995, St. Joseph's filed an application for payment, alleging that medicaid had refused payment for Todd's evaluation because the evaluation was not medically necessary. On March 6, at a hearing on the application, the juvenile court ordered DSS to pay for Todd's hospitalization, stating that "I don't think that the hospital ought to end up footing the bill for this youngster. My order . . . was entered with the idea . . . that [medicaid] covered it. If [medicaid] doesn't cover it, then I feel the matter should be paid by the Department of Social Services." Over objection by DSS, which appeared to contest the application for payment, the court ordered DSS to pay the hospital bill, stating that "[DSS is] the only other agency that has concerned — that will have any liability. I can't order anybody else to pay it."

DSS appeals from this order, assigning as error the decision of the juvenile court to order DSS to pay for the treatment of a child who was never placed in DSS' custody. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 533 N.W.2d 664 (1995). Our standard of review for this juvenile case is de novo on the record; under this standard, this court is required to reach its conclusion independent of the trial court's findings. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

St. Joseph's argues that DSS must pay Todd's bill pursuant to § 43-258(4), which reads in part as follows:

> In order to encourage the use of the procedure provided in this section [preadjudication evaluations], all costs incurred during the period the juvenile is being evaluated at a state facility or institution shall be the responsibility of the state unless otherwise ordered by the court pursuant to section 43-290.

St. Joseph's contends that "state" modifies only "facility" and not "institution," and that because St. Joseph's is an institution, DSS must pay; alternatively, St. Joseph's contended at oral argument that it is, in fact, a state facility insofar as Todd was evaluated at St. Joseph's at the behest of a state actor, the juvenile court.

St. Joseph's argument that § 43-258 requires DSS to underwrite treatment at any institution, private or public, is simply wrong. Had the Legislature intended that effect, it need not have added the "state" modifier at all. Notably, the same statute refers to placing juveniles for preadjudication evaluation at "one of the facilities or institutions of the State of Nebraska." § 43-258(2).

In discerning the meaning of a statute, this court determines and gives 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. *Koterzina v. Copple Chevrolet, ante* p. 158, 542 N.W.2d 696 (1996). The statute requires the State to pay for services at state hospitals. St.

Joseph's is a private hospital, irrespective of its occasional interface with the state court system.

St. Joseph's also posits that the juvenile court has continuing jurisdiction over DSS. Under this theory, the court can order DSS to pay for Todd's treatment simply because in some cases DSS can be ordered to act with respect to a child irrespective of its wishes or even its participation in a court proceeding. St. Joseph's refers in particular to Neb. Rev. Stat. § 43-290 (Reissue 1993), which enumerates procedures for securing the costs of care and treatment for a juvenile. Under § 43-290, a juvenile court can order a child under its jurisdiction to receive medical, psychological, or psychiatric study or treatment. The juvenile court can order the costs of the study or treatment to be paid by the child's parent or guardian; if the child has been committed to the custody of DSS, the court can order DSS to pay for the study or treatment. *Id.*

We find that the opposite of this statutory provision must also be true: if the child has not been committed to the custody of DSS, then the court has no authority to order DSS to finance the child's study or treatment. At various times over the course of Todd's journey through the juvenile justice system, Todd was committed to the custody of the Douglas County Youth Center, St. Joseph's, his parents, and the Nebraska Department of Correctional Services at the Youth Rehabilitation and Treatment Center in Geneva, Nebraska, and the Youth Rehabilitation and Treatment Center in Kearney, Nebraska. At no point did the court commit Todd to the care and custody of DSS. None of DSS' services, such as assistance in determining a plan for Todd's care and placement, were sought by the court or by any party to this litigation, nor did DSS offer any such services.

St. Joseph's notes correctly that a juvenile court can order DSS to take custody of a child even if DSS did not participate in the placement process. See Neb. Rev. Stat. § 43-254(3) (Reissue 1993). This does not imply, however, that under § 43-290 DSS must pay for a child who was never placed in its custody.

Whether St. Joseph's, Douglas County, medicaid, Todd's parents, or some other party must assume the costs of Todd's evaluation is not in question in this appeal. We are asked only

to determine whether DSS, the appellant, should pay; we find that it should not.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. VERLYN BEETHE, APPELLANT.
545 N.W.2d 108

Filed March 29, 1996. No. S-95-640.

1. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Notice: Proof.** Proof of proper notice is an element of the State's prima facie case pursuant to Neb. Rev. Stat. § 2-955(3)(a) (Reissue 1991).
3. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed.
4. **Governmental Subdivisions: Notice.** In order to prove notice as required by Neb. Rev. Stat. § 2-955(3)(a) (Reissue 1991), it must be shown that the county control authority made a finding of uncontrolled noxious weeds and issued proper notice to the defendant or delegated its statutory duty to the weed control superintendent to make such findings and to give such notice.

Appeal from the District Court for Pawnee County, WILLIAM B. RIST, Judge, on appeal thereto from the County Court for Pawnee County, CURTIS L. MASCHMAN, Judge. Judgment of District Court reversed.

Thomas L. Morrissey, of Morrissey, Morrissey & Dalluge, for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

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

CONNOLLY, J.

Verlyn Beethe was found guilty by the county court for Pawnee County of 14 counts of failing or refusing to control noxious weeds pursuant to Neb. Rev. Stat. § 2-955(3)(a) (Reissue 1991). The district court for Pawnee County affirmed the county court's decision. Under the authority granted to us by Neb. Rev. Stat. § 24-1106 (Cum. Supp. 1994) to regulate the caseloads of the appellate courts of this state, we remove the appeal to this court. Because there is an absence of evidence in the record to show that Beethe was served with proper notice, we conclude there was insufficient evidence to support a finding of guilty on any of the charges of which he was convicted. We therefore reverse.

BACKGROUND

On June 1, 1994, Larry Bradbury, the county weed control superintendent for Pawnee County, inspected Beethe's land and discovered a moderate infestation of noxious weeds, i.e., musk thistle. On that date, Bradbury delivered a "15-day individual notice" to the Pawnee County sheriff's office for service upon Beethe. Deputy Sheriff Marty Tuttle personally served Beethe with the notice that day. The notice stated in part the specific section of land that was infested with musk thistle, the method of control recommended, and a warning that if within 15 days from June 16 the musk thistle had not been brought under control, he might, upon conviction, be subject to a fine of $100 per day for each day of noncompliance, up to a maximum of 15 days of noncompliance. The notice also stated that Beethe could request a hearing within 15 days to challenge the existence of a noxious weed infestation on his property.

During subsequent inspections of Beethe's land on June 16 and 28 and July 9, 1994, Bradbury found that no control methods had been taken with respect to the musk thistle. As a result, the Pawnee County Attorney filed a complaint against Beethe in county court alleging one count of refusal or failure to control noxious weeds pursuant to § 2-955(3)(a). The State later amended its complaint to 15 counts alleging that violations of § 2-955(3)(a) commenced on June 16 and continued thereafter on each day to and including June 30. Beethe was

subsequently convicted of 14 counts of failing or refusing to control noxious weeds. On appeal, the district court affirmed the trial court's decision. Beethe appeals.

ASSIGNMENTS OF ERROR

Beethe assigns 11 errors, which allege in summary that the county court erred in finding (1) he was served with notice or, in the alternative, the notice served was adequate; (2) the county weed control superintendent's qualifications were sufficient and adequately demonstrated; (3) the county weed control superintendent did not exceed his authority; (4) the county weed control authority fulfilled its duties; (5) there was sufficient evidence to justify the convictions; and (6) Neb. Rev. Stat. § 2-953 (Reissue 1991) and § 2-955 are not unconstitutionally vague.

STANDARD OF REVIEW

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. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994).

ANALYSIS

Beethe first alleges the county court erred in finding that he was served with notice or, in the alternative, that the notice served was adequate. At trial, Tuttle testified that he personally served Beethe notice on June 1, 1994, at the request of Bradbury. As a result, we will only address Beethe's assertion that the notice served was inadequate. Section 2-955(1)(b) states in pertinent part:

> Whenever any *control authority* finds it necessary to secure more prompt or definite control of weeds on particular land than is accomplished by the general published notice, it shall cause to be served individual notice upon the owner of record of such land at his or her last-known address, giving specific instructions and

> methods when and how certain named weeds are to be controlled.

(Emphasis supplied.)

Beethe argues that the county court erred in not requiring the State to prove beyond a reasonable doubt that the Pawnee County board of commissioners, sitting as the county weed control authority, caused individual notice to be served on him, and in finding that the county weed superintendent constitutes the agent of the control authority for purposes of making findings and issuing notice pursuant to the Noxious Weed Control Act.

In *State v. Brozovsky, ante* p. 723, 545 N.W.2d 98 (1996), we held that proof of proper notice is an element of the State's prima facie case pursuant to § 2-955(3)(a), which states in pertinent part:

> A person who is responsible for an infestation of noxious weeds on particular land under his or her ownership and who refuses or fails to control the weeds on the infested area within the time designated in the *notice delivered by the control authority* shall, upon conviction, be guilty of an infraction . . . .

(Emphasis supplied.)

Beethe is correct in his assertion that the State did not adduce any evidence that the Pawnee County weed control authority made any findings or caused notice to be served on him. However, the Noxious Weed Control Act provides exceptions to the performance of the duties it requires of the control authority. Neb. Rev. Stat. § 2-954(2)(b) (Reissue 1991) states that "[a] control authority may *cooperate* with any person in carrying out its duties and responsibilities under the act." (Emphasis supplied.) Section 2-954(3)(b) states in pertinent part that "[u]nder the direction of the control authority, it shall be the duty of every weed control superintendent to . . . perform such other duties as *required* by the control authority in the performance of its duties." (Emphasis supplied.)

The only evidence at trial with regard to Bradbury's authority to make findings and to issue notice was adduced on direct examination of Bradbury as follows:

> Q- . . . While on your inspection on the 1st of June, are you required to take certain action where you — with respect to your observations of noxious weeds on the property?
>
> A- I'm required to notify the landowner of my findings. I sent a letter with that notice stating what I've — that an inspection was conducted, what I found and ask that he takes appropriate action within a given length of time.

While Bradbury testified that he is "required to notify the landowner of [his] findings," the record does not indicate who required Bradbury to give such notice. The record is absent of any showing that the control authority delegated its statutory duty to make findings and to issue notice to Bradbury. It is a fundamental principle of statutory construction that penal statutes are to be strictly construed. *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995). As a result, we conclude that Beethe was prejudiced by the State's failure to prove an element of the crime charged—that Beethe was served proper notice after a finding of uncontrolled noxious weeds by the control authority or by the superintendent as expressly required by the control authority. See *State v. Brozovsky, supra*. Because we conclude there was insufficient evidence to support the convictions, we need not discuss Beethe's other assigned errors.

CONCLUSION

We conclude there was insufficient evidence to support a finding of guilty on any of the charges of which Beethe was convicted.

REVERSED.

HERBERT CORDS, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

545 N.W.2d 112

Filed March 29, 1996. No. S-95-838.

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. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact, the evidence must be considered in the light most favorable to the successful party.
4. **Workers' Compensation.** Whether an accident arose "out of" and "in the course of" employment must be determined from the facts of each case.
5. **Workers' Compensation: Proof.** The onus of proving that an injury arose both "out of" and "in the course of" the employment rests upon the applicant.
6. **Workers' Compensation: Words and Phrases.** "Arising out of" is a term which describes the accident and its origin, cause, and character, i.e., whether it resulted from risks arising within the scope or sphere of the employee's job.
7. ____: ____. "In the course of" refers to the time, place, and circumstances surrounding the accident.
8. **Workers' Compensation.** The test to determine whether an act or conduct of an employee which is not a direct performance of his work "arises out of" his employment is whether the act is reasonably incident thereto, or is so substantial a deviation as to constitute a break in the employment which creates a formidable independent hazard.
9. ____. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in under the conditions of his work, are regarded as being within the scope or sphere of the employment.
10. **Workers' Compensation: Proof.** The "in the course of" requirement demands that the injury be shown to have arisen within the time and space boundaries of employment and in the course of an activity whose purpose is related to employment.
11. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
12. ____: ____. Neb. Rev. Stat. § 48-185 (Reissue 1993) precludes an appellate court's substitution of its view of the facts for that of the Workers' Compensation

Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court.

13. **Workers' Compensation.** A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court.
14. **Workers' Compensation: Words and Phrases.** "Earning power," as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1993), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he is engaged or for which he is fitted.
15. **Workers' Compensation: Expert Witnesses.** While expert witness testimony may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court does not need to depend on expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant.
16. **Workers' Compensation.** A determination as to whether there is a reasonable probability that vocational rehabilitation services would reduce the amount of earning power lost by an injured worker is a question of fact to be determined by the Workers' Compensation Court.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

William F. Austin, Lincoln City Attorney, and James D. Faimon for appellant.

Rollin R. Bailey, of Bailey, Polsky, Cope & Knapp, for appellee.

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

CONNOLLY, J.

Herbert Cords brought this action against the City of Lincoln (City) seeking workers' compensation benefits for an injury sustained to his lower back as a result of an accident which occurred on July 8, 1992. At trial, a single judge of the Nebraska Workers' Compensation Court held that Cords' claimed accident "[arose] out of and in the course of his employment" with the City, and that Cords experienced a 10-percent loss of earning power as a result of the injury. Therefore, the court ordered the City to pay Cords permanent partial disability at a rate of $51.39 per week for 300 weeks, along with medical expenses and vocational rehabilitation

benefits. The appeals panel of the Workers' Compensation Court affirmed the trial court's order. The City appeals.

Under the authority granted to us by Neb. Rev. Stat. § 24-1106 (Cum. Supp. 1994) to regulate the caseloads of the appellate courts of this state, we remove the appeal to this court. We conclude there was sufficient competent evidence to support the trial court's findings and the award granted. As a result, we affirm the appeals panel's decision affirming the trial court's order.

FACTUAL BACKGROUND

Cords, age 60, began his employment with the City's parks and recreation department in 1961 and had held the position of assistant superintendent of parks since 1966. Cords' educational background includes high school and a few college courses. Prior to his employment with the City, Cords worked as a mechanic, farmed, drove a truck, and worked at an equipment company and a grocery store. As assistant superintendent of parks, Cords earned wages of $770.76 per week and reported only to the superintendent of parks, James Morgan, who in turn reported only to the mayor of Lincoln, Mike Johanns. Approximately 80 full-time employees were under Cords' supervision and direction. Cords' duties included overseeing the City's mechanical maintenance shop, carpentry maintenance shop, swimming pools, greenhouse, and four golf courses, along with seeing that orders were placed and fulfilled. In the performance of these duties, Cords would go to Lincoln's County-City Building approximately three to four times a week.

On July 7, 1992, Cords was told by his superior, Morgan, that due to a complaint against Cords, the City was offering him a chance to retire or he would be terminated. This ultimatum resulted from an alleged incident which involved a newspaper reporter. Cords asked Morgan whether he should contact the complaining party, retain a lawyer, or appeal to the mayor or personnel director regarding his job status. He was advised against contact with the complaining party but was informed that he was free to pursue whatever options he chose. Cords elected to contact the mayor's office and was able to schedule an appointment.

On July 8, 1992, Cords reported to work at approximately 7 a.m. and began performing some of his usual duties. At approximately 10:30 a.m., Cords went to the County-City Building to speak with the mayor and to speak with someone in the purchasing department about some grass seed he had ordered. Cords first attempted to inquire about the grass seed, but neither of the individuals he needed to speak with was there. He then went to the mayor's office and was advised that the mayor would follow the recommendation of Morgan. After speaking with the mayor, Cords went down to the first floor to speak with Ron Todd, an acquaintance in the personnel department. After speaking with Todd, Cords decided to go back upstairs to "talk to the Mayor one more time."

On his way to the mayor's office, Cords decided against revisiting the mayor. As a result, he started back down the stairs, planning to return to his office and to talk again to Morgan. As he was approximately four to five stairs from the bottom of the stairwell, Cords slipped, turned his ankle, and fell backward onto the stairs, injuring his lower back. After the fall, Cords went to the parks office to fill out an accident report, as is required after all accidents by City employees. He then attempted to see Morgan, who was out of the office. Cords then went to his own office and began returning phone calls, but began to hurt and decided to go home.

On July 9, 1992, while at home due to his injuries, Cords received a letter of termination of employment from Morgan. The letter, which was dated July 9, stated that Cords was suspended immediately pending discharge. The letter further stated that Cords had "ten working days to appeal this suspension prior to discharge" and that "at the end of the suspension period [he would] be terminated and may appeal the termination as provided in the Lincoln Municipal Code." On that date, Cords wrote a letter of resignation giving 2 weeks' notice and laid it on Morgan's desk.

As a result of his injury, Cords saw a family physician, an orthopedic surgeon, a physical therapist, and a neurologist. The orthopedic surgeon, Dr. Samuel Smith, gave Cords "a 2% partial permanent impairment for the body as a whole on the basis of his injury." At trial, Cords testified that he continued

to suffer from lower back pain and from numbness in the three smallest toes on his right foot. Cords further testified that since the accident, he must walk slowly because when he walks fast it hurts, that he can ride only 50 miles in a car before he has to get out and move around, that he had to buy a riding lawn mower in order to mow his yard, and that after he resigned he began cleaning apartments but quit those jobs because it hurt him to carry things.

At trial, a single judge of the Nebraska Workers' Compensation Court held that Cords' claimed accident "[arose] out of and in the course of his employment" with the City, and that Cords experienced a 10-percent loss of earning power as a result of the injury. Therefore, the court ordered the City to pay Cords permanent partial disability at a rate of $51.39 per week for 300 weeks, along with medical expenses and vocational rehabilitation benefits. The appeals panel of the Workers' Compensation Court affirmed. The City appeals.

ASSIGNMENTS OF ERROR

The City assigns 10 errors, which allege in summary that there was insufficient evidence to support the Workers' Compensation Court's conclusions that Cords: (1) incurred an accident "arising out of and in the course of his employment," (2) was eligible for $51.39 per week for 300 weeks in permanent partial disability compensation due to a 10-percent loss of earning power, and (3) was eligible for vocational rehabilitation services.

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. *Hull v. Aetna Ins. Co., ante* p. 125, 541 N.W.2d 631 (1996); *Buckingham v. Creighton University*, 248 Neb. 821, 539 N.W.2d 646 (1995).

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. *Scott v. Pepsi Cola Co., ante* p. 60, 541 N.W.2d 49 (1995). In testing the sufficiency of the evidence to support findings of fact, the evidence must be considered in the light most favorable to the successful party. *Morton v. Hunt Transp.*, 240 Neb. 63, 480 N.W.2d 217 (1992); *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991).

ANALYSIS

Arising out of and in the Course of Employment

The City first alleges there was insufficient evidence to support the trial court's conclusion that Cords incurred an accident "arising out of and in the course of his . . . employment" as required by Neb. Rev. Stat. § 48-101 (Reissue 1993). More specifically, the City argues that Cords' appointment with the mayor at the County-City Building was outside the course of his employment, and therefore, the accident did not arise out of his employment.

Whether an accident arose "out of" and "in the course of" employment must be determined from the facts of each case. *Tompkins v. Raines*, 247 Neb. 764, 530 N.W.2d 244 (1995). The onus of proving that the injury arose both "out of" and "in the course of" the employment rests upon the applicant. *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965); *Bartlett v. Eaton*, 123 Neb. 599, 243 N.W. 772 (1932).

"Arising out of" is a term which describes the accident and its origin, cause, and character, i.e., whether it resulted from risks arising within the scope or sphere of the employee's job. On the other hand, "in the course of" refers to the time, place, and circumstances surrounding the accident. *Cox v. Fagen Inc., ante* p. 677, 545 N.W.2d 80 (1996); *Johnson v. Holdrege Med. Clinic, ante* p. 77, 541 N.W.2d 399 (1996).

The test to determine whether an act or conduct of an employee which is not a direct performance of his work "arises out of" his employment is whether the act is reasonably incident thereto, or is so substantial a deviation as to constitute a break in the employment which creates a formidable independent

hazard. *Cannia v. Douglas Cty.*, 240 Neb. 382, 481 N.W.2d 917 (1992); *Bituminous Casualty Corp. v. Deyle*, 225 Neb. 82, 402 N.W.2d 859 (1987); *Schademann v. Casey*, 194 Neb. 149, 231 N.W.2d 116 (1975).

> "All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment."

Schademann, 194 Neb. at 155, 231 N.W.2d at 121.

The "in the course of" requirement demands that the injury be shown to have arisen within the time and space boundaries of employment and in the course of an activity whose purpose is related to employment. *Cox v. Fagen Inc., supra*; *Moore v. The Sisk Co.*, 216 Neb. 451, 343 N.W.2d 767 (1984).

In determining whether to affirm, modify, reverse, or set aside the judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. In the instant case, the trial judge found that Cords

> was still an employee on the date of his injury. He was "on the clock" when the accident occurred. While his normal job description may not have involved meetings with the Mayor or his staff regarding his employment status, there can be little doubt that continuation of his 26 year career was fundamentally within the concept of "course of employment" and the accident therefore "arose out of" that employment. There is no formula for determination of questions whether an accident arises out of and in the course of employment. Such adjudications must occur on the specific facts of each case. The evidence as a whole preponderates in favor of [Cords].

Section 48-185 precludes an appellate court's substitution of its view of the facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. *Aken*

v. Nebraska Methodist Hosp., 245 Neb. 161, 511 N.W.2d 762 (1994).

It is uncontroverted that Cords was an employee of the City on July 8, 1992, when the injury occurred. At the hearing, Cords adduced the following evidence: Besides Morgan, the only person with a position superior to Cords' in the parks and recreation department was the mayor. In the performance of his duties, Cords would go to the County-City Building approximately three to four times a week. While Morgan never advised Cords to visit the mayor in regard to his termination, he did tell Cords that he was free to pursue whatever options he chose. Cords made an appointment to see the mayor. In the morning before visiting the mayor, Cords performed his regular duties. While at the County-City Building to visit the mayor, Cords attempted to inquire about some seed he had ordered, which was part of his regular duties. After the accident, Cords continued performing his duties, including filling out an accident form, attempting to talk to his superior, and returning phone calls.

Cords' discussion with the mayor about retaining him as an employee of the City after 26 years of exemplary service in a responsible managerial position is certainly a subject that is of beneficial interest to the City. See *McCall v. McCall Amusement, Inc.*, 748 S.W.2d 827 (Mo. App. 1988) (injury suffered by employee while performing act for mutual benefit of employer and employee is usually compensable and arises out of and in course of employment, even though advantage to employer is slight).

It is true that the meeting with the mayor was not a direct performance of Cords' work as assistant superintendent of parks. However, when considering the evidence adduced in the light most favorable to Cords, it was not clearly erroneous for the trial court to have found that such a meeting arose within the time and space boundaries of employment and in the course of an activity whose purpose was related to employment, and was not so substantial a deviation as to constitute a break in the employment which created a formidable independent hazard. See, *Cox v. Fagen Inc., ante* p. 677, 545 N.W.2d 80 (1996); *Cannia v. Douglas Cty.*, 240 Neb. 382, 481 N.W.2d 917 (1992).

Thus, we conclude the trial judge had sufficient competent evidence in the record to find that Cords incurred injuries to his lower back as a result of an accident "arising out of and in the course of his employment."

PERMANENT PARTIAL DISABILITY COMPENSATION

The City next alleges there was insufficient evidence to support the trial court's conclusion that Cords was eligible for $51.39 per week for 300 weeks in permanent partial disability compensation due to a 10-percent loss of earning power.

A determination as to whether an injured worker has had a loss of earning power is a question of fact to be determined by the Workers' Compensation Court. *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994). Neb. Rev. Stat. § 48-121(2) (Reissue 1993) states in pertinent part: "For disability partial in character . . . the compensation shall be sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter."

"Earning power," as used in subsection (2) of § 48-121, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he is engaged or for which he is fitted. *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980).

While expert witness testimony may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court does not need to depend on expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant. See *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990).

The City did not adduce any evidence concerning Cords' injuries or earning power. In addition to the opinion of Dr. Smith that Cords suffered "a 2% partial permanent impairment," Cords personally testified that he continued to suffer from lower back pain and from numbness in the three smallest toes on his right foot. Cords further testified that since the accident, he must walk slowly because when he walks fast

it hurts, that he can ride only 50 miles in a car before he has to get out and move around, that he had to buy a riding lawn mower in order to mow his yard, and that after he resigned he began cleaning apartments but quit those jobs because it hurt him to carry things.

This testimony, in addition to Cords' age, Cords' limited work experience and education, the position he held, the wages he was earning, and the disability that he suffered, establishes that Cords is not employable for a position comparable to the position he held and that he suffered a 10-percent loss of earning capacity. As a result, we conclude that there was sufficient competent evidence in the record justifying the trial court's award of permanent partial disability at a rate of $51.39 per week for 300 weeks.

Vocational Rehabilitation Services

Finally, the City alleges there was insufficient evidence to support the trial court's conclusion that Cords was eligible for vocational rehabilitation services. Neb. Rev. Stat. § 48-162.01(3) (Reissue 1993) provides in part:

> An employee who has suffered an injury covered by the Nebraska Workers' Compensation Act shall be entitled to prompt medical and physical rehabilitation services. When as a result of the injury an employee is unable to perform suitable work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including job placement and retraining, as may be reasonably necessary to restore him or her to suitable employment.

A determination as to whether there is a reasonable probability that vocational rehabilitation services would reduce the amount of earning power lost by an injured worker is a question of fact to be determined by the Workers' Compensation Court. *McGowan v. Lockwood Corp., supra.*

As stated, Cords testified about the accident; about how he felt on the day of the trial, that more than 2 years 3 months after the accident he was still suffering from physical pain and difficulty; about his numerous visits to medical doctors seeking relief; and about how he had tried to obtain new jobs, but could

not do so due to his injury. The City offered no contradictory evidence. As a result, we conclude that there was sufficient competent evidence from which the trial judge could conclude that Cords was eligible for vocational rehabilitation services.

CONCLUSION

We conclude the trial judge had sufficient competent evidence in the record to find that Cords incurred an accident "arising out of and in the course of his . . . employment" and was eligible for vocational rehabilitation services, as well as $51.39 per week for 300 weeks in permanent partial disability compensation due to a 10-percent loss of earning power. Therefore, the Workers' Compensation Court review panel's decision affirming the trial judge's order is affirmed.

AFFIRMED.

SOLAR MOTORS, INC., FORMERLY KNOWN AS BAKER CHRYSLER, PLYMOUTH, DODGE, INC., AND BRETT R. BAKER, APPELLEES AND CROSS-APPELLANTS, V. FIRST NATIONAL BANK OF CHADRON, APPELLANT AND CROSS-APPELLEE.

545 N.W.2d 714

Filed April 5, 1996. No. S-93-622.

1. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction.
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. **Verdicts: Appeal and Error.** A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.
5. ____: ____. In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
6. **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.
7. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
8. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
9. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.
10. **Contracts: Debtors and Creditors.** An obligation of good faith in the performance or enforcement of a contract can exist in a debtor-creditor relationship.
11. **Negotiable Instruments: Words and Phrases.** A demand note is a note that is payable at sight or on presentation.
12. **Negotiable Instruments: Time: Actions.** A note payable on demand is due the day after it is executed and delivered, and it may then be the subject of an action to enforce the indebtedness evidenced by it.
13. **Negotiable Instruments.** No obligation of good faith and fair dealing is imposed on a party calling due a demand note.
14. **Contracts: Intent.** 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.
15. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
16. **Breach of Contract: Pleadings: Proof.** In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty.
17. **Contracts.** Instruments made in reference to and as part of the same transaction are to be considered and construed together.
18. **Contracts: Time.** That instruments were made or dated at different times is not significant if they are related to and were part of the same transaction.

19. **Contracts: Parties: Liability.** Mutual assent by the parties is required to modify a contract that substantially changes the liabilities of the parties.
20. **Contracts: Parties.** The silence of a contracting party to a proposed modification leaves the contract unmodified.
21. **Contracts: Intent.** The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.

Petition for further review from the Nebraska Court of Appeals, HANNON, MILLER-LERMAN, and INBODY, Judges, on appeal thereto from the District Court for Dawes County, PAUL D. EMPSON, Judge. Judgment of Court of Appeals affirmed.

Trev E. Peterson and Rodney M. Confer, of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Steven W. Olsen, of Simmons, Olsen, Ediger & Selzer, P.C., for appellees.

Robert J. Hallstrom, of Brandt, Horan, Hallstrom & Sedlacek, for amicus curiae Nebraska Bankers Association, Inc.

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

WHITE, C.J.

This lender liability action was brought by plaintiffs-appellees Solar Motors, Inc., and Brett Baker, Solar Motors' president, alleging that defendant-appellant, First National Bank of Chadron, breached a lending agreement between the parties. Specifically at issue are the bank's actions in demanding payment of a promissory note. At trial, the jury returned a verdict in favor of the plaintiffs in the amount of $204,357. The bank appealed to the Nebraska Court of Appeals, which reversed and remanded with directions to dismiss, holding the bank not liable. *Solar Motors v. First Nat. Bank of Chadron*, 4 Neb. App. 1, 537 N.W.2d 527 (1995). The plaintiffs successfully petitioned this court for further review.

The plaintiffs assign six errors in their petition for further review, which can be consolidated into three. The plaintiffs contend that the Court of Appeals erred in (1) failing to find that the February 20 and March 5, 1990, letters from the bank to Solar Motors constituted a modification to the lending

agreement between the parties; (2) failing to find that the bank breached the terms of this alleged modified contract; and (3) failing to find that the bank breached its obligation of good faith and fair dealing under this alleged modified contract. We affirm the judgment of the Court of Appeals.

The record reveals the following facts: Baker purchased a Chrysler franchise, Solar Motors, from Northwest, Inc., in 1988. The bank had entered into lending arrangements with Northwest in the past for the financing of its automobile dealership.

In December 1988, the bank agreed to help finance Solar Motors' business. Baker signed two promissory notes to the bank. One note was in the amount of $40,000 for the purchase of equipment (equipment note), to be amortized over 7 years. The other note was a demand note (floor plan note) in the amount of $125,000 to finance the purchasing of used vehicles for resale. The floor plan note was executed on a standard form that contained requisite blanks for a variety of different note types. This floor plan note was filled out to provide payment on demand.

In February 1990, the bank returned for insufficient funds two checks drawn by Solar Motors to pay Chrysler for certain expenses. Steve Erwin, president of the bank, wrote a letter dated February 20 to Chrysler pursuant to Baker's request to ease any concerns that Chrysler representatives might have as a result of the returned checks. Erwin's letter to Chrysler provided assurances that Solar Motors would no longer be overdrawn and also stated, "The bank at this time plans on continuing to work with this company in the 1990 year."

On March 5, Erwin wrote a letter to Baker at Solar Motors regarding the status of the parties' lending agreement. The letter stated that the bank was requiring "changes to be made" by Solar Motors to continue financing the floor plan line. These changes included, among other things, a 1-percent increase in the interest rate, no financing of vehicles over 180 days, elimination of Baker's personal draws on the account, and a decrease in the floor plan line of $25,000 per year.

Subsequent to the receipt of this letter, Baker met with Erwin to discuss the terms set forth in the letter. Erwin testified at trial

that shortly after this discussion, a new promissory note was signed to reflect the 1-percent increase as indicated in Erwin's letter. This renewal note was not dated, but still contained the standard form demand provision that was in the original note.

Erwin sent a letter dated August 23, 1990, to Baker requesting payment of the balance of the loans. This letter listed various reasons for the bank's requesting payment, including continued losses in revenue, checking account overdrafts, and undercapitalization.

After the August 23 letter, Baker requested that the bank continue its financing. The bank wrote a letter dated November 6 offering to make a "new commitment" under the terms specified in that letter. The bank's letter stated that the offer to make a new commitment would remain open until November 15. Solar Motors never responded.

On April 1, 1991, the bank wrote Solar Motors a letter stating that if the obligations were not paid in full by April 22, legal action would be commenced. Demand was made again on May 7, and the balance of the notes was eventually paid on June 24.

The plaintiffs filed a petition in Dawes County District Court, alleging damages based on theories of breach of good faith and fair dealing, breach of contract, negligent misrepresentation, and breach of fiduciary obligations. The trial court submitted the case to the jury on the theory that the bank breached its obligation of good faith and fair dealing by calling for payment on the floor plan note. The trial court refused to submit the breach of contract theory to the jury.

After deliberations began, the jury posed the following question to the district court judge: " 'Is a DEMAND note truly able to be called for absolutely no particular reason, other than the bank's choice, or must a bank use one of the reasons listed under the "other terms and conditions" section?' "

The judge responded to the jury by issuing jury instruction No. 6: "A Borrower need not be in default before the lender may demand payment. The 'Default and Acceleration' portion of the promissory note does not apply when the note is a demand note. However, the demand is subject to the duty of good faith and fair dealing."

The jury returned a verdict in favor of the plaintiffs in the amount of $204,357.

The bank appealed to the Court of Appeals, contending that there was no implied duty of good faith and fair dealing when calling due a promissory note that was payable on demand. The plaintiffs cross-appealed, contending that the district court erred by failing to submit the breach of contract issue to the jury.

The Court of Appeals reversed the judgment and remanded the cause with directions to set aside the judgment and dismiss the plaintiffs' petition. The Court of Appeals found that no obligation of good faith and fair dealing accompanied the calling of a demand instrument and further held that the February 20 and March 5, 1990, letters did not modify the original lending agreement as evidenced by the original floor plan note.

This case essentially involves the review of the district court judge's instructions to the jury and the jury's verdict in favor of the plaintiffs. Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995).

To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction. *Klawitter v. Lampert*, 248 Neb. 231, 533 N.W.2d 896 (1995).

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). A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Winslow v. Hammer*, 247 Neb. 418, 527 N.W.2d 631 (1995). In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential

conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 533 N.W.2d 664 (1995).

The plaintiffs contend in their brief in support of the petition for further review that the jury did not rely on the obligation of good faith and fair dealing accompanying the calling of a demand note. Instead, the plaintiffs contend that the letters of February 20 and March 5, 1990, modified the lending agreement as evidenced by the original floor plan note so as to exclude the demand provision and that the bank breached both its duty of good faith and the terms of this modified agreement. The bank, however, contends that it was entitled to demand payment because of the demand provision in the floor plan note.

We first find it necessary to address the validity of the trial judge's proposition of law in jury instruction No. 6, stating that a party calling a demand instrument is bound by the obligation of good faith and fair dealing. Nebraska's Uniform Commercial Code regulates negotiable instruments, which include demand instruments. See Neb. U.C.C. §§ 3-103, comment 1, and 3-104(1)(c) (Reissue 1980). Neb. U.C.C. § 1-203 (Reissue 1980) states that "[e]very contract or duty within this act imposes an obligation of good faith in its performance or enforcement." The plaintiffs contend that the obligation set forth in § 1-203 was imposed on the bank when calling due the floor plan note.

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*, 248 Neb. 518, 537 N.W.2d 312 (1995). 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. *Omaha Pub. Power Dist., supra.*

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. *Omaha Pub. Power Dist., supra.* A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995).

This court has held that an obligation of good faith in the performance or enforcement of a contract can exist in a debtor-creditor relationship. *Production Credit Assn. v. Eldin Haussermann Farms*, 247 Neb. 538, 529 N.W.2d 26 (1995); *Bloomfield v. Nebraska State Bank*, 237 Neb. 89, 465 N.W.2d 144 (1991). However, the issue of whether a duty of good faith and fair dealing accompanies the calling of a demand instrument is one of first impression to this court. When looking at other provisions of the U.C.C. in conjunction with § 1-203, we agree with the Court of Appeals that this obligation does not apply to a party calling due a demand instrument.

The U.C.C. defines a demand note as a note that is "payable at sight or on presentation." Neb. U.C.C. § 3-108 (Reissue 1980). The nature of a demand note is that it is payable on presentation at the will of the holder. The note is payable at the will of the holder, because the note is already due. A note payable on demand is due the day after it is executed and delivered, and it may then be the subject of an action to enforce the indebtedness evidenced by it. See *Alexanderson v. Wessmann*, 158 Neb. 614, 64 N.W.2d 306 (1954).

Neb. U.C.C. § 1-208 (Reissue 1992) supports this interpretation that no obligation of good faith and fair dealing arises when calling a demand note. That section discusses options to accelerate at will in negotiable instruments and provides in relevant part:

> A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired.

§ 1-208. The comment to § 1-208 states in part, "Obviously this section has no application to demand instruments or

obligations whose very nature permits call at any time with or without reason." A demand note is not the same as a note containing an acceleration clause, because under the former, payment is already due, whereas under the latter, the date of payment is being accelerated. When reading the comment to § 1-208 in light of the text of the statute, a good faith belief that the prospect of payment or performance is impaired is not required when calling a demand instrument.

Moreover, holding that a demand instrument must be called in good faith would impose terms on the parties to the lending agreement that were never agreed upon.

> The imposition of a good faith defense to the call for payment of a demand note transcends the performance or enforcement of a contract and in fact adds a term to the agreement which the parties had not included. . . . The parties by the demand note did not agree that payment would be made only when demand was made in good faith but agreed that payment would be made whenever demand was made.

Centerre Bank of Kansas City v. Distributors, 705 S.W.2d 42, 48 (Mo. App. 1985).

For the reasons stated above, we hold that no obligation of good faith and fair dealing is imposed on a party calling due a demand note. Therefore, the district court judge's jury instruction was in error.

We find, as did the Court of Appeals, that this error was more than harmless and therefore requires reversal. The jury's general verdict provides no indication of whether this instruction was a determining factor in its decision. However, the jury found in favor of the plaintiffs on the theory of a breach of good faith in the performance of a contract, and the bank did not have this obligation under the demand instrument. The substantial rights of the bank have therefore been affected.

The Court of Appeals, however, went beyond reversing the case and remanding the cause of action for a new trial absent the erroneous jury instruction. The Court of Appeals instead concluded that because the demand provision was still a provision of the parties' lending agreement as a matter of law, no modified contract existed in which to support the plaintiffs'

breach of obligation of good faith or breach of contract theories, and that court remanded with directions to dismiss. Therefore, we address whether, as a matter of law, the letters of February 20 and March 5, 1990, failed to form a modified contract that eliminated the demand provision of the note.

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. *Western Sec. Bank v. United States F. & G. Co.*, 248 Neb. 679, 539 N.W.2d 15 (1995). "The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below." *Larsen v. First Bank*, 245 Neb. 950, 957, 515 N.W.2d 804, 811 (1994).

The plaintiffs contend that the bank's February 20 letter to Chrysler reflected the bank's promise to continue financing at least through the year 1990. However, the plaintiffs failed to allege in their amended petition that the February letter formed part of the modified contract. "In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty." *Production Credit Assn. v. Eldin Haussermann Farms*, 247 Neb. 538, 545, 529 N.W.2d 26, 32 (1995). Therefore, this court will not consider the February letter in determining whether the lending agreement was modified so as to exclude the demand provision as the plaintiffs contend.

The plaintiffs contend that the March 5 letter and renewal note must be construed together in determining if the original note was modified. The plaintiffs cite *Nowak v. Burke Energy Corp.*, 227 Neb. 463, 418 N.W.2d 236 (1988), in support of their contention. *Nowak* involved the issue of whether an interest-bearing provision listed in a security agreement, but not listed in a contemporaneously executed promissory note, bound the debtor to pay interest to the creditor. This court concluded that the security agreement and the promissory note should be read as one contract, and stated that

> in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are, in the eyes of the law, one instrument, and will be read and construed as if they were as much one in form as they are in substance.

Id. at 468, 418 N.W.2d at 240.

It is true that instruments made in reference to and as part of the same transaction are to be considered and construed together. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993). The fact that the instruments were made or dated at different times is not significant if they are related to and were part of the transaction. *Id.* The renewal promissory note contained a 1-percent interest rate increase that was reflected in the letter of March 5. This renewal note was admitted into evidence without objection. Therefore, we construe these documents together for purposes of determining whether the contract was modified so as to exclude the demand provision.

Mutual assent by the parties is required to modify a contract that substantially changes the liabilities of the parties. *Whorley v. First Westside Bank*, 240 Neb. 975, 485 N.W.2d 578 (1992). Moreover, the silence of a contracting party to a proposed modification leaves the contract unmodified. *Id.*

The record indicates that the March 5 letter was not intended by the parties to modify the contract so as to exclude the demand provision. The parties never discussed elimination of the demand provision. The renewal note signed subsequent to March 5 reflected a 1-percent increase in the interest rate of the loan. It also indicated, as did the original note, that it was a note payable on demand. The bank, therefore, went beyond mere silence as to any response to a proposed modification removing the demand provision. It explicitly expressed its intention to not modify the demand provision by creating a renewal note that contained another demand provision.

Moreover, the March 5 letter provides no indication as to what an alternative due date could be for the floor plan note. The only provision in the letter referring to time was the goal for Solar Motors to improve its floor plan line $25,000 per year,

therefore eliminating floor plan credit in 5 years. When testifying about this particular provision, Baker testified that Erwin told him that "the term was not a stipulation, that it was just a goal and a positioning statement that I should look at myself and try to do." Baker also testified, "I said as long as it was a goal situation and a positioning statement, I could live with that."

"It is well-established law in this state that the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence." *Nowak*, 227 Neb. at 471, 418 N.W.2d at 241-42. The parties interpreted their contract not to include the time provision set forth in the March 5 letter.

When construing the March 5 letter and renewal note together, we conclude that the lending agreement was not modified so as to exclude the demand provision. Because the demand provision was part of the contract, the obligation of good faith does not apply and the plaintiffs have failed to demonstrate that their tendered instruction for breach of contract is warranted by the evidence.

For the reasons above, we affirm the decision of the Court of Appeals.

AFFIRMED.

LEON D. GORDON, APPELLANT, V. DR. EVAN CONNELL, APPELLEE.

545 N.W.2d 722

Filed April 5, 1996. No. S-94-419.

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 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.
3. **Malpractice: Limitations of Actions.** In medical malpractice cases, the period of limitations or repose begins to run when the treatment rendered after and relating to the allegedly wrongful act or omission is completed.
4. **Limitations of Actions: Words and Phrases.** In the context of statutes of limitation, discovery occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of the cause of action.
5. ____: ____. "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury and not that one has a legal right to seek redress.
6. **Limitations of Actions: Damages.** One need not know the full extent of one's damages before the limitations period begins to run, as a statute of limitations can be triggered at some time before the full extent of damages is sustained.
7. **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.
8. **Limitations of Actions: Prisoners.** A showing of a recognizable legal disability, separate from the mere fact of imprisonment, which prevents a person from protecting his or her rights is required to entitle a prisoner to have the statute of limitations tolled during imprisonment.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Darren R. Carlson and Eric L. Klanderud, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Jerry W. Katskee, of Katskee, Henatsch & Suing, for appellee.

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

CONNOLLY, J.

Leon D. Gordon filed a professional negligence action against Dr. Evan Connell, a dentist. Gordon alleged that Connell negligently administered novocaine while performing a dental procedure, thereby injuring his facial and jaw muscles. The district court granted Connell's motion for summary

judgment, finding that Gordon's action was barred by the statute of limitations. We affirm.

FACTUAL BACKGROUND

In July 1990, while an inmate at the Douglas County Correctional Center in Omaha, Nebraska, Gordon was evaluated by Connell for complaints related to an abscessed tooth on the lower right side of his mouth. Connell was the dentist employed on call with the correctional center. Initially, Connell attempted to treat the abscessed tooth with antibiotics, but this treatment failed to reduce the pain. On or about July 20, Connell performed a root canal on the abscessed tooth and also filled the tooth next to the abscessed tooth.

The following week, Gordon visited Connell and informed him that he was still having problems with the abscessed tooth. Connell gave Gordon the choice of having the tooth removed or waiting a week in order to see if the pain would subside. Gordon chose to wait a week. When the pain did not subside, Gordon returned to Connell to have the tooth pulled.

While attempting to numb the gum area so Connell could pull the tooth, Connell administered a shot of novocaine into Gordon's right jaw. Gordon claims that he immediately felt "something" in his right ear and that when asked if his lip was numb, he replied his lip was not numb, but his right ear, cheek, eye, and temple were numb.

After administering another shot of novocaine, Connell succeeded in numbing Gordon's jaw and extracted the abscessed tooth, as well as the adjacent tooth. According to Gordon, Connell explained the extraction of the adjacent tooth by saying that the tooth "looked bad too."

After Gordon filed a grievance with the Douglas County Department of Corrections, a grievance hearing was held on August 10, 1990. At the grievance hearing, Gordon complained that he had not given Connell permission to remove the second tooth. Also, he stated that his ear still hurt from the shots that he received for the tooth extraction and that if his ear did not improve, he would seek legal action for both the ear and the tooth.

Gordon filed his second formal grievance on January 16, 1991, in which he claimed that he was continuing to have problems with his ear and stated that he felt that he should have been taken to the hospital when this happened. Furthermore, he stated that "his ear should've been healed by now."

On August 10, 1992, Gordon filed a complaint under 42 U.S.C. § 1983 (1994) in the U.S. District Court for the District of Nebraska against Connell and various Douglas County corrections officials, claiming they violated his civil rights in their treatment of his case. In his complaint, Gordon specifically alleged that Connell was negligent. However, the § 1983 action was subsequently dismissed for lack of proper service of process upon the defendants.

Gordon was released from prison on October 23, 1992, and was treated by Dr. Michael McDermott on December 8. McDermott diagnosed Gordon as having nerve damage to the face and jaw caused by Connell's negligent injection of novocaine in July 1990. Subsequently, on March 8, 1993, Gordon filed this action in the district court for Douglas County, alleging that Connell's negligence caused the damage to his nerves and tissues in his face and ear and caused the resultant pain and suffering.

On April 5, 1994, Connell moved for summary judgment. The trial court granted the motion for summary judgment, finding that Gordon did not commence his cause of action within the statutory time limit set forth in Neb. Rev. Stat. § 25-222 (Reissue 1995) and that the statute was not tolled due to Gordon's incarceration. The trial court dismissed Gordon's action with prejudice. Gordon appeals.

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. *Zion Wheel Baptist Church v. Herzog, ante* p. 352, 543 N.W.2d 445 (1996); *John Markel Ford v.*

Auto-Owners Ins. Co., ante p. 286, 543 N.W.2d 173 (1996); *Kocsis v. Harrison, ante* p. 274, 543 N.W.2d 164 (1996).

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. *Zion Wheel Baptist Church v. Herzog, supra*; *Kocsis v. Harrison, supra*; *Bogardi v. Bogardi, ante* p. 154, 542 N.W.2d 417 (1996).

ANALYSIS

In this appeal, we are asked to decide that either the fact of Gordon's imprisonment tolled the statute of limitations for professional negligence or the statute of limitations should be no bar, because Gordon alleges that he was unable to "discover" his injuries until such time as he left prison. We begin by noting that this appeal arises in the context of the grant of a motion for 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. *Zion Wheel Baptist Church v. Herzog, supra*; *John Markel Ford v. Auto-Owners Ins. Co., supra*; *Kocsis v. Harrison, supra*.

The limitations period for professional negligence actions is provided in § 25-222:

> 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.

(Emphasis in original.)

Discovery Provisions of § 25-222

In medical malpractice cases, the period of limitations or repose begins to run when the treatment rendered after and relating to the allegedly wrongful act or omission is completed. *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994). Nebraska follows the "occurrence rule," under which a professional negligence suit accrues at the time of the act or omission causing injury. *Suzuki v. Holthaus*, 221 Neb. 72, 375 N.W.2d 126 (1985). However, the occurrence rule is tempered by the discovery provision of § 25-222, which provides that if an act or omission that causes injury is not discovered within 2 years, a plaintiff has 1 year after discovery to file suit. *Id.*

In the context of statutes of limitations, discovery occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of the cause of action. *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994). "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury and not that one has a legal right to seek redress. *Thomas v. Countryside of Hastings*, 246 Neb. 907, 524 N.W.2d 311 (1994); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993). However, one need not know the full extent of one's damages before the limitations period begins to run, as a statute of limitations can be triggered at some time before the full extent of damages is sustained. See *id.*

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., supra*; *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993). The trial court found that Gordon did not commence his action within the statutory time limit set forth in § 25-222. There was ample evidence in the record to indicate that Gordon's injury was "discovered" within the 2-year limitations period of § 25-222. Immediately following the extraction of the teeth, Gordon filed a grievance with the Douglas County Department of Corrections, claiming not only that his ear hurt, but that if it did not improve, he would initiate a legal action for both the ear and the tooth. Additionally, Gordon filed a second grievance on January 16, 1991, in which he asserted that he was continuing to have problems with his ear. While Gordon may not have known the full extent of the damage to his facial nerves, he certainly knew that he had been injured, because he continued to experience pain.

Even viewing the evidence in the light most favorable to Gordon, we conclude that the trial court was not clearly wrong in finding that Gordon had not filed within the statutorily imposed time limit.

TOLLING OF STATUTE UNDER NEB. REV. STAT. § 25-213 (REISSUE 1995)

Although § 25-222 sets forth the statute of limitations for professional negligence actions, the limitations period may be tolled as set forth in § 25-213 which provides:

> Except as provided in sections 76-288 to 76-298, if a person entitled to bring any action mentioned in this chapter . . . is, at the time the cause of action accrued, within the age of twenty years, a person with a mental disorder, *or imprisoned*, every such person shall be entitled to bring such action within the respective times limited by this chapter after such disability is removed.

(Emphasis supplied.)

Gordon argues that the district court erred by finding that the statute of limitations set forth under § 25-222 was not tolled by § 25-213. However, this court has previously held that a

showing of a recognizable legal disability, separate from the mere fact of imprisonment, which prevents a person from protecting his or her rights is required to entitle a prisoner to have the statute of limitations tolled during imprisonment. *Cole v. Kilgore*, 241 Neb. 620, 489 N.W.2d 843 (1992); *Scott v. Hall*, 241 Neb. 420, 488 N.W.2d 549 (1992). Additionally, we recently held in *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505 (1995), that the statute of limitations on a legal malpractice claim is not tolled while the petitioner is imprisoned.

Gordon does not demonstrate any legal disability separate from the mere fact of his imprisonment. Under our previous holdings, this is insufficient to toll the statute of limitations.

CONCLUSION

As the statute of limitations was not tolled during the period of Gordon's incarceration and he did not file within the statutory time period required for professional negligence actions, we find that the district court was correct in concluding that there was no genuine issue as to any material fact in this action and that Connell was entitled to judgment as a matter of law.

AFFIRMED.

VAL-PAK OF OMAHA, INC., APPELLANT, V. DEPARTMENT OF REVENUE OF THE STATE OF NEBRASKA AND MUCHO BERRI BALKA, TAX COMMISSIONER FOR THE STATE OF NEBRASKA, APPELLEES.

545 N.W.2d 447

Filed April 5, 1996. No. S-94-428.

1. **Administrative Law: Final Orders: Appeal and Error.** A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.

2. **Administrative Law.** Agency regulations that are properly adopted and filed with the Secretary of State have the effect of statutory law.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

David A. Ludtke and Stanley J. Andersen, of Rembolt Ludtke Parker & Berger, for appellant.

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

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

WRIGHT, J.

Val-Pak of Omaha, Inc. (Val-Pak), appeals the order of the Lancaster County District Court which affirmed the state Tax Commissioner's denial of Val-Pak's claim for a refund of Nebraska use tax.

SCOPE OF REVIEW

A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. See, Neb. Rev. Stat. § 84-918(3) (Reissue 1994); *Lee v. Nebraska State Racing Comm.*, 245 Neb. 564, 513 N.W.2d 874 (1994).

FACTS

Val-Pak is a Nebraska business licensed under an agreement with Val-Pak Direct Marketing Systems, Inc. (Direct Marketing), of Largo, Florida. Between 1987 and 1991, Val-Pak operated a direct-mail advertising business in Omaha, Nebraska, and surrounding areas in Nebraska and Iowa. Direct Marketing prints advertising material and delivers it to residents by mail. The agreement between Val-Pak and Direct Marketing provided that Val-Pak had the right to secure and arrange for the distribution of advertising material under the system provided by Direct Marketing within the territory specified in the agreement.

Direct Marketing agreed to "print and mail all material needed to complete [Val-Pak's] distribution." Val-Pak agreed to

"pay [Direct Marketing's] prevailing rates for all work ordered." Direct Marketing billed Val-Pak for the cost of producing, printing, and distributing advertising material in Nebraska.

Val-Pak entered into "participation agreements" with local businesses for the preparation and distribution by mail of advertising materials within a designated area. Under these participation agreements, Val-Pak agreed to provide assistance in planning and preparing draft copies and proofs of the proposed advertising. Val-Pak also agreed to arrange the printing of the advertising materials, their insertion into envelopes, and their distribution through the mail.

Val-Pak's employees secured customers' participation in direct-mail advertising and prepared the preliminary advertising material for submission to Direct Marketing. When the preliminary advertising material was completed and approved by a customer, it was forwarded to Direct Marketing, which prepared a proof copy for review by the customer. The returned proof copy was reviewed by the customer for accuracy. Pursuant to the participation agreement, the customer then paid Val-Pak for its services.

The final proof was returned to Direct Marketing for production and distribution. Direct Marketing purchased the printing materials, published the advertisement, purchased the envelopes, stuffed the envelopes with the printed materials, paid the postage, and mailed the materials to residents in an area designated by Val-Pak. Val-Pak never took physical possession of the materials distributed by Direct Marketing. Direct Marketing was then paid by Val-Pak pursuant to the licensing agreement between Val-Pak and Direct Marketing.

The Tax Commissioner issued a notice of deficiency determination and assessment against Val-Pak for use tax due for the period of 1987 through 1991, in the amount of $12,180.80. The assessment was based upon Val-Pak's failure to remit use tax on its purchase and use of tangible personal property provided by Direct Marketing and distributed in Nebraska pursuant to Val-Pak's specifications. Val-Pak paid the assessment and subsequently filed a claim for refund on September 22, 1992, and an amended claim for refund on

September 25. The Tax Commissioner denied Val-Pak's original and amended refund claims in a letter dated December 15.

ASSIGNMENTS OF ERROR

Val-Pak makes three assignments of error: The district court erred (1) in determining that the regulations of the Nebraska Department of Revenue do not exempt Val-Pak's activities from Nebraska use tax, (2) in determining that Val-Pak used or consumed tangible personal property in the State of Nebraska, and (3) in affirming the Tax Commissioner's decision and failing to grant Val-Pak's request for relief.

ANALYSIS

The decisive issue on appeal is whether the district court erred in finding that Val-Pak's purchase and use of advertising materials distributed in Nebraska constituted a use of tangible personal property subject to Nebraska's use tax.

We first set forth the applicable statutes in effect at the time Val-Pak's claim for refund was filed. Neb. Rev. Stat. § 77-2703 (Cum. Supp. 1992) provided:

> (1) There is hereby imposed a tax . . . upon the gross receipts from all sales of tangible personal property sold at retail in this state . . . .
>
> . . . .
>
> (2) A use tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased, leased, or rented from any retailer and on any transaction the gross receipts of which are subject to tax under subsection (1) of this section on or after June 1, 1967, for storage, use, or other consumption in this state at the rate set as provided in subsection (1) of this section on the sales price of the property or, in the case of leases or rentals, of the lease or rental prices.

"Use" was defined as "the exercise of any right or power over tangible personal property incident to the ownership or possession of that tangible personal property . . . ." Neb. Rev. Stat. § 77-2702.23 (Cum. Supp. 1992). "Tangible personal property" was defined as "personal property which may be seen, weighed, measured, felt, or touched or which is in any

other manner perceptible to the senses . . . ." Neb. Rev. Stat. § 77-2702.20 (Cum. Supp. 1994). A "retailer" was defined as "[a]ny seller engaged in the business of making sales of tangible personal property for . . . use, or other consumption . . . ." Neb. Rev. Stat. § 77-2702.14(1) (Cum. Supp. 1992). Section 77-2703(2)(f) provided: "It shall be further presumed . . . that tangible personal property shipped or brought to this state by the purchaser after June 1, 1967, was purchased from a retailer on or after that date for . . . use, or other consumption in this state."

The district court found that Val-Pak's control over the preparation and distribution of the direct-mail advertising materials constituted the exercise of a right or power over tangible personal property and, therefore, involved a taxable use as defined in § 77-2702.23. The district court relied upon *Comfortably Yours, Inc. v. Director, Division of Taxation*, 12 N.J. Tax 570 (1992), *aff'd* 272 N.J. Super. 540, 640 A.2d 862 (1994). In that case, the New Jersey Tax Court held that the taxpayer's control over distribution of the catalogs was an "economic utilization" of the catalogs and, therefore, qualified as a "use" under New Jersey law.

Val-Pak argues that § 77-2703(2) did not provide for a use tax to be imposed when the property was "economically utilized" in this state. Val-Pak asserts that the tax is imposed when the property is *used* in this state, as use is defined by § 77-2702.23, and that since Val-Pak does not have any conceivable right or power over the advertising fliers after they are delivered to a post office in Florida, a use tax should not be imposed upon Val-Pak.

Val-Pak refers us to other jurisdictions which have determined that there is no "use" of materials for purposes of imposing a use tax when catalogs are printed outside of the jurisdiction and distributed by common carriers to post offices for delivery to recipients. See, *Mervyn's v. Arizona Dept. of Revenue*, 173 Ariz. 644, 845 P.2d 1139 (1993); *May Dept. Stores v. Director of Revenue*, 748 S.W.2d 174 (Mo. 1988); *Modern Merchandising v. Dept. of Revenue*, 397 N.W.2d 470 (S.D. 1986); *Department of Revenue v. Horne Directory, Inc.*, 105 Wis. 2d 52, 312 N.W.2d 820 (1981); *District of Columbia*

v. W. Bell & Co., Inc., 420 A.2d 1208 (D.C. 1980); *Bennett Bros. v. Tax Comm.*, 62 A.D.2d 614, 405 N.Y.S.2d 803 (1978); *Mart Realty, Inc. v. Norberg*, 111 R.I. 402, 303 A.2d 361 (1973). For the reasons set forth below, we conclude that these cases are not applicable to our decision, nor is *Comfortably Yours, Inc.*, upon which the district court relied.

The regulations of the Department of Revenue specifically provide that advertising services similar to those performed by Val-Pak are subject to tax. Agency regulations that are properly adopted and filed with the Secretary of State have the effect of statutory law. *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989). Our decision is controlled by 316 Neb. Admin. Code, ch. 1, § 056 (1984), which states in part:

> REG-1-056 ADVERTISING AND ADVERTISING AGENCIES
>
> 056.01 INTRODUCTION
>
> 056.01A The determination of the sales and use tax liability of an advertising agency is dependent upon whether the agency is performing a service which does not result in the transfer of title or possession of tangible personal property or is engaged in an activity which results in the transfer of title or possession of tangible personal property.
>
> When an advertising agency is providing a service to its customers, as set out in the following sections 056.02A, 056.02B, and 056.04A, it is the ultimate consumer of all materials and services purchased by it and used in providing that service. The advertising agency is liable for payment of the applicable sales or use tax on the agency's cost of providing that service, regardless of the relationship between the agency and its customer.

Val-Pak has conceded that it acted as an advertising agency and provided a service to its customers. Thus, pursuant to § 056.01A, Val-Pak is the ultimate consumer of all materials and services purchased by it and used in providing that service. Val-Pak is therefore liable for payment of the applicable use tax on its cost of providing that service regardless of its relationship with its customer.

Val-Pak argues that § 056.02B4 exempts Val-Pak from the tax. Section 056.02 states in pertinent part:

> 056.02 ADVERTISING SERVICES WHICH DO NOT RESULT IN THE TRANSFER OF TANGIBLE PERSONAL PROPERTY.
>
> . . . .
>
> 056.02B ADVERTISING SERVICES. Sales tax does not apply to charges by an advertising agency for services that are not a part of the sale of tangible personal property or do not represent labor or service cost in the agency's production of any tangible personal property which is subject to the tax. (See section 056.01A)
>
> Examples of such services are:
>
> . . . .
>
> 056.02B4 Providing an advertising service by placing and/or arranging for the placing of an advertisement in media, such as newspapers, magazines, or other publications if no transfer of tangible personal property to the customer is involved. This occurs when an advertising agency is hired to develop an idea for a customer and arranges for publication by contracting with a publisher. As part of this service the agency prepares finished art which is sent to the publisher to be used for reproduction purposes. After such use, the finished art is either discarded or returned to the agency. The agency then bills its customer for various itemized charges such as creating, planning, layout, finished art work, photoprints, typography, and the charges by a newspaper or magazine for publication. Although in such a situation the customer derives economic benefit from the publication of the advertisement, they do not receive title to, or possession of the finished art or any other tangible personal property. The agency is providing an advertising service which is not subject to tax.

The provisions of § 056 must be read in conjunction with each other. Under § 056.01A, Val-Pak is the ultimate consumer of all materials and services purchased by it in providing the service to its customers. Under § 056.02B, sales tax does not apply to charges by an advertising agency for services that are

not part of the sale of tangible property or do not represent labor or service cost in the agency's production of any tangible personal property which is subject to the tax. When considered together, §§ 056.01A and 056.02B make it clear that Val-Pak is liable for payment of the applicable use tax on the cost of providing its service, i.e., "all materials and services purchased by it and used in providing that service."

For the reasons set forth herein, the judgment of the district court is affirmed.

AFFIRMED.

LEADER NATIONAL INSURANCE COMPANY, AN OHIO CORPORATION, APPELLANT, V. AMERICAN HARDWARE INSURANCE GROUP, APPELLEE.

545 N.W.2d 451

Filed April 5, 1996. No. S-94-437.

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. ____: ____: ____. In reviewing a ruling on a general demurrer, an appellate court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
3. **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.
4. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action means a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff.
5. **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.
6. **Subrogation: Words and Phrases.** Subrogation is the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.

7. ____: ____. Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.
8. **Subrogation: Liability.** To be entitled to subrogation, one must pay a debt for which another is liable.
9. **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.
10. **Insurance: Contracts.** The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed.

Thomas D. Wulff and Dennis W. Clark, of Welch, Wulff & Childers, for appellant.

Dan H. Ketcham, of Hansen, Engles & Locher, P.C., for appellee.

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

FAHRNBRUCH, J.

The issue in this subrogation appeal is whether the insurer of the negligent driver of a vehicle or the insurer of the owner of the vehicle involved in an accident should pay for the damages suffered by third parties.

The trial court found that, under the amended petition filed in this case, the insurer of the owner of the vehicle, American Hardware Insurance Group (American), could not be held liable for the damages paid to third parties by the driver's insurer, Leader National Insurance Company (Leader). We affirm.

ASSIGNMENT OF ERROR

In substance, Leader claims that the trial court erred in sustaining American's demurrer to Leader's amended petition, which the court found did not state 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. *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505 (1995). In reviewing a ruling on a general demurrer, an appellate court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995). 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. *Vowers & Sons, Inc. v. Strasheim*, 248 Neb. 699, 538 N.W.2d 756 (1995). A statement of facts sufficient to constitute a cause of action means a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 1835, 128 L. Ed. 2d 463 (1994).

FACTS

Leader's amended petition against American alleged that Leader's insured, Thomas Lustgraaf, test-drove a Nissan Sentra owned by Bellevue Nissan, Inc. During his test drive, Lustgraaf collided with a car and continued on and struck a gasoline dispenser and other property at a convenience store. Two suits were filed against Lustgraaf for property damage arising out of the accidents.

Lustgraaf demanded that Bellevue Nissan's vehicle liability insurer, American, defend, indemnify, and pay all damages stemming from the accidents. American denied coverage. Leader defended Lustgraaf and settled all claims arising from the accidents for $9,418.05. In its amended petition, Leader alleged that American, under its insurance policy with Bellevue Nissan, had the primary duty to defend and indemnify potential customers involved in a collision while test-driving a vehicle owned by Bellevue Nissan.

Leader claimed in its amended petition that it was entitled to subrogation against American and prayed for judgment against American for damages it had paid as a result of Lustgraaf's accidents, together with interest and court costs.

Attached to Leader's amended petition was the American policy insuring Bellevue Nissan. 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. *Vowers & Sons, Inc. v. Strasheim, supra.*

American's insurance policy declarations reflect that Bellevue Nissan is an auto dealer. Under the liability coverage section, the insurance policy contains the following paragraph under its definitions of who is insured:

> (2) Anyone else while using with your permission a covered "auto" you own, hire or borrow *except*:
>
> . . . .
>
> (d) Your customers, if your business is shown in the Declarations as an "auto" dealership. However, if a customer of yours:
>
> (i) Has no other available insurance (whether primary, excess or contingent), they are an "insured" but only up to the compulsory or financial responsibility law limits where the covered "auto" is principally garaged.
>
> (ii) Has other available insurance (whether primary, excess or contingent) less than the compulsory or financial responsibility law limits where the covered "auto" is principally garaged, they are an "insured" only for the amount by which the compulsory or financial responsibility law limits exceed the limits of their other insurance.

(Emphasis supplied.)

Also attached to Leader's amended petition are exhibits which reflect that Lustgraaf intended to buy from Bellevue Nissan the Sentra he was driving at the time of the accidents involved here. One exhibit reflects that Lustgraaf was having difficulty obtaining financing to purchase the Sentra. According to the exhibit, during the test drive that resulted in the accidents involved in this case, Lustgraaf intended for his mother to take

the car to her credit union to obtain the necessary financing to purchase the Sentra. In any event, Lustgraaf was the driver of the car at the time of the accidents.

Following a hearing, the trial court sustained American's demurrer to Leader's amended petition. Leader elected to stand on its amended petition, and the trial court dismissed it.

ANALYSIS

Subrogation is the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990). Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other. *Horton v. Ford Life Ins. Co.*, 246 Neb. 171, 518 N.W.2d 88 (1994). To be entitled to subrogation, one must pay a debt for which another is liable. *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993).

In order for Leader's amended petition seeking subrogation against American to state a cause of action, it must allege that American is liable for the obligations paid by Leader. Whether American has a duty to pay for damages caused by the negligent test-driving of Lustgraaf, a customer of American's insured, Bellevue Nissan, can be discerned from the language of American's policy insuring Bellevue Nissan, which Leader included as part of its petition.

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. *Standard Fed. Sav. Bank v. State Farm*, 248 Neb. 552, 537 N.W.2d 333 (1995). The parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. *Dalton Buick v.*

Universal Underwriters Ins. Co., 245 Neb. 282, 512 N.W.2d 633 (1994).

The relevant terms of American's policy insuring Bellevue Nissan are clear. American insures a customer of Bellevue Nissan who with permission borrows a vehicle owned by Bellevue Nissan only if that customer carries vehicle liability insurance less than that required by law. Such a contract is not inconsistent with public policy or statute. See *Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co.*, 243 Neb. 194, 498 N.W.2d 333 (1993) (insurer of auto dealership not required by law to insure customer who damages loaner car).

Under the facts of this case, at the time of the accidents, Lustgraaf was a customer of Bellevue Nissan. See, *Aubrey v. Harleysville Ins. Companies*, 140 N.J. 397, 658 A.2d 1246 (1995); *Winn v. Becker*, 660 A.2d 284 (Vt. 1995); *Yosemite Ins. v. State Farm Mut.*, 98 Nev. 460, 653 P.2d 149 (1982).

Leader's amended petition alleges that Leader insured Lustgraaf, defended Lustgraaf, and paid third parties for damages they suffered. It is evident that Lustgraaf was sufficiently insured as required by law and, in any event, was sufficiently insured to cover the damages he caused while driving Bellevue Nissan's vehicle. American's policy insuring Bellevue Nissan, which was attached to the amended petition, conclusively contradicts the amended petition's allegation that American had the primary duty to defend Lustgraaf. Under American's policy, American had no duty to defend Lustgraaf.

CONCLUSION

Under the state of the record, we affirm the judgment of the district court sustaining American's demurrer, and because Leader elected to stand on its amended pleading, we affirm the dismissal of Leader's lawsuit.

AFFIRMED.

LANCE BERGGREN, APPELLEE, V. GRAND ISLAND ACCESSORIES, INC., APPELLANT.

545 N.W.2d 727

Filed April 5, 1996. No. S-95-201.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Nebraska Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the judgment, order, 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, an appellate court is obligated to make its own determinations.
3. **Workers' Compensation: Rules of Evidence: Appeal and Error.** The Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence; admission of evidence is within the discretion of the compensation court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.
4. **Workers' Compensation: Expert Witnesses.** It is for the Nebraska Workers' Compensation Court to determine which, if any, expert witnesses to believe.
5. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
6. **Workers' Compensation: Expert Witnesses: Proof.** Expert medical testimony couched in terms of probability is sufficient to sustain a workers' compensation claimant's burden of proof.
7. **Workers' Compensation: Words and Phrases.** For purposes of workers' compensation claims, the phrase "more likely than not" is the equivalent of the statement that a causal relationship is probable.
8. **Workers' Compensation: Expert Witnesses: Words and Phrases.** For workers' compensation claims, medical testimony based on "reasonable certainty" is the same as medical testimony based on "reasonable probability."
9. **Workers' Compensation: Expert Witnesses: Case Overruled.** To the extent that *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981), and *Fuglsang v. Blue Cross*, 235 Neb. 552, 456 N.W.2d 281 (1990), hold that a medical opinion based on a reasonable degree of medical probability is not sufficient to establish a causal relationship, they are overruled.
10. **Workers' Compensation: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1993), is measured by an evaluation of a worker's general eligibility to procure and hold employment, the worker's capacity to perform the required tasks, and the worker's ability to earn wages in employment for which he or she is engaged or fitted.

11. **Workers' Compensation: Appeal and Error.** Factual determinations by the Nebraska Workers' Compensation Court will not be set aside on appeal unless they are clearly erroneous.

Petition for further review from the Nebraska Court of Appeals, HANNON, IRWIN, and MILLER-LERMAN, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals reversed.

Douglas J. Peterson, of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

David P. Kyker for appellee.

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

CAPORALE, J.

I. INTRODUCTION

The Nebraska Workers' Compensation Court ordered the defendant-appellant employer, Grand Island Accessories, Inc., to pay the plaintiff-appellee employee, Lance Berggren, benefits for solvent toxicity resulting in seizures. In seeking review by the Nebraska Court of Appeals, Grand Island Accessories asserted, in summary, that the compensation court erred in (1) excluding certain evidence, (2) finding that Berggren's condition was compensable, and (3) finding that Berggren sustained a loss of earning power. The Court of Appeals reversed the compensation court's award. *Berggren v. Grand Island Accessories*, 95 NCA No. 45, case No. A-95-201 (not designated for permanent publication). Berggren then successfully sought further review by this court. We now reverse the judgment of the Court of Appeals.

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 judgment, order, or award; or (4) the findings of fact by the compensation court do not

support the order or award. *Cords v. City of Lincoln, ante* p. 748, 545 N.W.2d 112 (1996); *Cox v. Fagen Inc., ante* p. 677, 545 N.W.2d 80 (1996); *Pettit v. State, ante* p. 666, 544 N.W.2d 855 (1996); *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995); *Buckingham v. Creighton University*, 248 Neb. 821, 539 N.W.2d 646 (1995); Neb. Rev. Stat. § 48-185 (Reissue 1993). However, as in other cases, an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Shilling v. Moore, ante* p. 704, 545 N.W.2d 442 (1996); *Pettit, supra*; *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995); *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994).

III. FACTS

Berggren began working for Grand Island Accessories in October 1987, being initially hired as an assembler. As such, his duties included painting and assembling parts, working with paints and thinners, and packaging the parts for shipping.

After working as an assembler for a little over a year, he was transferred to the "sputter coater room," in which the environment was controlled in order to keep the temperature constant and to keep dust out. The main activity in this room was to put a topcoat on styrene parts and then apply a brass coating on them. Berggren's duties in this activity included stocking parts, changing the paint filters, keeping the paint vat full, dumping the runoff of the excess paint, and maintaining the paint guns and paint tunnel. In the course of performing these duties, Berggren came into contact with a variety of solvents.

When Berggren first began working in the coater room, he developed a rash on his arms, ankles, and feet. He testified that he would feel faint and dizzy when working around the paints, changing the filters, and working in the "sputter coater machine" itself. In addition, he would occasionally experience an "aura," a feeling that he now associates with the oncoming of a seizure. He described this sensation as feeling "spacey," developing a funny taste in his mouth, and hearing loud ringing in his ears.

In February or March 1992, Berggren left the coater room and began working in the maintenance department. As a maintenance worker, Berggren fixed various equipment and maintained the company grounds. On occasion, his maintenance duties required him to be in the coater room, although only a few days a month. Berggren continued to work in the maintenance department until his employment with Grand Island Accessories was terminated in January 1993.

Berggren had his first seizure on July 15, 1992, at which time he was working in the maintenance department. He had experienced an aura at approximately noon that day and later, while working on a tape machine, had a seizure. The last thing he remembers is working on the tape machine; being transported in an ambulance is the first thing he remembers after that. He was treated in a hospital emergency room and released, and he spent the rest of the day at home, returning to work the next day.

A second seizure occurred on September 25, 1992. In the time between the two seizures, Berggren occasionally experienced auras while working, but did not have a seizure. The second seizure took place when Berggren was cleaning the lunchroom. He was again transported by ambulance to a hospital where he was treated and released. Berggren did not return to work for several days.

This second seizure was the last one Berggren had while employed by Grand Island Accessories, but he had another in June or July 1993. At the time of the compensation court trial, he was working in the shipping and receiving department at a furnace company.

After Berggren's second seizure, he was seen by a physician, who was unable to determine the cause, notwithstanding that the physician had a number of diagnostic studies performed. Berggren then consulted a second physician, who too was unable to confirm that a toxin was the cause of the seizures.

After his third seizure, Berggren was treated by still another physician, who stated in a report that she believed with reasonable medical certainty that Berggren suffered repetitive solvent toxicity during his employment at Grand Island Accessories and that the toxicity, although not the cause of his

seizure disorder, significantly contributed to its onset. This third physician testified by deposition:

> Q. . . . And the basis of your opinion as to the seizures, as I understand it, comes down to the two articles — or the articles that you have referenced regarding studies?
>
> A. It comes down also to my training and experience in clinical toxicology. . . .
>
> . . . There is an extensive literature concerning the risk for solvent-exposed individuals to seizures as well as to dementia and peripheral nerve damage. They are certainly at neurologic risk even though they do not have liver disease or they do not have occular motor dysfunction, and because they are at risk, I think it is contraindicated for a person with a convulsive disorder to become intoxicated, to take drugs of abuse or to be exposed to solvents. I think they are all of high risk and will increase the manifestations or precipitate the onset, and I think that with — I think that's more likely than not.
>
> Q. But is it medically certain?
>
> A. Medical certainty, as I understand it, is an event that is more likely than not; is that correct?
>
> Q. Well, the court will decide that.
>
> A. I distinguish this from absolute medical diagnosis which is usually 95 percent certain but I think this is certainly more likely than unlikely which I believe is reasonable medical certainty for an association.
>
> Q. And that's with regards to your conclusion that the seizure disorder is caused by exposure to solvents?
>
> A. My — is not was caused by the exposure, my opinion is that he has a seizure disorder probably diagnosed as idiopathic epilepsy in which the solvent disorder contributed to the onset and to the repetitive occurrence. That's fair.

IV. ANALYSIS

1. Exclusion of Evidence

In connection with the first assignment of error, Grand Island Accessories urges that the compensation court erroneously sustained Berggren's objection to Grand Island Accessories'

effort to adduce evidence as to whether any other of its employees complained of seizures.

Grand Island Accessories takes the position first that the question is relevant to determining whether Berggren suffers from an occupational disease, which is defined in Neb. Rev. Stat. § 48-151(3) (Reissue 1993) as meaning "only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and shall exclude all ordinary diseases of life to which the general public is exposed."

It is Grand Island Accessories' contention that the proposed question is relevant because the witness' answer would establish that Grand Island Accessories never had any other complaints of seizures by other employees doing the same job as Berggren and because it addresses the issue of whether Berggren's symptoms were characteristic of this job. However, the terms "trade," "occupation," "process," or "employment" used in § 48-151(3) refer not to the specific employer of the injured employee, but, rather, to employers as a whole in a particular occupation. See *Ritter v. Hawkeye-Security Ins. Co.*, 178 Neb. 792, 794, 135 N.W.2d 470, 472 (1965) ("[a]n occupational disease must be a natural incident of a particular occupation and must attach to that occupation a hazard which distinguishes it from the usual run of occupations and which is in excess of that attending employment in general"). It matters not whether any particular employee of Grand Island Accessories suffered from solvent toxicity which contributed to the onset of a seizure disorder, but, rather, the issue is whether an employee who is engaged in the same occupation and exposed to solvents in the same manner and under the same conditions has developed a similar disorder. This, however, was not the question posed.

But Grand Island Accessories asserts that the objection should have been overruled in any event because Berggren stated no basis for asserting it, merely stating " 'Objection, your honor.' " Brief for appellant at 29.

The record reveals that at the time the objection was made, Grand Island Accessories' counsel examined one of its personnel administrative assistants as follows:

Q. Have you ever received any complaints from any of the employees in the years that you've been —

[Berggren's counsel]: Objection. Relevance, Your Honor. We're just here to discuss . . . Berggren.

The Court: Were you done with your question?

[Grand Island Accessories' counsel]: No, I wasn't.

The Court: Okay. Finish your question, and then I'll rule on the objection. Okay?

Q. . . . Have you received any complaints from any other employees who worked in the same area as . . . Berggren with regards to seizures?

A. No.

[Berggren's counsel]: Objection, Your Honor.

The Court: I'll sustain his objection.

[Berggren's counsel]: I'd ask that the answer be stricken from the record.

The Court: Sustained.

It is therefore not the case that Berggren failed to provide a basis for his objection; he in fact stated that relevancy was the basis for his objection.

As the compensation court is not bound by the usual common-law or statutory rules of evidence, the admission of evidence is within that court's discretion, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Paulsen v. State, ante* p. 112, 541 N.W.2d 636 (1996). Therefore, the standard of review of an assigned error directed at the exclusion or admission of evidence is one of abuse of discretion. *Id.* Under the circumstances, we cannot say that the compensation court abused its discretion in ruling that the evidence sought to be elicited was not relevant.

Thus, there is no merit to the first assignment of error.

2. Compensability of Seizure Disorder

In claiming in the second assignment of error that the compensation court erred in finding that there was sufficient competent medical evidence to establish a causal link between Berggren's work and his condition, Grand Island Accessories argues that as two physicians were unable to find a link between Berggren's work and his condition and that as the third

physician's opinion was not based upon the requisite degree of medical certainty, the record is insufficient as a matter of law to support a ruling in favor of Berggren.

First, it must be remembered that it is for the compensation court to determine which, if any, of the expert witnesses to believe. *Surratt v. Watts Trucking, ante* p. 35, 541 N.W.2d 41 (1995). Even if the first two physicians' opinions can be characterized as disputing the third physician's opinion, the compensation court was free to disbelieve the first two and believe the third. In addition, in testing the sufficiency of evidence to support findings of fact made by the compensation court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Stansbury v. HEP, Inc.*, 248 Neb. 706, 539 N.W.2d 28 (1995); *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). Thus, the fact that in the opinions of the first two physicians there was no causal link between Berggren's work and his seizure disorder is of no consequence.

The question, therefore, is whether the third physician's opinion that although the repetitive solvent toxicity Berggren suffered did not cause his seizures but contributed to their onset was based on the degree of medical certainty required to support the compensation court's findings. Grand Island Accessories offers seven separate criticisms of the third physician's testimony in its brief, including that she has no special training in the area of diagnosing and treating seizure disorders; that her area of experience in toxicology is with regard to environmental toxicology, which is to be distinguished from solvents; that she did not review the air quality testing results at Grand Island Accessories; and that the reports she relied on in reaching her conclusions were speculative. All of these arguments relate to the foundation for the admission of her testimony, not to its sufficiency, if admissible. Both the third physician's report and her deposition testimony were admitted into evidence without any objection from Grand Island Accessories on the basis of foundation. In fact, the deposition testimony of the third physician was offered into evidence by Grand Island Accessories. Thus, its arguments going to the

foundational basis for the opinion may not be considered. See, *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

What remains is Grand Island Accessories' argument that the third physician's opinion is not sufficient as a matter of law to establish causation because she stated only that it was more likely than not that Berggren's exposure to solvents contributed to the onset of his seizures.

The seminal case on the issue of the degree of certainty required in medical testimony is *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965). Therein, a policeman was injured while arresting a suspect. The policeman received an award of compensation and the employer appealed, contending that the medical testimony was insufficient to establish causation. Evidence from three separate doctors had been admitted. One testified in response to a hypothetical question that in his opinion, an injury described by the claimant could have caused the condition that had been described in the testimony. Another testified that based on a reasonable degree of medical certainty, the scuffle described could have initiated the train of events that resulted in the compression of the nerve. In the opinion of the last doctor, the claimant's injury and resultant disability was probably due to the scuffle.

On appeal, we first stated the well-established rule that a workers' compensation award cannot be based on possibility or speculation; if an inference favorable to the claimant can only be reached on the basis thereof, then the claimant cannot recover. We observed that under that rule, the testimony of the first two doctors would be inadequate to support the award. However, that testimony, considered in conjunction with that of the third doctor, rendered the evidence sufficient. We wrote:

> The language used by [the third doctor] is as definite as a doctor can be without giving a positive opinion that the scuffle caused the injury. He is familiar with the probabilities and selects the cause which within his range of experience he has reason to believe is the cause of the disability. In the area of certain disabilities it is impossible for a reputable doctor to testify with absolute certainty that one cause and one cause alone is the reason for the

> disability. Medical diagnosis is not that exact a science. . . .
>
> . . . As we said in . . . Schwabauer v. State, 147 Neb. 620, 24 N. W. 2d 431: "If a claimant has adduced competent evidence having probative value which preponderantly convinces the trier or triers of the fact that claimant had an accident and incurred a disability arising out of and in the course of his employment, notwithstanding the trier or triers of the fact may recognize a possibility or even a probability that this was not true, an award of compensation thereon is proper and on appeal therefrom must be sustained."
>
> . . . .
>
> To recover in a workmen's compensation case a claimant must offer proof which preponderates in his favor on each of the indispensable elements of his claim. Seger v. Keating Implement Co., 157 Neb. 560, 60 N. W. 2d 598. Where the testimony gives rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained. Where, however, the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved.

Welke, 179 Neb. at 502–05, 138 N.W.2d at 812–13. Therefore, *Welke* teaches that expert medical testimony couched in terms of probability is sufficient to sustain a workers' compensation claimant's burden of proof.

As the phrase "more likely than not" is the equivalent of the statement that a causal relationship is probable, *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981) (White, J., dissenting), citing *People v. Erkinger*, 119 Cal. App. 2d 551, 259 P.2d 492 (1953), *Aultman v. Dallas Ry. & Term. Co.*, 152 Tex. 509, 260 S.W.2d 596 (1953), and *Hallum v. Omro*, 122 Wis. 337, 99 N.W. 1051 (1904), such testimony also satisfies the burden of proof. See, also, *Paulsen v. State, ante* p. 112, 541 N.W.2d 636 (1996) (suggesting testimony giving rise to inference of probability is relevant).

The *Welke* reasoning was utilized in *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 411, 308 N.W.2d 503, 512 (1981), wherein we proclaimed:

> Although it is generally stated that medical testimony must be given with "reasonable medical certainty," we have been unable to find any Nebraska case which specifically so states. It has frequently been held that medical testimony couched in terms of "possibility" is not sufficient, although when such testimony is in terms of "probability" it is sufficient. We have held that "reasonable certainty" and "reasonable probability" are one and the same thing.

See, *Morton v. Hunt Transp.*, 240 Neb. 63, 480 N.W.2d 217 (1992); *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991); *Hohnstein v. W.C. Frank*, 237 Neb. 974, 468 N.W.2d 597 (1991).

A further example of this reasoning is found in *Castro v. Gillette Group, Inc.*, 239 Neb. 895, 479 N.W.2d 460 (1992). In that case, a claimant accidentally injured during the course of his employment was found by the compensation court to have been permanently and partially disabled as a result thereof and entitled to benefits. However, the compensation court further found that he had not sufficiently established that the pain therapy he sought was reasonably necessary treatment. On appeal, we ruled that because the testimony of the claimant's medical expert regarding the necessity of the pain therapy was couched in terms of possibility and hopefulness, rather than probability, the compensation court's denial of that service was not erroneous.

However, Grand Island Accessories calls the foregoing rulings into question by directing our attention to two cases, *Husted, supra*, and *Fuglsang v. Blue Cross*, 235 Neb. 552, 456 N.W.2d 281 (1990). These two cases hold that an expert medical opinion which indicates that a causal connection is more likely than not lacks the sufficient definiteness and certainty required for it to be the basis of a workers' compensation award or a verdict.

In *Husted*, the claimant injured his lower back while employed by the defendant as a carpenter and brought a

workers' compensation action. The compensation court found that the claimant had established a causal connection between his cervical disk disorder and the accident. On appeal by the defendant, we observed that the finding of the compensation court rested upon the testimony of a medical expert who, upon being asked whether the cervical injury occurred at the time of the accident or during bed rest following the accident, testified merely that it was more likely that the cervical injury occurred from the accident than while he was at bed rest. We then concluded that such testimony lacked the definiteness and certainty necessary to form the basis for an award.

In doing so, we relied on *Camarillo v. Iowa Beef Processors, Inc.*, 201 Neb. 238, 266 N.W.2d 917 (1978), and *Marion v. American Smelting & Refining Co.*, 192 Neb. 457, 222 N.W.2d 366 (1974). However, on further study, it becomes clear that neither *Camarillo* nor *Marion* holds that expert medical testimony that an injury was more likely caused by a certain event than not is insufficient to sustain a compensation award. In *Camarillo*, 201 Neb. at 243, 266 N.W.2d at 919, we reversed an award to a claimant because "[t]he evidence . . . on behalf of the [claimant] does not even meet the standard of 'probability' in Welke . . . . An award for permanent disability cannot be based on mere possibilities." Thus, the *Camarillo* award was reversed not because the expert witness testified that a causal connection was probable, or more likely than not, but, rather, because the opinion of the expert witness did not rise to that level.

In *Marion*, the claimant suffered from gout and hypertension, conditions he attributed to lead poisoning suffered while working for the defendant 16 years earlier. The claimant's medical witness testified that the claimant's illness was secondary to lead intoxication, probably ingested during his employment with the defendant. The defendant's medical experts testified that the claimant's exposure to lead during his employment was not the cause of his current disabling medical problems and that there was no relationship between the claimant's present condition and his employment by the defendant. On appeal, we held that "[w]here the record in a case reflects nothing more than a resolution of conflicting

medical testimony, there appears no purpose in this court substituting its judgment of facts for the judgment of the compensation court." *Id.* at 460, 222 N.W.2d at 368. We therefore affirmed the dismissal of the claimant's petition, not because his expert's testimony was insufficient, but because the lower tribunal decided to believe the defendant's expert witnesses rather than the claimant's. It is clear, therefore, that the cases on which we rested the *Husted* opinion do not support it.

The issue in the second case relied upon by Grand Island Accessories, *Fuglsang, supra*, was the admissibility of certain expert testimony, not whether such testimony was sufficient to meet a claimant's burden of proof. The dispute in *Fuglsang* concerned whether the plaintiff was covered by a health insurance policy issued by the defendant or whether the condition was excluded from coverage because it was a preexisting illness. The defendant wished to elicit testimony in this regard from its medical expert by asking him to rest his opinion on whether " 'on a 50/50 basis, [it is] more likely than not . . . .' " *Fuglsang*, 235 Neb. at 554, 456 N.W.2d at 283. The trial court excluded such testimony. On appeal, we, relying on *Husted*, held that the exclusion of such testimony by the trial court was not an abuse of discretion. Leaving aside whether the question was one actually entrusted to the discretion of the trial court, we have now seen that in any event, the *Husted* ruling on the causation issue was improvident.

Thus, to the extent that *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981), and *Fuglsang v. Blue Cross*, 235 Neb. 552, 456 N.W.2d 281 (1990), hold that a medical expert's opinion based on a reasonable degree of medical probability is not sufficient to establish a causal relationship, they are overruled.

Accordingly, there is no merit to the second assignment of error.

3. Loss of Earning Power

Lastly, Grand Island Accessories complains of the compensation court's finding that Berggren sustained a loss of earning power, arguing that the earning capacity evaluation offered by Berggren does not comply with the analysis set forth

by this court in *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980).

Neb. Rev. Stat. § 48-121(2) (Reissue 1993) provides that certain types of partial disabilities shall be compensated based on "the difference between the wages received at the time of the injury and the earning power of the employee thereafter . . . ." In *Sidel*, we explained that the term "wages," as used in the foregoing statute, is not a complete synonym for earning power.

> "The ability to earn wages in one's employment is, obviously, a primary base in the admeasurement of earning power, but several other component factors are also involved. These include eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work in which engaged. If any one or more of these four elements of earning power are affected and only partially impaired, as the result of an accident arising out of and in the course of employment, and the disability is not one covered by subdivision 3 of section 48-121, Comp. St. 1929, the right to compensation is governed by subdivision 2 of such section. The right in such cases rests, as we have indicated, upon the fact that some preexisting element of earning capacity has been impaired."

205 Neb. at 546-47, 288 N.W.2d at 485.

In *Thom v. Lutheran Medical Center*, 226 Neb. 737, 740, 414 N.W.2d 810, 813-14 (1987), we expanded on the foregoing by writing:

> Earning power, as used in Neb. Rev. Stat. § 48-121(2) . . . is measured by an evaluation of a worker's general eligibility to procure and hold employment, the worker's capacity to perform the required tasks, and the worker's ability to earn wages in employment for which he or she is engaged or fitted. . . . Earning power is synonymous neither with wages . . . nor with loss of physical function . . . . Nonetheless, loss of physical function may affect a worker's eligibility to procure and hold employment, his or her capacity to perform the required tasks, and the ability to earn wages in employment for which he or she is engaged or fitted. Thus, while there is no numerical

> formula for determining one's earning power following an injury to the body as a whole . . . the extent of such impairment or disability may provide a basis for determining the amount of that worker's loss of earning power.

We there ruled that the range of expert medical opinions that the claimant's physical limitation translated to a permanent partial disability of from 7 to 25 percent of the body as a whole, the fact that she had been unable to find employment, and the evidence that her employment prospects had been diminished as a result of her accident supported the compensation court's finding that she suffered a 25-percent loss of earning power.

Here, the third physician testified that Berggren has a disability of 100 percent for employment involving significant solvent exposure and that he should not work in any environments or any occupations hazardous for individuals with seizure disorders. It was also her opinion that Berggren has a permanent partial disability estimated at 10 percent due to his toxicity resulting from repetitive exposure to solvents during his employment at Grand Island Accessories. The earning power evaluation received in evidence opined that based on Berggren's current income, the limitations on his employment as described by the third physician, and the loss of access to the labor market in jobs requiring exposure to hazards, Berggren had suffered a 29.4-percent loss of earning potential. As the loss of earning power evaluation takes into account Berggren's eligibility to procure employment generally, the ability to earn wages, and the extent of his body impairment, it complied with the requirements set forth in *Sidel* and *Thom*.

As factual determinations by the Nebraska Workers' Compensation Court will not be set aside on appeal unless they are clearly erroneous, this assignment of error too is meritless. *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995).

V. JUDGMENT

For the foregoing reasons, as first noted in part I, the judgment of the Court of Appeals is reversed.

REVERSED.

FAHRNBRUCH, J., participating on briefs.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. ROBERT L. GRIDLEY, RESPONDENT.

545 N.W.2d 737

Filed April 5, 1996. No. S-96-179.

1. **Disciplinary Proceedings.** Misappropriation of a client's funds affects both the bar and the public because it is a serious offense involving moral turpitude.
2. **Disciplinary Proceedings: Conversion.** Receiving a client's funds and converting them to personal use by placing them in an office account without consent of the client is illegal conduct involving moral turpitude.
3. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
4. ____. Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
5. ____. Misappropriation of a client's funds is more than a grievous breach of professional ethics. It violates basic notions of honesty and endangers public confidence in the legal profession.
6. ____. Misappropriation of client funds, as one of the most serious violations of duty an attorney owes to his client, the public, and the courts, typically warrants disbarment.
7. ____. Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment.
8. ____. The fact that no client suffered any financial loss is no excuse for a lawyer to misappropriate clients' funds nor any reason why a lawyer should not receive a severe sanction.
9. ____. A lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds.

Original action. Judgment of disbarment.

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

PER CURIAM.

Robert L. Gridley was duly admitted to the practice of law in the State of Nebraska on October 9, 1985, and was thereafter engaged in the private practice of law in Scottsbluff.

On February 15, 1996, Gridley voluntarily surrendered his license to practice law in Nebraska. In submitting the voluntary surrender of his license to practice law, Gridley admitted, in substance, that on numerous occasions, (1) client retainer moneys were deposited into his client trust account and that such funds or portions of them were transferred from the trust

account to his business account and utilized in the operation of his law office business prior to actually being earned; (2) there were periodic deficits in his client trust account which rendered that account's balance below that which would be commensurate with unearned client retainer deposits; (3) moneys transferred from the client trust account were, in large part, used to pay the wages of his employees; and (4) the foregoing activities were in violation of Canon 9, DR 9-102(A), of the Code of Professional Responsibility.

In regard to preserving identity of funds and property of a client, DR 9-102(A) provides:

> All funds of clients paid to a lawyer or law firm shall be deposited in one or more identifiable bank or savings and loan association accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay account charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

Although, in surrendering his license to practice law, Gridley only admitted that he violated DR 9-102(A), we find from the facts he admitted that he also violated Canon 1, DR 1-102(A), of the Code of Professional Responsibility, which provides that a lawyer shall not:

> (1) Violate a Disciplinary Rule.
>
> (2) Circumvent a Disciplinary Rule through actions of another.
>
> (3) Engage in illegal conduct involving moral turpitude.
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his or her fitness to practice law.

Misappropriation of a client's funds affects both the bar and the public because it is a serious offense involving moral turpitude. *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991). Receiving a client's funds and converting them to personal use by placing them in an office account without consent of the client is illegal conduct involving moral turpitude. *Id.*

In the written surrender of his license, Gridley claims that in a limited number of cases he personally or from his office account reimbursed portions of moneys which had wrongly been transferred from his trust account to his business account.

In surrendering his license, Gridley stated that he freely and voluntarily consented to any order that this court might enter in this matter, including, but not limited to, disbarment or suspension and that he waived his right to notice, appearance, or a hearing prior to the entry of such an order.

The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991). Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id.*

Misappropriation of a client's funds is more than a grievous breach of professional ethics. It violates basic notions of honesty and endangers public confidence in the legal profession. *State ex rel. NSBA v. Veith, supra*. Misappropriation of client funds, as one of the most serious violations of duty an attorney owes to his client, the public, and the courts, typically warrants disbarment. *Id.*

Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment. *State ex rel. NSBA v. Woodard, ante* p. 40, 541 N.W.2d 53 (1995). On rare occasions, we have found extraordinary mitigating circumstances which overcome the presumption of disbarment in misappropriation cases. See, *State ex rel. NSBA v. Bruckner, ante* p. 361, 543 N.W.2d 451 (1996);

State ex rel. NSBA v. Gleason, 248 Neb. 1003, 540 N.W.2d 359 (1995).

However, no mitigating factor is present in Gridley's case. In his voluntary surrender, Gridley states that no client was ever injured by his actions because his reasons for misappropriating client retainer moneys were to ensure prompt payment of employee wages and to facilitate continued representation of his clients. The fact that no client suffered any financial loss is no excuse for a lawyer to misappropriate clients' funds nor any reason why a lawyer should not receive a severe sanction. *State ex rel. NSBA v. Veith, supra.* A lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds. *State ex rel. NSBA v. Statmore*, 218 Neb. 138, 352 N.W.2d 875 (1984).

Gridley's admissions sufficiently demonstrate that he misappropriated clients' moneys on multiple occasions without any mitigating factor. This conduct will not be tolerated. We thus accept Gridley's surrender of his license to practice law and order him disbarred from the practice of law in Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

FAHRNBRUCH, J., not participating.

IN RE APPEAL OF MARK WAYNE DUNDEE FOR ADMISSION TO THE NEBRASKA STATE BAR ASSOCIATION.
MARK WAYNE DUNDEE, APPELLANT, V. NEBRASKA STATE BAR ASSOCIATION, APPELLEE.

545 N.W.2d 756

Filed April 12, 1996. No. S-34-950003.

1. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is the only court in Nebraska invested with the power to admit persons to the practice of law and to fix qualifications for admission to the Nebraska bar.

2. ____: ____. The Nebraska Supreme Court has the responsibility to adopt and implement systems to protect the public and to safeguard the justice system by assuring that those admitted to the bar are of such character and fitness as to be worthy of the trust and confidence such admission implies.
3. ____: ____. A "professional degree," as used in Neb. Ct. R. for Adm. of Attys. 5C (rev. 1996), contemplates only a juris doctor degree.
4. ____: ____. The Nebraska Supreme Court could not assume that a master of laws degree compensates for any deficiencies in a juris doctor education because of the qualitative differences between these degrees.
5. ____: ____. While a lawyer should be commended for pursuing graduate degrees in specialized areas of the law, the juris doctor is the professional degree that guarantees to Nebraska clients a certain minimum understanding of the law.
6. ____: ____. Attorneys should know that they are governed by the Nebraska Supreme Court Rules themselves, rather than by a summary of those rules in a cover letter.
7. **Attorneys at Law.** As lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the courts, this state's interest in regulating the quality of those who purport to practice law is compelling.

Original action. Affirmed.

Mark Wayne Dundee, pro se.

Amy L. Longo, of Ellick, Jones, Buelt, Blazek & Longo, for appellee.

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

WHITE, C.J.

This is an appeal from a decision of the Nebraska State Bar Commission denying the application of Mark Wayne Dundee for admission to the Nebraska State Bar. Dundee is an attorney applicant for admission; the state bar commission denied his application because Dundee had not met the educational requirements of the Nebraska Supreme Court Rules for Admission of Attorneys. Following our de novo review on the record, we affirm.

Dundee seeks admission to the Nebraska State Bar pursuant to rule 5A(2) of the Nebraska Supreme Court Rules for Admission of Attorneys (rev. 1996), which reads in pertinent part as follows:

> Class I–B applicants who may be admitted to practice in Nebraska upon approval of a proper application are those:
>
> (a) who have been licensed in the practice of law in another state, territory, or district of the United States preceding application for admission to the bar of Nebraska and have actively and substantially engaged in the practice of law in another state, territory, or district of the United States for 5 of the preceding 7 years immediately preceding application for admission, and
>
> (b) who at the time of their admission had attained educational qualifications at least equal to those required at the time of application for admission by examination to the bar of Nebraska.

Educational qualifications are contained in rule 5C of the Nebraska Supreme Court Rules for Admission of Attorneys, to wit:

> Educational Qualifications . . . . Every applicant must have received at the time of the examination a professional degree from a law school approved by the American Bar Association. The standards for approval which must be met are set forth in Appendix B and are incorporated here by reference. . . . An applicant without a degree from an approved law school shall be permitted to take the examination if such applicant will receive a degree from an approved law school within 60 days after the date of the examination taken.

Dundee earned his juris doctor degree in 1987 from Western State University, a state accredited and regionally accredited law school in California that has not been approved by the American Bar Association (ABA). In 1989, he received a master of laws (LL.M.) degree in taxation from the University of San Diego School of Law, an ABA-approved law school. Dundee contends that his LL.M. degree qualifies as the "professional degree" required in rule 5C and that because his LL.M. degree was conferred by an ABA-approved institution, he has met the requirements for admission to the Nebraska State Bar.

The issue before this court, therefore, is whether a "professional degree" contemplates only a juris doctor degree

or, rather, contemplates any degree conferred by a law school. Dundee urges a liberal construction of "professional degree," arguing that some other jurisdictions accept substitutes for a juris doctor degree from an ABA-approved law school. Indeed, Dundee apparently has qualified for admission to the bars of Michigan, Indiana, and the District of Columbia. It is because some other jurisdictions admit products of non-ABA-approved schools to practice that Dundee contends that he has "satisfied the statutory admission requirements as set forth in the Nebraska Court Rules for Admission of Attorneys and should thereby be admitted to the practice of law in the state of Nebraska." Brief for appellant at 9.

The bar admission practices of other states, and the policies behind those practices, do not govern admission practices in Nebraska. This court, and only this court, is invested with the power to admit persons to the practice of law and to fix qualifications for admission to the Nebraska bar. *In re Application of Majorek*, 244 Neb. 595, 508 N.W.2d 275 (1993). See Neb. Const. art. II, § 1, and art. V, §§ 1 and 25. This court thus has the responsibility to adopt and implement systems to protect the public and to safeguard the justice system by assuring that those admitted to the bar are of such character and fitness as to be worthy of the trust and confidence such admission implies. *In re Application of Majorek, supra*. We must determine the outcome of Dundee's appeal by what is right for Nebraska, not what may be right for another jurisdiction.

While the use of "professional degree" rather than "first professional degree" may have appeared to be a loophole through which graduates of non-ABA-approved juris doctor programs could gain access to the Nebraska bar, we hold today that "professional degree" contemplates only a juris doctor degree. This is the only means by which this court can ensure that all Nebraska lawyers receive their basic, "core" legal education according to the minimum standards promulgated by the ABA. See Neb. Ct. R. for Adm. of Attys., appendix B (rev. 1996). Accord *Matter of Adams*, 102 N.M. 731, 733, 700 P.2d 194, 196 (1985) (finding that a rule promulgating educational requirements for bar admission "not only promotes the licensing of adequately trained attorneys, it also provides for a uniform

and measurable standard by which to evaluate all applicants"). Notably, appendix B to the rules for admission of attorneys sets forth the standards for approval of schools conferring the professional degree required by rule 5C; those standards refer only to juris doctor degree curricula.

Unlike a juris doctor degree program, programs conferring LL.M. degrees are not the subject of any qualitative standards. Were this court to recognize an LL.M. degree as sufficient for the educational requirements in rule 5C, we would be compelled to undertake our own qualitative review of each LL.M. program. The benefits of conducting a school-by-school review of LL.M. curricula do not justify the expense of court resources. Accord *Application of Hansen*, 275 N.W.2d 790, 796 (Minn. 1978) ("[w]e have neither the time nor the expertise to investigate individually the special training of an applicant or the program offered by specific law schools, and any attempt by us to do so would be inefficient and chaotic").

Even beyond the lack of regulation over LL.M. programs, this court could not assume that an LL.M. degree compensates for any deficiencies in a juris doctor education because of the qualitative differences between these degrees. In considering whether to accept a graduate degree in law from an ABA-approved school in lieu of an accredited juris doctor degree, the Supreme Court of Florida noted that

> [a] Master's degree (LL.M.) usually involves only a one-year program of combined course work and research; a Doctorate of Juridical Sciences (S.J.D.) is a graduate academic research degree revolving around advanced publishable work; and a Master's in Comparative Law (M.C.L.) is primarily for foreign-educated lawyers. None of the three degrees . . . is based upon the core of courses we deem as minimally necessary to be a properly-trained attorney.

Florida Bd. of Bar Examiners in re Hale, 433 So. 2d 969, 972 (Fla. 1983).

This reasoning is persuasive. Dundee's only exposure to an ABA-approved school was through an unregulated program focusing exclusively on taxation. While the LL.M. program offered at the University of San Diego School of Law may be

academically rigorous, it is not an ABA-approved juris doctor program, nor is it a viable substitute. See, e.g., *In Matter of Bar Admission of Altshuler*, 171 Wis. 2d 1, 6, 490 N.W.2d 1, 3 (1992) (quoting policy of ABA Council of the Section of Legal Education and Admissions to the Bar that " 'no graduate degree in law is or should be a substitute for the professional degree in law (J.D.) and should not serve as the same basis as the J.D. degree does for bar admission purposes' "). The required coursework for an LL.M. in taxation does not include civil procedure, contracts, constitutional law, criminal law, evidence, family law, torts, professional responsibility, property, and trusts and estates. Since Western State University School of Law, Dundee's alma mater, operates outside the regulatory reach of the ABA, there is no guarantee that Western State offers the requisite instruction in these subjects.

While a lawyer should be commended for pursuing graduate degrees in specialized areas of the law, the juris doctor is the professional degree that guarantees to Nebraska clients a certain minimum understanding of the law. We will not construe "professional degree" to permit a loophole in a rule designed to protect the public from incompetent or inadequately educated attorneys. That Dundee has practiced law in Indiana for several years and has earned a host of degrees and certificates in various fields is of no matter. If we do not apply rule 5 uniformly rather than on a case-by-case basis, it will cease to operate as a rule at all.

Dundee argues that he relied on the state bar commission's interpretation of the rules for admission of attorneys to his detriment and that his reliance resulted in undue hardship. This argument is predicated on a cover letter from Jim Henshaw, admissions clerk for the Nebraska State Bar Commission, that accompanied the application materials sent to Dundee. In relevant part, Henshaw's letter provides as follows:

> Under the Nebraska rules for admission of attorneys, an attorney admitted in another state may be admitted in Nebraska without examination if he or she has engaged in the practice of law in another state for five of the last seven years, or is a graduate of an ABA approved law school and was admitted in another state after an examination similar

> to the examination administered in the State of Nebraska. . . . A copy of the Nebraska Rules is enclosed.

Dundee claims that he was duped by the cover letter into believing that he satisfied the requirements for admission, insofar as the letter does not mention the educational requirements incumbent on all applicants for admission. As a direct result of the putative misrepresentation of the Nebraska State Bar Commission, Dundee states that he suffered economic loss of $500 (the required application fee) as well as "undue harm" to his plans to relocate to Nebraska and open a law office.

This argument fails. As the letter states, a copy of the Nebraska Supreme Court Rules for Admission of Attorneys—which included rule 5—was enclosed for Dundee's review. As an attorney, Dundee should understand that the question of his admission would be governed by Supreme Court rules and not by a summary of those rules in a cover letter. We will not fault the state bar commission for Dundee's failure to read the rules that were provided for his review and were referenced in the very cover letter that he claims misled him.

As "lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts,' " *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975), this state's interest in regulating the quality of those who purport to practice law is compelling, see *id.* The educational requirements of the Nebraska Supreme Court rules are not onerous in light of that compelling interest. Since Dundee does not satisfy these requirements, we affirm the decision of the state bar commission to deny his application for admission.

AFFIRMED.

TERESA K. PALMER, APPELLANT, V. GARY R. PALMER, APPELLEE.
545 N.W.2d 751

Filed April 12, 1996. No. S-94-279.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial judge, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Constitutional Law: Parental Rights: Courts.** While a court has a duty to consider whether the religious beliefs of a parent threaten a child's best interests, a court may not restrict a parent's fundamental right to control the religious upbringing of a child absent a showing that particular religious practices pose an immediate and substantial threat to a child's temporal well-being.
3. **Constitutional Law: Parental Rights.** A state cannot interfere with a parent's liberty interest to direct the upbringing of the parent's child or children, including educational and religious instruction, in the absence of jeopardy to the child's health, safety, or significant social concerns.

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

John J. Respeliers and Thomas K. Harmon, of Respeliers and Harmon, P.C., and Gregory D. Olds for appellant.

No appearance for appellee.

Carolyn R. Wah for amicus curiae Watchtower Bible & Tract Society of New York, Inc.

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

GERRARD, J.

This is an appeal from the district court for Sarpy County, which dissolved the marriage of petitioner-appellant mother, Teresa K. Palmer, and respondent-appellee father, Gary R. Palmer, and awarded custody of the parties' minor daughter, Chelsie, to the mother, but placed restrictions on the mother's ability to involve the child in her religious beliefs and activities. The mother appealed to the Nebraska Court of Appeals, claiming that the district court erred in entering a decree restricting her right to direct the religious instruction of her daughter absent a clear and affirmative showing that the child's exposure to the mother's religious beliefs and practices poses an

immediate and substantial threat of harm to the child. We, on our own motion, in order to regulate the caseloads of the two courts, removed the appeal to this court. We now affirm but modify a portion of the decree in order to eliminate certain restrictions placed on the mother that impermissibly violate the Free Exercise Clause found in the First Amendment to the U.S. Constitution and article I, § 4, of the Nebraska Constitution.

FACTUAL BACKGROUND

The mother began studying to be a Jehovah's Witness in 1981 and was baptized in July 1984. The parties married on October 29, 1982, and their daughter, Chelsie, was born on September 8, 1990. In April 1993, the mother filed a petition for dissolution, and both parties prayed for custody of the minor child, who at the time of the dissolution proceedings was 3½ years old.

A trial was held in the district court for Sarpy County. At trial, the mother testified that as part of her religious activities, she attends a total of 5 hours per week of church services, consisting of a 1-hour-45-minute time period each Sunday, a 2-hour meeting on Tuesday evening, and a 1-hour meeting on Thursday evening. The mother also testified that every other Sunday, approximately two Sundays a month, she participates in a 1-hour door-to-door visitation ministry in which she visits people at their homes, distributes literature, and discusses her faith with willing participants. The mother testified that if awarded custody, she would bring Chelsie with her during these activities. Jehovah's Witnesses do not have separate church services for children, and the mother testified that during church services, she brings toys and activity books for her daughter to play with. The father testified that he attends a Catholic church in Papillion, Nebraska, and had taken Chelsie to church with him approximately six times in the few months leading up to the trial. The mother did not object to the father including the child in his religious activities or to the father having the power to authorize a blood transfusion for the child in emergency situations.

Two psychologists and the guardian ad litem testified at trial, but a large majority of the testimony centered on custodial

issues not raised in this appeal. The mother testified that the father did not want Chelsie raised as a Jehovah's Witness, but there was very little testimony regarding the effect of the mother's religious activities and practices on the child. The guardian ad litem testified that she did not think it was appropriate for the mother to take the child on door-to-door calls because "it's boring" and the "weather can either be hot or cold," and recommended that the mother be refrained from taking Chelsie on these calls until Chelsie was approximately 10 years old. In regard to the weekly services, the guardian ad litem stated:

> Chelsie is required to sit in church with her mother for a two and three-hour period of time for the services. I never could have kept my kids quiet or been able to enjoy the service myself had I had them with me for that long a period of time. I think that's too long for youngsters. They don't understand those sermons, they're way over their head.

And later, referring to the weekly services, the guardian ad litem testified, "I think that's too much religion for a three-year or four-year-old or a five-year-old."

The district court ruled that the best interests of Chelsie were that she be placed in the custody of the mother. The father was granted visitation on Tuesday and Thursday evenings, every other Sunday all day, and every Sunday in the afternoon. However, based on the above testimony, the district court placed the following restrictions on custody and visitation in paragraph 7 of the decree:

> (c) Petitioner shall not take the minor child with her on door-to-door visitation until the minor child reaches age seven;
>
> (d) Neither party shall require the minor child to sit in a regular church service until age seven, however, said child may attend religious education for children age-appropriate.

The mother challenges these restrictions.

STANDARD OF REVIEW

Child custody determinations are matters initially entrusted to the discretion of the trial court, and although this court reviews these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of an abuse of discretion. *Sullivan v. Sullivan, ante* p. 573, 544 N.W.2d 354 (1996); *Smith-Helstrom v. Yonker, ante* p. 449, 544 N.W.2d 93 (1996). The same standard of review applies to visitation determinations by the trial court. *Evenson v. Evenson*, 248 Neb. 719, 538 N.W.2d 746 (1995).

ANALYSIS

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This prohibition applies to states by virtue of the 14th Amendment to the U.S. Constitution and to judicial as well as legislative functions. *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958); *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). See, also, *LeDoux v. LeDoux*, 234 Neb. 479, 452 N.W.2d 1 (1990). Similarly, the Nebraska Constitution also protects religious freedom and prohibits interference therewith. Neb. Const. art. I, § 4. In the present case, the state is acting through the trial judge; thus, the actions of the trial judge qualify as governmental action governed by the Free Exercise Clause.

In order to invoke the Free Exercise Clause, the claimant must show that his or her sincerely held religious practices are burdened by the governmental action. *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981). A burden upon religion exists where the state, or agent thereof, "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs . . . ." 450 U.S. at 717–18. There is no question that the religious beliefs of the

mother are sincerely held. Further, it is clear that the beliefs and practices of the mother are burdened in the sense that an important benefit, full custody and parental training of her child, is limited by restrictions on her ability to include Chelsie in her religious practices, i.e., the custodial mother is prevented from including Chelsie in her door-to-door ministry, and she is prevented from taking Chelsie to regular adult religious services until the child reaches age 7. Thus, the Free Exercise Clause is clearly invoked in this case.

The inquiry does not end here, however, as a state may abridge religious practices upon a demonstration that some compelling state interest outweighs a complainant's interests in religious freedom. *LeDoux v. LeDoux, supra* (citing *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). See, also, 42 U.S.C. § 2000bb (1994) (Religious Freedom Restoration Act restoring compelling state interest test after *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). In the present case, the state interest implicated by the order of the district court was protection of the best interests of the child. This court has previously held that while a court has a duty to consider whether the religious beliefs of a parent threaten a child's best interests, a court may not restrict a parent's fundamental right to control the religious upbringing of a child absent a showing that particular religious practices " 'pose an immediate and substantial threat to a child's temporal well-being.' " *Peterson v. Peterson*, 239 Neb. 113, 126, 474 N.W.2d 862, 871 (1991); *LeDoux v. LeDoux, supra*. See, also, *Von Tersch v. Von Tersch*, 235 Neb. 263, 455 N.W.2d 130 (1990).

In *Von Tersch v. Von Tersch, supra*, this court reviewed a divorce decree in which the district court ordered that the custodial parent remove the minor children from a Christian school and place the children in a public school. The Christian school was exempt from state accreditation standards and not all of the teachers at the school were state certified.

In support of the proposition that the trial judge did not abuse his discretion in ordering the placement of the children in a public school, the noncustodial parent presented the trial

testimony of a psychologist who performed a custody evaluation. The psychologist testified that the lack of supplemental courses and strong emphasis on basics at the Christian school " 'generates a sense of awkwardness and potential vulnerability for the children.' " *Id.* at 267, 455 N.W.2d at 133. This court concluded that given the fact that the noncustodial parent's objections to the Christian school were not religiously based, but, rather, were based on the adequacy of the education provided, the primary issue in *Von Tersch* concerned a custodial parent's right to control the education of a child. However, in reviewing the decision of the trial judge, we stated in *Von Tersch* that "a state cannot interfere with a parent's liberty interest to direct the upbringing of the parent's child or children, including educational and religious instruction, in the absence of jeopardy to the child's health, safety, or significant social concerns." *Id.* at 269, 455 N.W.2d at 134. This court also reaffirmed the proposition that a custodial parent in a marital dissolution proceeding "normally has the right to control the religious training of a child legally affected by the proceeding unless there is a demonstrated serious threat to the health or well-being of the child." *Id.* at 272, 455 N.W.2d at 136.

In *Von Tersch*, we found that neither the testimony of the psychologist nor any other evidence in the record demonstrated that the Christian school presented any harm to the children's physical or mental health or well-being. We, therefore, held in *Von Tersch* that the trial judge abused his discretion in ordering that the children be removed from the Christian school and placed in a public school.

Similar to *Von Tersch v. Von Tersch, supra*, in this case, there exists insufficient evidence that attendance at the church services poses an immediate and substantial threat to the mental or physical health or well-being of the child. The only testimony which supports the restrictions imposed by the district judge is the testimony of the guardian ad litem as to her opinion that the child would be bored and unruly during extended religious services. Even accepting that testimony at face value, the child has visitation with her father during 3 hours of church services on Tuesday and Thursday evenings, and every other

Sunday all day. There is no evidence in the record that the child was manifestly fearful of either parent or was suffering from any tangible mental stress from attending the Jehovah's Witnesses services or participating in the door-to-door ministry. There is no evidence or even allegation of a threat of physical harm to the child caused by such activities. In fact, the mother testified that attendance and participation in the religious activities of both parents would be healthy for Chelsie and provide a basis for the child to determine which religion she would prefer when she reaches a sufficient age of understanding.

By all indications of the psychologists' evaluations, Chelsie is a happy, well-adjusted child. There has been no showing that the compelling end of the best interests of the child would be served by the restrictions imposed in this case. We, therefore, hold that the district court abused its discretion in placing limitations on the custodial mother's right to control the religious upbringing of her minor child in violation of the Free Exercise Clause found in the First Amendment to the U.S. Constitution and article I, § 4, of the Nebraska Constitution. The following restrictions are ordered to be stricken from paragraph 7 of the decree of dissolution:

> (c) Petitioner shall not take the minor child with her on door-to-door visitation until the minor child reaches age seven;
>
> (d) Neither party shall require the minor child to sit in a regular church service until age seven, however, said child may attend religious education for children age-appropriate.

JUDGMENT

Accordingly, paragraph 7 of the decree of dissolution is modified as set forth above, and the remainder of the decree is affirmed in all other respects.

AFFIRMED AS MODIFIED.

FAHRNBRUCH, J., concurs.

IN RE APPLICATION OF BURLINGTON NORTHERN RAILROAD COMPANY.
BURLINGTON NORTHERN RAILROAD COMPANY, APPELLEE, V. PAGE GRAIN COMPANY ET AL., APPELLANTS.

545 N.W.2d 749

Filed April 12, 1996. No. S-94-453.

1. **Federal Acts: States: Courts: Jurisdiction.** State courts no longer have jurisdiction to consider the practices, routes, services and facilities of interstate rail carriers because § 10501(a) of the federal ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), grants the federal Surface Transportation Board with exclusive jurisdiction over transportation by rail carriers as part of the interstate rail network.
2. **Constitutional Law: States.** The Supremacy Clause of the U.S. Constitution dictates that state law, including a state's constitution, is superseded to the extent it conflicts with federal law.
3. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
4. **Jurisdiction: 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.

Appeal from the Nebraska Public Service Commission. Appeal dismissed.

Bradford E. Kistler, of Kinsey Ridenour Becker & Kistler, for appellants.

Larry L. Ruth and Andrew S. Pollock, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

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

FAHRNBRUCH, J.

Nebraska's Public Service Commission (Commission) granted, on a 6-month trial basis, the application of Burlington Northern Railroad Company (Burlington) to discontinue its "Osmond Direct Service Agency" and transfer that agency's services to Burlington's Lincoln agency. Appellants, Page Grain Company, Dixon Elevator, North Side Grain Company, Orchard Fertilizer Company, and Larry Schaefer, as well as other

protestants, moved for a rehearing, which the Commission overruled.

Thereafter, the appellants filed an appeal of the Commission's ruling to the Nebraska Court of Appeals. We, upon the exercise of our authority to regulate the caseloads of the appellate courts, moved the appeal to this court.

In this court, Burlington moved for dismissal of the appeal as moot on the ground that the federal ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), which became effective January 1, 1996, vests exclusive jurisdiction over rail transportation in the federal Surface Transportation Board and thus preempts state regulation and remedies.

We hold that this court lacks subject matter jurisdiction to address the matter because the ICC Termination Act of 1995 preempts state remedies and vests exclusive jurisdiction in the federal government for interstate rail matters affecting practices, routes, services, and facilities of rail carriers.

ASSIGNMENTS OF ERROR

Appellants claim that the Commission erred in (1) exceeding its authority by granting Burlington's application on a 6-month trial basis, (2) granting Burlington's application in an unauthorized manner in contravention of Neb. Rev. Stat. § 75-110 (Supp. 1993), (3) assuming it would have jurisdiction to reinstate Burlington's service at Osmond after the 6-month trial period, and (4) failing to consider evidence of Burlington's intention to close its Lincoln centralized agency and transfer those functions to its Fort Worth, Texas, customer service center.

After the appeal was docketed in this court, Burlington filed a motion to dismiss the appeal. It claimed that § 10501(b) of the ICC Termination Act of 1995 vests exclusive jurisdiction of the regulation of the railroad industry to the federal Surface Transportation Board and expressly preempts regulation and remedies provided by state law.

FACTS

On August 18, 1993, Burlington applied to the Commission to discontinue Burlington's Osmond agency and transfer that agency's service to Burlington's Lincoln agency. Burlington's

Osmond agency served shippers in Bing, Willis, Waterbury, Allen, Dixon, Laurel, Belden, Randolph, McLean, Osmond, Plainview, Copenhagen, Brunswick, Orchard, Page, and O'Neill. Burlington claimed that affected shippers were not solely dependent on Burlington and that "honest, efficient and economical management and operation" of Burlington's railroad required discontinuance of the Osmond agency.

On March 9, 1994, following a hearing, the Commission granted Burlington's application to discontinue its Osmond agency on a 6-month trial basis to be followed by a hearing, the reopening of the record, and the entering of a final order.

Appellants and other protestants moved for a rehearing because they claimed that the Commission (1) was not authorized to discontinue Burlington's Osmond agency on a temporary basis, (2) the Commission order was contrary to the record, and (3) the Commission order was arbitrary and capricious. The motion for rehearing was overruled, and the Commission's order was affirmed.

ANALYSIS

State courts no longer have jurisdiction to consider the practices, routes, services, and facilities of interstate rail carriers because § 10501(a) of the federal ICC Termination Act of 1995 grants the federal Surface Transportation Board with exclusive jurisdiction over transportation by rail carriers as part of the interstate rail network. Section 10501 states in part:

> "(b) The jurisdiction of the [Surface Transportation] Board over—
>
> "(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> "(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, *the remedies provided under this part with respect to*

> *regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State Law.*"

(Emphasis supplied.) ICC Termination Act of 1995, Pub. L. No. 104–88, 109 Stat. at 807.

The rail service agency in question is a service of Burlington to its shipping customers, as well as a facility of that railroad. As such, the regulation of and remedies relevant to the rail service agency in question are under the exclusive jurisdiction of the federal government. The Supremacy Clause of the U.S. Constitution dictates that state law, including a state's constitution, is superseded to the extent it conflicts with federal law. See *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993). 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. *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995). 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. *Id.* As a result of the ICC Termination Act of 1995, this court has no authority to address the subject matter brought before it in this appeal.

The appeal is dismissed because this court's jurisdiction over rail transportation as it pertains to this appeal has been preempted by the ICC Termination Act of 1995.

APPEAL DISMISSED.

JENNIFER FRIEHE, APPELLEE, V. ROBERT J. SCHAAD, APPELLANT.

545 N.W.2d 740

Filed April 12, 1996. No. S-95-523.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.
2. **Constitutional Law: Statutes: Presumptions: Proof: Appeal and Error.** When passing on the constitutionality of a statute, an appellate court begins with a presumption of validity, and the burden of demonstrating a constitutional defect rests with the challenger.
3. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
4. **Equal Protection.** Under the Equal Protection Clause, gender-based classifications are subject to intermediate scrutiny.
5. ____. The intermediate scrutiny test requires that gender-based distinctions must serve important governmental objectives and must be substantially related to achievement of those objectives.
6. **Constitutional Law: Parent and Child.** A distinction exists between the termination of an opportunity to form a familial bond and the termination of an established familial bond, warranting different levels of constitutional protection.
7. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
8. **Estoppel.** The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.

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

Michael J. Murphy, of Angle, Murphy, Valentino & Campbell, P.C., for appellant.

Michael C. Washburn, of Erickson & Sederstrom, P.C., for appellee.

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

GERRARD, J.

Appellee, Jennifer Friehe, filed an action for declaratory judgment in the district court for Hall County seeking

termination of the parental rights of putative father, Robert J. Schaad, to the minor child, Seth Daniel Friehe, and seeking the right to singularly execute and enforce a relinquishment of rights for purposes of adoption. Friehe asserted that since Schaad had not filed a notice of intent to claim paternity within 5 days of the child's birth, as required by Neb. Rev. Stat. §§ 43-104.02 and 43-104.04 (Reissue 1993), Schaad's consent to relinquishment was unnecessary. In response, Schaad challenged the constitutionality of §§ 43-104.02 and 43-104.04 as applied to him, asserting that these statutes, as applied in this case, violate the Equal Protection and Due Process Clauses of the 14th Amendment of the U.S. Constitution and Neb. Const. art. I, § 3. The district court upheld the constitutionality of the statutes as applied in this case and entered an order allowing Friehe to execute a valid relinquishment and consent and to proceed to adoption, without the necessity of Schaad's consent or relinquishment. Schaad appealed to the Nebraska Court of Appeals, and this case was transferred to our docket in order to regulate the caseloads of the appellate courts. We hold that §§ 43-104.02 and 43-104.04 are constitutional as applied in this case and affirm the declaratory judgment of the district court.

FACTUAL BACKGROUND

Jennifer Friehe and Robert J. Schaad began dating in November 1992 and continued their relationship until approximately March or April 1994. The parties engaged in sexual relations at least as late as March 1994, and there is no dispute that Schaad is the father of the child in question. Friehe gave birth to Seth Daniel Friehe the evening of June 15, 1994. Schaad was notified by telephone of the birth on June 16; this was his first knowledge of the pregnancy and resulting birth. Friehe alleges that she herself was unaware of the pregnancy until the day of birth, when she went to the doctor complaining of flu-like symptoms and was informed that she was in labor.

On June 16, the day following the birth, Schaad traveled to the Friehe home where he was informed by Friehe's parents that Friehe was contemplating adoption. Schaad also visited Friehe in the hospital on this day and was again informed that Friehe was considering adoption; however, Friehe expressed a desire

that the parties make a joint decision. Schaad did not dispute the possibility of adoption at that time, but requested more time to make a decision. On June 16, Schaad did not go to the hospital to visit the child, but observed the child during feeding while in Friehe's room.

Over the next few days, numerous discussions occurred between Friehe, Schaad, and their respective parents, in which Schaad indicated a desire to raise the child, and Friehe indicated that her first choice remained adoption. Schaad visited the child at the hospital on an infrequent basis. No immediate agreement could be reached by the parties; however, on June 18, the parties reached a consensus to postpone a final decision concerning adoption for at least 1 week and to place the child in temporary foster care in the meantime through Nebraska Children's Home Society, a licensed Nebraska adoption and foster care agency.

On June 19, the child was placed in temporary foster care. Schaad did not file a notice of intent to claim paternity by June 20, 5 days after the child's birth. There is no evidence that either party was aware of the 5-day filing requirement as of June 20. However, on June 21, Schaad contacted an attorney and was informed of the 5-day filing rule, which had already passed. Schaad did not file a notice of intent to claim paternity at that time, but continued to try and work things out with Friehe. One week later, an agreement had still not been reached between the parties, and a final decision was indefinitely postponed. Friehe then left town to visit relatives in Colorado. At least one letter was exchanged between the parties during this time, in which Friehe clearly indicated her preference for adoption.

On July 6, after returning from out of town, Friehe informed Schaad of her decision to place the infant for adoption. Schaad then filed two notices of intent to claim paternity of the infant with the Nebraska Department of Social Services. The first notice, dated July 10, was handwritten, while the second, dated July 14, was executed on the state-prepared form. In late July 1994, the adoption placement agency was changed upon request of the Nebraska Children's Home Society to Lutheran Family Services; however, the foster home of the child has remained unchanged. The child remains in temporary foster care.

On September 14, Friehe filed a petition for declaratory judgment in the district court for Hall County seeking a determination of the respective rights of the parties and asserting that Schaad's rights in regard to the adoption were terminated by his failure to comply with §§ 43-104.02 and 43-104.04. In response, Schaad asserted that these statutes are unconstitutional as applied to him and that Friehe was equitably estopped from claiming the protection of these statutes as a result of fraudulent misrepresentations. Specifically, Schaad alleged that Friehe was equitably estopped from relying on §§ 43-104.02 and 43-104.04 because Friehe intentionally hid the fact of her pregnancy from Schaad and intentionally entered into the agreement on June 18 to postpone the adoption decision in an attempt to prevent Schaad from exercising his right to file a notice of intent to claim paternity within the 5-day period.

The Attorney General was properly served with notice of the constitutional issues in this case. The parties stipulated to submission of the matter on pleadings, depositions, affidavits, exhibits, and written arguments. The district court found the statutes constitutional and applicable, and ordered that a relinquishment executed by Friehe alone would be valid for purposes of the adoption. Schaad appeals from this declaratory judgment.

Schaad alleges that in addition to the oral expression of his intent to raise the child and his attempt to establish a close relationship with the child, he has acted financially responsible in offering to pay Friehe's medical expenses of the birth, although such offer was refused by Friehe's father. This offer of payment is undisputed. Because of these actions, Schaad asserts that termination of his parental rights by operation of §§ 43-104.02 and 43-104.04 would unconstitutionally violate his rights to due process and equal protection under the law.

ASSIGNMENTS OF ERROR

Schaad asserts that the district court erred in (1) not finding §§ 43-104.02 and 43-104.04 violative of a putative father's rights of due process and equal protection guaranteed by the 14th Amendment to the U.S. Constitution and (2) not applying the doctrine of equitable estoppel to prevent the termination of

the rights of a putative father where the father has in good faith relied to his detriment on the false and misleading representations of the mother.

STANDARD OF REVIEW

Whether a statute is constitutional is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. *State v. Kelley, ante* p. 99, 541 N.W.2d 645 (1996); *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995). When passing on the constitutionality of a statute, an appellate court begins with a presumption of validity, and the burden of demonstrating a constitutional defect rests with the challenger. *Chrysler Motors Corp. v. Lee Janssen Motor Co.*, 248 Neb. 322, 534 N.W.2d 309 (1995); *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993).

Claims of equitable estoppel and fraudulent misrepresentation rest in equity. In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Whitten v. Malcolm, ante* p. 48, 541 N.W.2d 45 (1995); *City of Lincoln v. Townhouser, Inc.*, 248 Neb. 399, 534 N.W.2d 756 (1995).

ANALYSIS

Constitutionality.

Section 43-104.02 provides:

> (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 on forms provided by the department, within five days after the birth of such child, a notice of intent to claim paternity.
>
> (2) The notice shall contain the claimant's name and address, the name and last-known address of the mother, and the month and year of the birth or the expected birth of the child.

Additionally, § 43-104.04 provides:

> 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 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.

Schaad does not assert that these statutes are facially unconstitutional. Rather, Schaad asserts that these statutes are unconstitutional as applied in this case.

This court first addressed the issues of equal protection and due process in the context of the 5-day filing requirement of §§ 43-104.02 and 43-104.04 in *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986). In *Shoecraft*, the putative father was aware of the pregnancy at least 7 months before the birth of the child and was aware of the possibility of adoption some 3½ to 4 months before birth. The father continued to have contact with the mother during the pregnancy, but he did not offer to pay any expenses associated with the pregnancy or birth. The father was notified of the birth on the date of birth and was aware of the mother's execution of a relinquishment for purposes of adoption. The father did not execute a consent to the adoption or participate in the relinquishment. The father also did not file a notice of intent to claim paternity until 9 days after the birth of the child.

We acknowledged in *Shoecraft* that the 5-day filing requirement raised questions of equal protection because it treated unwed mothers and fathers differently, providing for automatic parental rights for unwed mothers while unwed fathers were required to file a notice of intent to claim paternity within 5 days of birth in order to obtain, or retain, any rights with regard to adoption and the child's welfare. However, in *Shoecraft*, we upheld the constitutionality of the statutes in question as applied to that case, utilizing a strict scrutiny analysis. This court, in *Shoecraft*, held that the father had

sufficient notice of the birth and that the disparate classification was justified because it served the compelling state interest of protecting the well-being of all children. Specifically, in *Shoecraft*, we noted that the limited 5-day filing period was justified given the interest of the government in expedient adoptions, which serve the best interests of the child. This court further stated that the case before it was clearly different from the case of a separated or divorced father, since the father in *Shoecraft* had not established a relationship with the child and, therefore, less protection of the father's rights was justified. Nevertheless, this court in *Shoecraft* recognized the possibility that the 5-day notice period may be constitutionally violative in a case where the father was not notified of the birth.

We again addressed the constitutionality of § 43-104.02 in *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987). In that case, the putative father lived with the mother prior to birth and was aware of the pregnancy. After the birth, the father's name was placed on the birth certificate, and the father, mother, and child lived together for 19 months. During this time, the father provided support for both the mother and child. The mother then left with the child to live with a friend and subsequently moved in with a new boyfriend. The father continued to maintain contact with the child, although such contact was limited by the mother's efforts to prevent the father from seeing the child. The father also continued to provide basic necessities for the child while the child was visiting relatives who allowed him access to the child. Approximately 2 years 1 month after the child's birth, the mother placed the child for adoption without the father's knowledge. The child remained with foster parents for a few weeks and was then placed with the adoptive parents. The father learned of the adoption some 3 months later, at which time he obtained an attorney and filed a notice of intent to claim paternity. The father appeared at the adoption proceedings to contest the adoption, asserting that Neb. Rev. Stat. §§ 43-104.02 et seq. (Reissue 1984) were unconstitutional on their face and as applied in that case.

This court in *In re Application of S.R.S. and M.B.S.* upheld the statutes as facially constitutional. However, we held that the

statutes in question were unconstitutional as applied to that case, using a strict scrutiny analysis, because requiring the father to comply with the 5-day filing requirement did not serve the interests of the state of protecting the best interests of children where the father had developed a substantial familial bond with the child prior to the adoption.

Equal Protection Analysis.

At this juncture, we note that the fact situation in the present case appears more similar to that of *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986), than that of *In re Application of S.R.S. and M.B.S., supra*, in that the father in this case does not possess an established familial bond with the child in question. However, rather than applying the very same analysis as *Shoecraft*, we wish to clarify the type of constitutional test that will be applied in equal protection cases involving gender-based claims.

For purposes of our equal protection analysis, the classification involved in this case is gender based, that is, the statutes in question treat unwed mothers and unwed fathers differently, and it is on this basis that the statutes are challenged. The U.S. Supreme Court has held that gender classification is subject to intermediate scrutiny, requiring that gender-based distinctions must serve important governmental objectives and must be substantially related to achievement of those objectives. See *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979) (citing *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976)) (stating that gender-based distinctions must serve important governmental objectives and must be substantially related to those objectives, as opposed to strict scrutiny test of a compelling state interest and necessary or least restrictive means). See, also, *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 468, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981) (explaining that Supreme Court has not held gender-based classifications to be " 'inherently suspect' " and thus does not apply " 'strict scrutiny' " to those classifications, but, rather, proper analysis lies in between rationality test and strict scrutiny test). Therefore, to the extent we implied in

Shoecraft that gender classification was a suspect classification entitled to strict scrutiny, we now modify our test to that of intermediate scrutiny in cases that involve gender-based equal protection claims.

Furthermore, although the relationship between parent and child is always constitutionally protected, the U.S. Supreme Court cases indicate that the degree of protection and, therefore, the level of scrutiny applied by the Court depend on the nature of the right involved and the nature of the parental relationship itself, that is, whether it is a parental relationship consisting only of a biological link or an established familial bond with all its inherent responsibilities. Compare *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (involving forced sterilization and stating that rights of marriage and procreation are fundamental rights justifying strict scrutiny analysis); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (involving free exercise of religion clause and holding that right to choose religious upbringing of children is fundamental right entitled to strict scrutiny); and *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (dealing with right to educate children as parents see fit), with *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983) (distinguishing between mere biological link and established familial relationship and stating that former is entitled to less constitutional protection; ultimately applying intermediate scrutiny to analyze putative father's right to intervene in adoption proceedings). See, also, *Caban v. Mohammed, supra* (applying intermediate scrutiny to analyze disparate treatment of unwed mother and unwed father under adoption laws). A strict scrutiny analysis is not applicable per se because a case involves parental rights.

In the instant case, as in the U.S. Supreme Court case of *Lehr v. Robertson, supra*, we are not dealing with the constitutionality of terminating an established familial bond, but, rather, with the constitutionality of terminating the opportunity to form such bond. To such a situation, the Supreme Court has applied an intermediate scrutiny test. *Id.* (setting forth intermediate scrutiny test of important governmental objective and substantially related means).

Therefore, we conclude that the appropriate test to be applied in this case is intermediate scrutiny for purposes of our equal protection analysis.

It is not disputed that the statute at issue treats Friehe and Schaad disparately. However, disparate treatment of individuals does not make statutes unconstitutional per se. If there is a proper showing that there exists a substantial relation between the disparate treatment of this unwed mother and unwed father and an important governmental objective, then §§ 43-104.02 and 43-104.04 would not be unconstitutional as applied.

The state's asserted interest sought to be served in the present case is to protect the well-being of all children and to ensure their proper care and nurture. We accept that this is an important governmental objective. See *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986) (accepting it as even a "compelling" governmental objective). The state has an important interest in protecting the needs and interests of children of both wed and unwed parents.

However, it must be further determined if the disparate treatment of unwed mothers and unwed fathers in the context of this case is substantially related to the end of protecting the best interests of children. We hold that the means of the state employed in this case, that of requiring a putative father to file a notice of claim of paternity within 5 days of birth in order to assert rights, is substantially related to protecting the best interests of children on the facts of this case. The interest of the state is not mere convenience or expediency, which, of themselves, would not be enough to form a substantial relation. *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). Rather, the state seeks to protect the interests of children born out of wedlock by providing a mechanism for speedy transfer, while allowing the putative father some time to exercise his rights. Some finality for the transfer of children to adoptive parents must be achieved. The 5-day period employed in §§ 43-104.02 and 43-104.04 was selected as a legitimate amount of time in which a child would be in the hospital with the mother and in which the father could determine his intentions to the child. See Judiciary Committee Hearing, L.B. 224, 84th Leg., 1st Sess. 2 (Jan. 29, 1975) (statement of

Senator Anderson). In this way, the mother, father, and, most importantly, the child, are not left in limbo during an extensive period. It is in the best interests of the child to allow the transfer to a loving adoptive family as soon as possible after birth. This is not to say that no time should be allotted to a putative father to assert his rights; certainly some time should be provided, and is, under the statutes at issue.

Furthermore, the putative father's ignorance of the 5-day period is no excuse. We are not dealing here with a case where the father did not know of the birth of the child within the 5-day period and, therefore, did not have an opportunity to exercise his rights. Although Schaad did not know of the pregnancy, as did the father in *Shoecraft*, Schaad did know of the birth, and it is this knowledge, not that of the pregnancy, which is important for purposes of the statutes. There is also no evidence that anything was done by Friehe or others to prevent Schaad from exercising his rights within the statutory period. In fact, from the day after the birth, Schaad was aware of Friehe's intentions to place the child for adoption and of her unwillingness to waver from this position. Schaad had opportunity to exercise his rights under the statute but failed to do so. In fact, even after Schaad learned of the 5-day period, he did not file a notice of intent to claim paternity until over a month later. We, therefore, hold, under the facts of this case, where the putative father had sufficient notice of the birth and had not developed a substantial familial bond with the child prior to the proposed adoption, that §§ 43-104.02 and 43-104.04, as applied, do not violate Schaad's rights to equal protection of the law under the 14th Amendment to the U.S. Constitution.

Due Process Analysis.

Schaad does not assert any substantive due process claims. Rather, his claims as to due process involve only procedural due process. Procedural due process limits the ability of the government to deprive people of interests which constitute " 'liberty' " or " 'property' " interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be

heard. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). This case does not involve a due process "property" interest. However, it is asserted that this case involves a constitutionally protected "liberty" interest.

On the issue of the nature of the liberty interest involved in this case, once again, the Supreme Court case of *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983), is instructive. The Supreme Court has held that an established familial relationship, and the duties consequent therein, are liberty interests entitled to substantial due process protection. See, *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (holding that parents have protected liberty interest in the way they choose to educate their children); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (holding that parents have protected liberty interest in controlling education of their children); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (holding that parents have protected liberty interest in controlling religious upbringing of their children); *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (holding that father had protected liberty interest in maintaining established custody of children, and stating that father was entitled to hearing on his fitness as parent prior to termination of custody).

However, the liberty interest involved in this case does not involve termination of established custodial rights or the liberty of parents to control the upbringing of children in their custody. The liberty interest involved in this case is the liberty of a putative father to potentially form a familial bond with his child. See *Lehr v. Robertson, supra*. In such a situation, the Supreme Court has stated: "The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights." 463 U.S. at 265.

Under the facts of the present case, we hold that Schaad was provided adequate notice of the birth of the child and was given adequate opportunity to exercise his rights and be heard. Schaad was provided notice of the birth within the statutory filing

period. In fact, but for the fact that he was not home the night of the birth, he would have received notice immediately after the birth occurred, which appears to be as much notice as anyone received under these circumstances. Furthermore, pursuant to the statutory procedures, Schaad had it within his own power to assert his rights and obtain an opportunity to be heard by filing a notice of intent to claim paternity. His own failure to act upon the notice given to him deprived him of the opportunity to be heard. Schaad's procedural due process claim under either the U.S. Constitution or the Nebraska Constitution is without merit.

Equitable Estoppel.

The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed. *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994).

Schaad has asserted that Friehe should be equitably estopped from relying on §§ 43-104.02 and 43-104.04 due to her actions to intentionally mislead Schaad. Specifically, Schaad asserts that Friehe intentionally hid her pregnancy from him and intentionally postponed a decision as to the adoption in order to prevent Schaad from exercising his rights under the statutes at issue. We find no merit in these assertions. There is no evidence that Friehe intentionally hid her pregnancy from Schaad, and Schaad admits this in his deposition. Furthermore, there is no evidence that Friehe intentionally postponed a decision as to the adoption until after the statutory period in order to prevent Schaad from exercising his rights. Both parties mutually agreed to postpone a decision beyond 5 days after the birth. Also, as there is no evidence that either party was aware of the 5-day filing requirement until after such period had passed, there can be no intent to prevent Schaad from complying with this unknown requirement. Therefore, we find that Schaad's claims for equitable estoppel are without factual support, and Friehe is not estopped from relying on §§ 43-104.02 and 43-104.04.

JUDGMENT

Accordingly, we hold that §§ 43-104.02 and 43-104.04 are constitutional as applied to Schaad in this case, and the judgment of the district court is therefore affirmed.

AFFIRMED.

WHITE, C.J., concurs.

FINDAYA W., MINOR DEPENDENT, BY AND THROUGH HER MOTHER AND NEXT FRIEND, THERESA W., APPELLEE AND CROSS-APPELLANT, V. A-T.E.A.M. CO., INC., ALSO KNOWN AS A-TEAM, INC., AND CIGNA PROPERTY AND CASUALTY COMPANY, APPELLANTS AND CROSS-APPELLEES.

SHARMALE M., MINOR DEPENDENT, BY AND THROUGH HER MOTHER AND NEXT FRIEND, SHIRLEY M., APPELLEE AND CROSS-APPELLANT, V. A-T.E.A.M. CO., INC., ALSO KNOWN AS A-TEAM, INC., AND CIGNA PROPERTY AND CASUALTY COMPANY, APPELLANTS AND CROSS-APPELLEES.

546 N.W.2d 61

Filed April 12, 1996. Nos. S-95-836, S-95-837.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
4. **Constitutional Law: Statutes.** In addressing a constitutional challenge to a statute, the issue is whether the statute impinges on some fundamental constitutional right or whether the statute creates a suspect classification.
5. **Statutes: Discrimination: Parent and Child.** Statutory classification based on illegitimacy must be substantially related to an important governmental objective.
6. **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.

7. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
8. **Statutes: Discrimination: Parent and Child.** A discriminating statute based upon illegitimacy is reviewed under an intermediate scrutiny because Nebraska has an important interest in protecting the needs and interests of children of both wed and unwed parents.
9. **Equal Protection: Parent and Child.** The equal treatment of legitimate and illegitimate children is an important governmental objective.
10. **Statutes: Discrimination: Parent and Child.** The Supreme Court reviews statutory discrimination based on illegitimacy in the same manner that it reviews gender-based discrimination.
11. **Discrimination: Parent and Child.** A state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.
12. **Constitutional Law: Equal Protection: Parent and Child: Discrimination: Proof.** Neb. Rev. Stat. § 48-124(3) (Reissue 1993) is in violation of the Equal Protection Clause of the U.S. Constitution and Nebraska's constitutional counterpart, Neb. Const. art. I, §§ 1 and 25, because it discriminates against illegitimate children by mandating a heavier burden of proof as opposed to a lesser burden of proof required of legitimate children.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Matthew J. Buckley, of Hansen, Engles & Locher, P.C., for appellants.

Steven H. Howard, of Law Offices of Ronald J. Palagi, P.C., for appellees.

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

FAHRNBRUCH, J.

Two minor children born out of wedlock, Findaya W. and Sharmale M., bringing suit by and through their respective mothers, were awarded workers' compensation benefits due to the death of their biological father (decedent) in the course of his employment with A-T.E.A.M. Co., Inc.

In the Workers' Compensation Court, the minors challenged the constitutionality of a provision in Neb. Rev. Stat. § 48-124 (Reissue 1993) which conclusively presumes that minor children born in wedlock are dependent upon the deceased employee parent but requires children born out of wedlock to prove actual dependency upon the deceased employee parent.

The minors' cases were consolidated for trial in the Workers' Compensation Court and on appeal in this court.

The Workers' Compensation Court held that the provision in § 48-124 for disparate treatment of children born in and out of wedlock is unconstitutional and awarded the minors involved here compensation benefits under the Nebraska Workers' Compensation Act.

A-T.E.A.M. and its workers' compensation insurance carrier, Cigna Property and Casualty Company (defendants), appeal from the compensation court judgment. The minors cross-appeal.

We affirm the workers' compensation trial court. We hold that the disparate treatment of children born in and out of wedlock by § 48-124(3) impermissibly discriminates against children born out of wedlock by requiring those children to assume a heavier burden of proof concerning their dependency than that required of children born in wedlock, who are conclusively presumed to be dependent upon a deceased employee parent, and, therefore, is in violation of the Equal Protection Clause of the U.S. Constitution and Nebraska's constitutional counterpart, Neb. Const. art. I, §§ 1 and 25.

ASSIGNMENTS OF ERROR

The defendants claim that the workers' compensation court erred in finding that the disparate treatment of children born out of wedlock is unconstitutional and that the minors are entitled to the conclusive presumption of dependency under § 48-124(3), and claim that the review panel erred in awarding the minors attorney fees and interest on unpaid compensation.

In their cross-appeal, the minors claim that the Workers' Compensation Court erred in (1) finding that they did not receive over 50 percent of their support from the decedent; (2) finding that the decedent's fiance, a witness, had no interest in

the cases; and (3) sequestering the minors' mothers at portions of the consolidated trials.

STANDARD OF REVIEW

Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Kelley, ante* p. 99, 541 N.W.2d 645 (1996). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Chrysler Motors Corp. v. Lee Janssen Motor Co.*, 248 Neb. 322, 534 N.W.2d 309 (1995), *cert. denied* ____ U.S. ____, 116 S. Ct. 516, 133 L. Ed. 2d 424. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995).

In addressing a constitutional challenge to a statute, the issue is whether the statute impinges on some fundamental constitutional right or whether the statute creates a suspect classification. *State v. Popco, Inc.*, 247 Neb. 440, 528 N.W.2d 281 (1995). Statutory classification based on illegitimacy must be substantially related to an important governmental objective. *Clark v. Jeter*, 486 U.S. 456, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988). Even when a law may be constitutionally suspect, a court will attempt to interpret it in a manner consistent with the Constitution. *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995).

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. *Hull v. Aetna Ins. Co., ante*, p. 125, 541 N.W.2d 631 (1996).

FACTS

It is undisputed that the decedent, a single male, died in an accident arising out of and in the course of his employment with

A-T.E.A.M. It is also undisputed that Findaya was born July 16, 1988, and Sharmale was born June 12, 1982.

Each of the minors' mothers filed a petition basically alleging that her daughter was actually dependent upon the decedent at the time of his death and that the disparate treatment of children born in and out of wedlock provided in the Nebraska Workers' Compensation Act is violative of the U.S. and Nebraska Constitutions based upon the U.S. Supreme Court holding in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972).

Neither of the minors' mothers was ever married to the decedent, nor did either mother initiate paternity proceedings against him. According to the testimony of the mothers, the decedent was the biological father of each minor. Each mother testified that the decedent publicly held himself out as the father of her minor child involved here and that more than half of her child's financial support was provided by the decedent.

The trial court found that each minor proved by a preponderance of the evidence that she is the daughter of the decedent. However, the court further found that neither minor proved that she was actually dependent upon the decedent for more than half of her support at the time of his death, as required under § 48-124.

Nevertheless, the trial court found that each minor involved here is entitled to the same conclusive presumption of dependency that § 48-124 confers upon legitimate children, because requiring a child born out of wedlock to prove actual dependency violates the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. Thus, the trial court ordered the defendants to pay benefits provided by the Nebraska Workers' Compensation Act to the minors.

The defendants applied for review to a Workers' Compensation Court review panel, which affirmed the judgment of the trial court and ordered the defendants to pay attorney fees of $2,000.

ANALYSIS

Section 48-124 states in relevant part:

> The following persons shall be conclusively presumed to be dependent for support upon a deceased employee: . . . (3) a child or children under the age of eighteen years . . . .
>
> The term child shall include a posthumous child, a child legally adopted or for whom adoption proceedings are pending at the time of death, an actually dependent child in relation to whom the deceased employee stood in the place of a parent for at least one year prior to the time of death, an actually dependent stepchild, *or an actually dependent child born out of wedlock*. . . .
>
> . . . .
>
> Actually dependent shall mean dependent in fact upon the employee and shall refer only to a person who received more than half of his or her support from the employee and whose dependency is not the result of failure to make reasonable efforts to secure suitable employment.

(Emphasis supplied.)

Thus, under § 48-124(3), a child under the age of 18 is conclusively presumed to be dependent for support upon the deceased employee unless the child was born out of wedlock, in which event the conclusive presumption does not apply. Instead, the illegitimate child of a deceased employee must prove (1) that she or he was "actually dependent" for more than half of her or his support from the deceased employee and (2) that the child's dependency is not the result of failure of the child to make reasonable efforts to secure suitable employment. This second requirement does not apply in this case because of the tender ages of the two children involved.

The defendants argue that the statute does not violate the Constitution because the state's interest in "facilitating problems of proof" is rationally related to the statute's purpose of continuing support of dependents after casualty. Brief for appellants at 14. Yet, as already stated, the standard of review is not a rational relationship test, but whether the statute is substantially related to an important governmental objective. See *Clark v. Jeter*, 486 U.S. 456, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988). A discriminating statute based upon illegitimacy is reviewed under an intermediate scrutiny because Nebraska

has an important interest in protecting the needs and interests of children of both wed and unwed parents. See *Friehe v. Schaad, ante* p. 825, 545 N.W.2d 740 (1996).

In finding § 48-124(3), providing for the disparate treatment of children born in and out of wedlock, unconstitutional, the trial court relied upon the U.S. Supreme Court holding in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972). In *Weber v. Aetna Casualty & Surety Co.*, the Court addressed the right of dependent unacknowledged illegitimate children to recover Louisiana workers' compensation benefits for the death of their natural father. For purposes of recovery under workers' compensation, Louisiana law did not include illegitimate children unless acknowledged by the father.

The *Weber* Court held that Louisiana's denial of equal recovery rights to dependent unacknowledged illegitimate children violates the Equal Protection Clause of the 14th Amendment. Louisiana argued that the state has an interest in protecting legitimate family relationships. However, the Supreme Court responded that it cannot be thought that persons will shun illicit relations because the offspring may not one day reap the benefits of workers' compensation.

The Court did not address the constitutionality of La. Rev. Stat. Ann. § 23:1251 (West 1964), which granted a conclusive presumption of dependency upon the deceased employee to a child under the age of 18 years who was living with the parent at the time of the parent's accident. The Court noted that § 23:1251 did not exclude illegitimate children and emphasized that the holding in *Weber v. Aetna Casualty & Surety Co.* requires equality of treatment between two classes of persons the genuineness of whose claims the state might in any event be required to determine.

Therefore, *Weber v. Aetna Casualty & Surety Co.* is persuasive but does not directly consider excluding illegitimate children from a conclusive presumption of dependency or the state's claim of an interest in "facilitating problems of proof."

The U.S. Supreme Court has upheld statutes analogous to § 48-124 under a more lenient review of whether the statute is rationally related to a legitimate state purpose of administrative

convenience in resolving problems of proof. See, *Parham v. Hughes*, 441 U.S. 347, 99 S. Ct. 1742, 60 L. Ed. 2d 269 (1979) (wrongful death statute); *Mathews v. Lucas*, 427 U.S. 495, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976) (provisions of the Social Security Act).

Since these cases were decided, the U.S. Supreme Court has heightened the level of scrutiny of statutes which discriminate based on illegitimacy. See *Clark v. Jeter, supra*. Furthermore, this court has held that the equal treatment of legitimate and illegitimate children is an important governmental objective. See *Friehe v. Schaad, supra*. See, also, *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986). Therefore, we review statutory discrimination based on illegitimacy in the same manner that we review gender-based discrimination. See *Clark v. Jeter, supra*.

The U.S. Supreme Court addressed a Missouri statute that is analogous to § 48-124(3) using the stricter standard of review we employ in the case at bar. In *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 100 S. Ct. 1540, 64 L. Ed. 2d 107 (1980), the Court considered the constitutionality of a statute under which a widow is presumed dependent upon her husband's earnings but a widower is not entitled to death benefits unless he either is mentally or physically incapacitated from wage earning or proves actual dependency on his wife's earnings. The stated government objective was administrative efficiency in presuming dependency in the case of women. The *Wengler* Court held that administrative convenience does not justify gender-based discrimination because to give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.

Just as the statute held unconstitutional in *Wengler v. Druggists Mutual Ins. Co.* discriminated based on gender for the sake of administrative convenience, so too does § 48-124(3) discriminate against illegitimate children for the sake of convenience.

A state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children

generally. *Gomez v. Perez*, 409 U.S. 535, 93 S. Ct. 872, 35 L. Ed. 2d 56 (1973). Furthermore, Nebraska has an important interest in protecting the needs and interests of children of both wed and unwed parents. *Friehe v. Schaad, ante* p. 825, 545 N.W.2d 740 (1996). While the court recognizes lurking problems with respect to proof of paternity, those problems cannot be made into an impenetrable barrier that works to shield invidious discrimination. *Gomez v. Perez, supra.*

"Facilitating problems of proof" does not justify discrimination against illegitimate children, when the state has an important governmental objective of caring for all children regardless of whether they are born in wedlock.

Therefore, we hold that § 48-124(3) is in violation of the Equal Protection Clause of the U.S. Constitution and Nebraska's constitutional counterpart, article I, §§ 1 and 25, because it discriminates against illegitimate children by mandating a heavier burden of proof as opposed to a lesser burden of proof required of legitimate children. This statutory discrimination is not substantially related to an important governmental objective.

By affirming the trial court's finding that the disparate treatment of children born in and out of wedlock is unconstitutional, we necessarily dispose of all other assigned errors.

CONCLUSION

We hold that § 48-124(3) impermissibly discriminates against illegitimate children applying for workers' compensation benefits by requiring that illegitimate children prove actual dependency upon a decedent employee while granting legitimate children a conclusive presumption of dependency upon the decedent employee. As a result of such discrimination, § 48-124(3) violates the Nebraska and U.S. Constitutions. Therefore, we affirm the Workers' Compensation Court's order finding that the minors involved here are entitled to benefits under the Nebraska Workers' Compensation Act.

AFFIRMED.

MARY MENDENHALL AND DEANNA NICODEMUS, PERSONAL REPRESENTATIVES OF THE ESTATE OF DENISE WEMPEN, DECEASED, APPELLEES AND CROSS-APPELLANTS, V. DALE GRANTZINGER, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLEE.

546 N.W.2d 775

Filed April 19, 1996. No. S-94-059.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is 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.
3. **Insurance: Contracts.** The insurer, as the drafter of an insurance policy, is responsible for language creating an ambiguity. The resolution of an ambiguity in an insurance policy turns not on what the insurer intended the language to mean, but on what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Reversed and remanded for further proceedings.

John O. Sennett, of Sennett and Associates, for appellant.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellees Mendenhall and Nicodemus.

Martin J. Troshynski, of Kelley, Scritsmier & Byrne, P.C., for appellee State Farm.

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

WRIGHT, J.

State Farm Mutual Automobile Insurance Company (State Farm) denied coverage on a policy of automobile liability insurance issued to Dale Grantzinger. The Custer County

District Court granted summary judgment in favor of State Farm. Grantzinger appeals, and the personal representatives of Denise Wempen's estate cross-appeal.

SCOPE OF REVIEW

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. *Western Sec. Bank v. United States F. & G. Co.*, 248 Neb. 679, 539 N.W.2d 15 (1995); *Horace Mann Cos. v. Pinaire*, 248 Neb. 640, 538 N.W.2d 168 (1995).

FACTS

On March 25, 1989, Grantzinger acquired a BMW motorcycle. Grantzinger and Wempen were riding the motorcycle on April 2, and as Grantzinger was slowing down to make a turn, he and Wempen were thrown to the ground. Wempen died a few days later as a result of the injuries caused by the accident. At the time of the accident, Grantzinger did not have an insurance policy which specifically listed the BMW.

When Grantzinger acquired the BMW, he owned seven other motorcycles: a 1980 Honda Goldwing, a 1978 Moto Guzzi, a 1978 Kawasaki KE250 dirt bike, a Honda 250 dirt bike, assorted pieces of two BSA motorcycles, and a Honda SL70 minibike. Only the Honda Goldwing and the Moto Guzzi were specifically insured by State Farm at the time the BMW was purchased.

On March 12, 1990, the personal representatives of Wempen's estate, Mary Mendenhall and Deanna Nicodemus (collectively referred to as "Mendenhall"), filed a wrongful death action against Grantzinger in Custer County District Court. Grantzinger made demand upon State Farm for coverage under the "newly acquired car" provision of his insurance policy.

The "newly acquired car" provision had been converted into a "newly acquired motorcycle" provision by State Farm's motorcycle coverage endorsement No. 6279ZZ, which provided: "The definition of ***car*** is changed to read: '***Car*** — as

used in Sections I, II, III and V means a 2-wheel land motor vehicle with wheels in tandem. . . .' " (Emphasis in original.)

The liability section of the policy stated its coverage as follows:

> We will:
>
> 1. pay damages which an ***insured*** becomes legally liable to pay because of:
>
> a. ***bodily injury*** to others, and
>
> b. damage to or destruction of property including loss of its use,
>
> caused by accident resulting from the ownership, maintenance or use of ***your car;*** and
>
> 2. defend any suit against an ***insured*** for such damages with attorneys hired and paid by us. . . .
>
> . . . .
>
> **Coverage for the Use of Other Cars**
>
> The liability coverage extends to the use, by an ***insured***, of a ***newly acquired car*** . . . .

(Emphasis in original.)

The "newly acquired car" provision read as follows:

> ***Newly Acquired Car*** — means a ***car*** newly owned by ***you*** or ***your spouse*** if it:
>
> 1. replaces ***your car;*** or
>
> 2. is an added ***car*** and:
>
> . . . .
>
> b. if . . . we insure all ***cars***
>
> owned by ***you*** and ***your spouse*** on the date of its delivery to ***you*** or ***your spouse*** . . . .

(Emphasis in original.)

State Farm's answer alleged that the policy did not provide coverage to Grantzinger. State Farm argues in its brief on appeal that the newly acquired BMW did not qualify under the "newly acquired car" provision of the policy because State Farm did not insure all motorcycles owned by Grantzinger at the time of the purchase of the BMW.

Grantzinger testified by deposition regarding the operability of these other motorcycles. The Kawasaki dirt bike was kept in an old garage and "hadn't been run for a couple years." Grantzinger speculated that it would not have started the day of

the accident, because it had been sitting for 2 years and the gas would have been old. Grantzinger said that the carburetor clogged if the dirt bike sat for "any length of time," and he did not know if the tires were filled with enough air. He said that "[t]he fuel tank was full of rust on it," and he did not know if the dirt bike would run unless he replaced the fuel tank. Grantzinger said he had insured the dirt bike with State Farm for 1 to 2 years beginning in 1984. This was apparently the only time it was licensed.

Grantzinger's testimony regarding the condition of the Honda dirt bike was similar. He stated that it would not start and was in a similar condition to the Kawasaki. He could not recall the last time it had been ridden. Grantzinger testified that the BSA motorcycles were simply a collection of parts from two different motorcycles. He never put the parts together to form an operable motorcycle. Grantzinger stated that he bought the Honda minibike when his children were young and that it had not run since his children outgrew it. He estimated that it had not been started for 5 to 10 years and that it would require "quite a bit of work" to return it to operating condition. The Honda minibike was never licensed or insured.

Grantzinger filed a third-party petition against State Farm as his insurer under the policy covering the Honda Goldwing and the Moto Guzzi. Mendenhall also filed a claim against State Farm under the same theory.

Mendenhall, Grantzinger, and State Farm each moved for summary judgment. The trial court found that Grantzinger's ownership of the uninsured Kawasaki and Honda dirt bikes excluded coverage of the newly acquired BMW motorcycle and granted summary judgment in favor of State Farm. The court denied Mendenhall's and Grantzinger's motions for summary judgment. Grantzinger and Mendenhall appeal the summary judgment in favor of State Farm and the denial of their motions for summary judgment.

ASSIGNMENTS OF ERROR

Mendenhall and Grantzinger assign essentially the same three errors: (1) The trial court erred in sustaining State Farm's motion for summary judgment, (2) the trial court erred in

finding that Grantzinger's uninsured motorcycles were "cars" under the terms of the "newly acquired car" provision contained in the policy of insurance issued by State Farm to Grantzinger and in finding that the BMW motorcycle owned by Grantzinger was not a newly acquired vehicle and was not insured by State Farm at the time of the accident, and (3) the trial court erred in overruling Grantzinger's and Mendenhall's motions for summary judgment.

ANALYSIS

The issue presented is whether all the motorcycles owned by Grantzinger at the time the BMW was purchased were "cars" within the meaning of the "newly acquired car" provision of State Farm's insurance policy. 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. *Western Sec. Bank v. United States F. & G. Co.*, 248 Neb. 679, 539 N.W.2d 15 (1995); *Horace Mann Cos. v. Pinaire*, 248 Neb. 640, 538 N.W.2d 168 (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. *C.S.B. Co. v. Isham, ante* p. 66, 541 N.W.2d 392 (1996).

State Farm's insurance policy provided temporary coverage after the purchase of a new car even though Grantzinger had not yet obtained insurance specifically covering the newly acquired car. The policy required that in order for coverage to attach to the newly acquired car, or in this case motorcycle, "all cars owned" by Grantzinger had to be insured by State Farm at the time of the new acquisition.

State Farm claims that it is entitled to a summary judgment because not all of the motorcycles Grantzinger owned on March 25, 1989, were insured by State Farm. Grantzinger and Mendenhall claim that the "newly acquired car" provision of

the policy is ambiguous because the term "car" is susceptible of at least two reasonable but conflicting interpretations.

The trial court found that Grantzinger's ownership of the uninsured Kawasaki and Honda dirt bikes excluded coverage of the newly acquired BMW and cited *Rodriguez v. Government Employees Ins. Co.*, 210 Neb. 195, 313 N.W.2d 642 (1981). In *Rodriguez*, we discussed the rules that relate to contracts of insurance. We declined to hold that an operable but unlicensed automobile was not an automobile under the policy at issue in that case; however, we did not address whether an inoperable car was a "car" within the policy. It was undisputed that the car was operable, and to that extent, *Rodriguez* is distinguishable from the case at bar and is not controlling.

Other jurisdictions which have applied automatic coverage clauses in automobile insurance policies have concluded that the phrase "all automobiles owned by the named insured" do not contemplate a vehicle which is in such a position or condition that a reasonable person would not include it in a policy of public liability insurance. See, *Palmer v. State Farm Mut. Auto. Ins. Co.*, 614 S.W.2d 788 (Tenn. 1981); *Harshbarger v. Ins. Co.*, 40 Ohio App. 2d 296, 319 N.E.2d 209 (1974); *Luke v. American Family Mutual Insurance Company*, 476 F.2d 1015 (8th Cir. 1972); *Manns v. Indiana Lum. Mut. Ins. Co. of Indianapolis*, 482 S.W.2d 557 (Tenn. App. 1971); *Trippel v. Dairyland Mut. Ins. Co.*, 2 Wash. App. 318, 467 P.2d 862 (1970); *Lambert v. Alabama Farm Bureau Mut. Cas. Ins. Co.*, 281 Ala. 196, 200 So. 2d 656 (1967).

In *Luke*, the U.S. Court of Appeals for the Eighth Circuit wrote:

> Other courts construing the same provision have almost uniformly defined an owned automobile within the policy coverage as an operable automobile, one capable of being used on the streets and highways. [Citations omitted.] The ownership of an automobile which is junk or needs major repairs can hardly be thought to be ownership for liability insurance purposes "since the principal purpose of such insurance is to provide coverage for an automobile which is to be driven and which may become involved in an accident or other mishap." [Citation omitted.] Cases

> which have differed from this view have usually done so where the car is temporarily inoperable and is being repaired for future service.

476 F.2d at 1018.

Based on our analysis of these cases and the policy in question, we conclude that the "all cars owned" provision is ambiguous. The provision is ambiguous as to whether its requirement that "all cars owned" be insured by State Farm includes all cars or only all operable cars.

The insurer, as the drafter of the policy, is responsible for language creating the ambiguity. The resolution of an ambiguity in an insurance policy turns not on what the insurer intended the language to mean, but on what a reasonable person in the position of the insured would have understood it to mean at the time the contract was made. *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987).

We therefore conclude that the phrase "all cars owned" relating to the "newly acquired car" provision of State Farm's policy does not contemplate a "car" which is in such a condition of operability that a reasonable person would not include it in a policy of automobile liability insurance.

Under the policy in question, there exists a material question of fact as to whether the motorcycles owned by Grantzinger are in such a condition of inoperability that a reasonable person would not have included them in a policy of automobile liability insurance. The district court erred in granting summary judgment in favor of State Farm.

For the reasons set forth herein, we deny any further relief requested by Mendenhall on cross-appeal. The terms of the insurance policy do not require us to conclude that the BMW motorcycle was insured by State Farm as a matter of law. We decline to consider whether public policy mandates that coverage be afforded to the BMW motorcycle under the facts of this case. The public policy issue was not assigned as error, and errors which are argued but not assigned will not be considered by an appellate court. See *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995).

CONCLUSION

The district court's grant of summary judgment in favor of State Farm is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DONALD BRISTOL, APPELLANT AND CROSS-APPELLEE, V. ERIC RASMUSSEN, APPELLEE AND CROSS-APPELLANT.

547 N.W.2d 120

Filed April 19, 1996. No. S-94-085.

1. **Judgments: Appeal and Error.** In review of a bench trial in 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. ____: ____. In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. ____: ____. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
4. **Waters.** The flow of water cannot be interfered with to the detriment of the upper proprietor.
5. ____. It is the duty of those who build structures in a natural watercourse to provide for the passage through such obstruction of all waters which may reasonably be anticipated to flow or be carried therein, and this is a continuing duty.
6. **Waters: Negligence.** It is the duty of one who constructs an artificial drain with structures therein changing the natural flow of surface water to use reasonable care to maintain it or them so that water will not be collected and thrown on another to his damage.
7. **Damages: Proof.** While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
8. **Crops: Damages.** The question of whether damage based on the destruction of an unmatured crop is speculative is decided by whether there is sufficient data to

determine with reasonable certainty the probable value it would have had if it had matured.

9. **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.
10. **Damages: Evidence.** 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.
11. **Crops: Damages.** The measure of damages for the destruction of an unmatured growing crop is the value the crop would have had if it had matured, minus any savings to the plaintiff in the costs of producing, harvesting, and transporting the crop to market.
12. ____: ____. Damages based upon the value of an unmatured crop are analogous to profits lost and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness.
13. **Crops: Value of Goods: Proof.** The value of a matured crop may be proved by showing the market value, less the necessary costs of producing, harvesting, and transporting the crop to market.
14. **Crops: Damages: Value of Goods.** The value of an unmatured crop at the time of its injury or destruction is determined by taking into account the nature of the land; the type of crop planted; the kind of season, whether wet or dry; the yield of crops growing in such a season; the average yield of crops on neighboring land; the development of the crop at the time of destruction; the yield of a similar crop not injured; the market value of the crop as injured; the market value of the probable crop without injury; the time of the injury; the expense that would have been incurred if the crop had not been injured; the circumstances which surrounded the crop which may have resulted in the crop's not maturing; and all other circumstances illustrated by the evidence tending to establish such value.
15. **Trial: Witnesses: Appeal and Error.** The trial court is given discretion in determining whether or not a witness is qualified to state his opinion, and such determination will not be disturbed on appeal absent an abuse of discretion.
16. **Witnesses: Value of Goods.** The owner of personal property is qualified by reason of the ownership relation to give his estimate of the value of such property.
17. **Crops: Witnesses: Value of Goods.** An owner of crops may testify regarding the price that the owner received for crops actually sold, and such testimony is probative of fair market value if the crop sale is an arm's-length transaction.
18. **Crops: Value of Goods: Vendor and Vendee: Words and Phrases.** Fair market value is the price that a crop will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell.

Appeal from the District Court for Fillmore County, ORVILLE L. COADY, Judge, on appeal thereto from the County Court for Fillmore County, DANIEL BRYAN, JR., Judge. Judgment of District Court reversed, and cause remanded with directions.

David H. Hahn, of Hahn Law Office, for appellant.

Darrell K. Stock, of Snyder & Stock, for appellee.

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

GERRARD, J.

I. INTRODUCTION

Plaintiff-appellant Donald Bristol appeals the judgment of the district court, which reversed a county court judgment in his favor. The county court, in a bench trial, found that the destruction of 10 acres of growing soybeans on Bristol's land was proximately caused by flooding, resulting from defendant-appellee Eric Rasmussen's downstream obstruction of Indian Creek, and awarded damages to Bristol.

Rasmussen cross-appeals the judgment of the district court, because it ostensibly lets stand the county court ruling that Rasmussen's obstruction was the proximate cause of the flooding to Bristol's land. Finding the judgment of the district court to be in error, we reverse, and remand with directions to reinstate the county court judgment.

II. FACTUAL BACKGROUND

Bristol and his wife are the owners of the northeast quarter of Section 22, Township 8 North, Range 2 West of the 6th P.M., in Fillmore County, Nebraska. Bristol has farmed this northeast quarter section either with his father or on his own since 1977. Rasmussen is the owner of the northeast quarter of Section 15, Township 8 North, Range 2 West of the 6th P.M., in Fillmore County, Nebraska, which is located directly north of Bristol's land. Indian Creek drains south to north through both properties. The quarter sections at issue are not adjoining, but are separated by the southeast quarter of Section 15. In 1978, Bristol's father rerouted Indian Creek to flow alongside the county road which was the eastern border of his quarter section. Bristol partially filled the old creekbed and began farming this land. It is uncontroverted that this land was subject to periodic flooding. However, the evidence at trial indicated this flooding was temporary, and the floodwaters would rapidly drain from the affected land.

In 1989, after a heavy rain, Bristol noticed his land was not draining as rapidly as it had in the past. Bristol's grandfather told him he thought there appeared to be an obstruction across Indian Creek on Rasmussen's property. In response, Bristol followed the drainage of Indian Creek until, on Rasmussen's land, he encountered an obstruction across the creek which apparently was causing water to pool and not drain off his land. Bristol unsuccessfully attempted to contact Rasmussen concerning the obstruction. Instead, he met with Rasmussen's tenant. At Bristol's urging, the tenant removed the obstruction with a backhoe, and Bristol's land immediately began draining. The tenant stated he did not place the obstruction across Indian Creek, nor was he aware of the obstruction until Bristol brought it to his attention.

In early July 1990, Bristol again noticed an obstruction across Indian Creek as it passed through Rasmussen's land. At this time, Bristol contacted Rasmussen and expressed his concern that this obstruction would cause flooding on his land if they were to have a large rain. In response, Rasmussen informed Bristol that he was permitted to place the obstruction across the creek. In fact, in 1990, Rasmussen hired Joel Snodgrass of George Thompson Land Leveling to install the obstruction at issue across Indian Creek. Snodgrass stated that at Rasmussen's direction and while Rasmussen was present, he placed a used culvert of unknown size in the flow of Indian Creek and then moved some nearby soil to obstruct the remainder of the drainageway.

On July 20, 1990, Bristol reported the northeast quarter of Section 22 received 0.94 inch of rain and another 2 inches of rain on July 26. Consequently, Bristol testified that on July 26, water began backing up onto his land. Bristol documented this flooding and the condition of the land prior to the flooding on videotape and with photographs that were offered and received at trial.

At trial, only Bristol testified as to proof of damages. Bristol first identified for the court how he determined the number of acres damaged by the July 26, 1990, flooding. Using a map from the Agriculture Stabilization and Conservation Service (ASCS), Bristol explained how he and other farmers relied on

the ASCS for estimates of crop damage. Bristol then testified that based upon the ASCS estimate and his knowledge and experience in measuring his own field, it was his opinion that 15 acres of his soybeans were destroyed by the flooding of July 26.

Bristol admitted that during a period of heavy rain, his land was subject to flooding, even without an obstruction across Indian Creek. Thus, in an effort to establish the extent to which the flooding on his land was solely attributable to Rasmussen's 1990 obstruction across Indian Creek, Bristol testified that in 1992, the current crop year, even though Rasmussen was no longer obstructing Indian Creek, 5 acres of the land at issue flooded and sustained crop damage subsequent to a 5-inch rain. In contrast, Bristol testified that the 1990 flooding which occurred while Rasmussen was obstructing Indian Creek, destroyed 15 acres of soybeans subsequent to a 3-inch rain.

In testifying how he estimated the projected yield for the destroyed soybeans, Bristol testified that he relied on production records for that portion of his 1990 soybean crop which was not damaged by flooding on the same field. He also testified regarding soybean production records for the same field in 1991. Bristol concluded that the average yield for the flooded 1990 soybeans would have been 55 bushels per acre. Bristol conceded that the soybeans destroyed in 1990 were replanted short-season soybeans and that the first planting of soybeans had been destroyed by a flood following a heavy rain in June, prior to the existence of any obstruction on Rasmussen's property. Bristol admitted that a yield difference would be expected between the full-season soybeans, which yielded 55 bushels per acre, and the replanted short-season beans. However, he did not quantify this expected yield difference.

Bristol testified that he sold his 1990 crop of undamaged soybeans from the northeast quarter of Section 22 for an average price of $5.70 per bushel. Bristol testified that he saved $5 to $10 per acre in irrigation costs by not having to irrigate the 1990 destroyed soybeans. He also testified that he saved $10 per acre by not having to harvest the soybeans, as this would have been the amount he would have paid someone to harvest the field. The trial court asked Bristol if there were any further costs

saved such as herbicides or other chemicals, and he replied that no other costs were saved.

III. FINDINGS OF COUNTY COURT

The trial court entered a money judgment for Bristol and against Rasmussen in the amount of $2,935 and made extensive findings of fact in an eight-page order. The trial court acknowledged that Bristol's evidence was substantially composed of his observations and opinions based upon his knowledge and experience in farming this quarter section for the past 16 years. The proof of negligence offered by Bristol was essentially that on only two occasions, water had failed to adequately drain from Bristol's land. On both occasions, an obstruction was in place across Indian Creek on Rasmussen's land. In addition, during the 1989 occurrence, removal of the obstruction by Rasmussen's tenant resulted in the immediate draining of the pooled water from Bristol's land.

The trial court recognized Bristol did not offer any expert testimony as to causation, nor did Rasmussen offer any expert testimony to refute Bristol's claim. However, the trial court did not find expert testimony necessary, as Bristol's testimony concerning the discovery of the obstruction, the effect after removal, and the nonexistence of any other obstructions went unrefuted. Moreover, Snodgrass' testimony revealed that Rasmussen was responsible for the obstruction and that Rasmussen did not utilize any engineering expertise in the construction of the 1990 obstruction.

The trial court found that Bristol's claim of complete destruction of the affected soybean crop went unrefuted and that the destroyed crop was unmatured. The court found Bristol to be qualified to give his opinion of the number of acres affected by the flooding. The trial court then concluded that of the 15 acres flooded in July 1990, only 10 can be attributed to Rasmussen's negligence, due to the fact 5 acres of soybeans on the same land were destroyed in the 1992 flooding when Rasmussen was not obstructing Indian Creek.

The trial court then found that the measure of damages for the destruction of the unmatured crop is the value of the crop had it matured, minus the salvage value if any, minus the costs

saved by not having to harvest and transport the crop to market. The court found that Bristol would have received $5.70 per bushel market value at harvesttime, less $20 per acre that was saved for not harvesting and transporting to market the 10 acres of destroyed soybeans.

In addition, the court found Bristol's probable yield to be 55 bushels per acre, the average yield for the soybeans not destroyed by the 1990 flooding. The court recognized that the testimony as to yield was based upon full-season soybeans and that the destroyed soybeans were short-season soybeans with a different estimated yield. However, the trial court found no other evidence existed as to any other expected yield, nor was there any evidence as to any further circumstances which would have prevented this short-season crop from maturing and being harvested. Thus, the court calculated Bristol's total damages as $2,935 and entered judgment accordingly.

IV. DISTRICT COURT PROCEEDINGS

On appeal, the district court reversed, and remanded with instructions to dismiss. The district court made no findings as to whether the county court erred in its determination of liability in favor of Bristol and against Rasmussen. Instead, the district court, in its order of dismissal, was generally critical of Bristol's damage evidence and reversed the judgment for the following verbatim reason:

> All in all, I believe that this case should be reversed because the local fair market value of soybeans was not established by the testimony of an elevator employee or any other means, expert or lay. The law is clear that price is determined as of the day that the crop matures—harvest time. If one wants to argue, it could be said that price should be determined as of the day that the crop was injured. If one selects a day after harvest, at least more tha[n] 30 days thereafter, one has to account for storage costs. How daring it would be for this trial judge to permit a plaintiff to pick a particular date of sale at his option or even to average his sale date selections!
>
> I appreciate the effort to do things economically. On the other hand, cases involving small awards are often among

the most difficult both in the trying and the deciding. I would suggest that a pre-trial conference might have been worth the expense and time involved. The case is reversed and remanded with the instruction to dismiss it at the cost of Plaintiff.

V. ASSIGNMENTS OF ERROR

Bristol assigned as error the district court's finding that the local fair market value of soybeans had not properly been established and that the price of a crop destroyed prior to harvest is determined as of the day that the crop matures.

In his cross-appeal, Rasmussen assigns as error the presumptive finding that his actions were the proximate cause of the flooding on Bristol's property.

VI. SCOPE OF REVIEW

In our review of a bench trial in 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. *Coldwell Banker Town & Country Realty v. Johnson, ante* p. 523, 544 N.W.2d 360 (1996); *Hill v. City of Lincoln, ante* p. 88, 541 N.W.2d 655 (1996). In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Ashland State Bank v. Elkhorn Racquetball, Inc.*, 246 Neb. 411, 520 N.W.2d 189 (1994).

However, whether a decision conforms to law is by definition a question of law, in connection with which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 533 N.W.2d 664 (1995); *Ruch v. Conrad*, 247 Neb. 318, 526 N.W.2d 653 (1995).

VII. ANALYSIS

1. Issue of Rasmussen's Negligence

The flow of water cannot be interfered with to the detriment of the upper proprietor. *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991). In Nebraska, the principle is well

established that it is the duty of those who build structures in a natural watercourse to provide for the passage through such obstruction of all waters which may reasonably be anticipated to flow or be carried therein, and this is a continuing duty. *Wilson Concrete Co. v. County of Sarpy*, 189 Neb. 312, 202 N.W.2d 597 (1972). In addition, it is the duty of one who constructs an artificial drain with structures therein changing the natural flow of surface water to use reasonable care to maintain it or them so that water will not be collected and thrown on another to his damage. *Gable v. Pathfinder Irr. Dist.*, 159 Neb. 778, 68 N.W.2d 500 (1955), *overruled on other grounds, Cover v. Platte Valley Public Power & Irr. Dist.*, 162 Neb. 146, 75 N.W.2d 661 (1956).

Thus, as a downstream proprietor, Rasmussen cannot unreasonably interfere with the flow of water to the detriment of the upper proprietor Bristol. Considering the evidence most favorably to the prevailing party, Bristol, the uncontroverted testimony of Snodgrass was that in 1990, Rasmussen directed him to install a used culvert in the natural watercourse of Indian Creek, thus creating the obstruction Bristol claimed caused the flooding of his land. Moreover, there was no evidence that Rasmussen exercised due care to prevent injury to upstream landowners when he directed Snodgrass to install the culvert across Indian Creek. Therefore, we determine that the trial court was not clearly wrong in its finding that Rasmussen breached his duty as a downstream proprietor by negligently obstructing Indian Creek.

The question then becomes whether Rasmussen's obstruction was the proximate cause of the damage to Bristol's unmatured soybeans. Bristol testified it was Rasmussen's obstruction which caused both the 1989 and 1990 flooding. In support of this claim, Bristol offered photographs and a videotape which clearly demonstrated that Rasmussen's obstruction did, in fact, create a ponding of the waters flowing into Indian Creek. Moreover, it was Bristol's unrefuted testimony that this ponding caused by Rasmussen's obstruction extended back to his property. In addition, Bristol testified that in 1989, immediate removal of the obstruction on Rasmussen's land across Indian Creek resulted in the draining away of the floodwaters from

Bristol's land. The evidence clearly supports the conclusion that Rasmussen's obstruction across Indian Creek in 1990 was the proximate cause of the flooding on Bristol's land. Accordingly, the finding of the trial court that Rasmussen was negligent and his negligence was the proximate cause of the damages suffered by Bristol is likewise not clearly wrong. There is no merit to Rasmussen's cross-appeal.

2. Issue of Proof of Damages

Having found that the evidence supports the conclusion Rasmussen breached his duty to Bristol and that Rasmussen's acts were the proximate cause of the damage sustained by Bristol, we now turn to the issue of whether the damages awarded Bristol were in conformance with Nebraska law. While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994). The question of whether damage based on the destruction of an unmatured crop is speculative is decided by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if it had matured. *Patrick v. City of Bellevue*, 164 Neb. 196, 82 N.W.2d 274 (1957).

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); *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994). 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. *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993).

The measure of damages for the destruction of an unmatured growing crop is the value the crop would have had if it had matured, minus any savings to the plaintiff in the costs of producing, harvesting, and transporting the crop to market.

Romshek v. Osantowski, 237 Neb. 426, 466 N.W.2d 482 (1991). Damages based upon the value of an unmatured crop are analogous to profits lost and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness. *Id.* The value of a matured crop may be proved by showing the market value, less the necessary costs of producing, harvesting, and transporting the crop to market. See *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550, 188 N.W. 239 (1922). However, there are several factors that assist the trier of fact in determining the value of an unmatured crop at the time of its injury or destruction, including: the nature of the land; the type of crop planted; the kind of season, whether wet or dry; the yield of crops growing in such a season; the average yield of crops on neighboring land; the development of the crop at the time of destruction; the yield of a similar crop not injured; the market value of the crop as injured; the market value of the probable crop without injury; the time of the injury; the expense that would have been incurred if the crop had not been injured; the circumstances which surrounded the crop which may have resulted in the crop's not maturing; and all other circumstances illustrated by the evidence tending to establish such value. *Romshek v. Osantowski, supra* (citing *Hopper v. Elkhorn Valley Drainage District, supra*).

The trial court properly identified the measure of damages to unmatured growing crops and cited the factors to be considered from *Hopper v. Elkhorn Valley Drainage District, supra*. The court specifically identified four factors that were considered in awarding damages in this case: (1) the acres affected by Rasmussen's negligence, (2) the reasonably probable yield from those acres, (3) the market value of the crops destroyed, and (4) the cost saved by Bristol in not having to finish producing and in not having to harvest and transport the crop to market.

(a) Acres Affected

The trial court determined that the destruction of only 10 of the 15 acres flooded was proximately caused by Rasmussen's negligence. Bristol testified that based upon his own estimates and those of the ASCS, it was his opinion 15 acres of soybeans were in fact destroyed in the 1990 flooding. The court reduced

Rasmussen's responsibility for the 1990 flooding by 5 acres because of Bristol's testimony that his land was subject to periodic flooding and that after a 5-inch rain in 1992, he experienced destruction of 5 acres of soybeans on this same land, even when Indian Creek was not obstructed.

In reversing, the district court was critical of the county court's finding based upon this testimony. The district court concluded that expert witness testimony would have better established the acres damaged by Rasmussen's negligence. The trial court is given discretion in determining whether or not a witness is qualified to state his opinion, and such determination will not be disturbed on appeal absent an abuse of discretion. *Paro v. Farm & Ranch Fertilizer*, 243 Neb. 390, 499 N.W.2d 535 (1993).

The trial court did not abuse its discretion by accepting Bristol's estimates as to the number of acres affected. Bristol testified that he relied on ASCS crop damage estimates just as other farmers in the area rely on these estimates to determine crop damage. Further, based upon Bristol's years of experience and specialized knowledge in farming that particular land, the trial court found that he qualified as an expert to testify in the form of an opinion as to the number of acres affected by the flooding. See Neb. Rev. Stat. § 27-702 (Reissue 1995). While there may be alternate methods to establish the number of acres for crop damage purposes, there was adequate foundation laid for Bristol's testimony, and his testimony was unrefuted by either cross-examination or other expert or lay testimony.

(b) Reasonably Probable Yield

The trial court relied upon Bristol's testimony regarding the yield on the unflooded portion of the 1990 soybean crop, on the same field, in determining a reasonably probable yield for the damage calculation. In *Miller v. Drainage District*, 112 Neb. 206, 199 N.W. 28 (1924), the defendant in a crop damage case complained when the plaintiff was allowed to testify regarding the probable yield and the market value of his crop. This court determined that the plaintiff was competent to testify as to the value of his own personal property and stated: " 'In an action for damages on account of an injury to chattels, the owner of such

chattels is qualified by reason of that relationship to give his estimate of their value.' " *Id.* at 209, 199 N.W. at 29.

In the case at bar, the trial court properly applied the factors found in *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550, 188 N.W. 239 (1922); Bristol's yield projection of 55 bushels per acre was neither speculative nor uncertain given the status of the crop at the time of injury. Rasmussen did not cross-examine Bristol regarding the probable yield, nor was any evidence offered to refute the 55-bushel-per-acre projection. The evidence regarding the probable yield, based on Bristol's testimony and the actual yield for the same field in 1990, was sufficient for the trier of fact to estimate and assess Bristol's damages with a reasonable degree of certainty and exactness.

(c) Market Value

Bristol testified that he sold the remainder of the undamaged 1990 soybean crop for an average price of $5.70. The trial court utilized this $5.70 figure when it calculated the damages to be awarded to Bristol. Clearly, the county court used a proper measure of the "market value of the probable crop without injury" when it accepted the 1990 price received for those soybeans produced on the same quarter section of land as that of the destroyed crop.

Thus, the district court erred when it found that "local fair market value of soybeans was not established by the testimony of an elevator employee or any other means, expert or lay." Quite to the contrary, "market value of the probable crop without injury" was established by Bristol's unrefuted testimony. See *Hopper v. Elkhorn Valley Drainage District, supra*. Accordingly, we hold that an owner of crops may testify regarding the price that the owner received for crops actually sold, and such testimony is probative of fair market value if the crop sale is an arm's-length transaction. Fair market value is the price that a crop will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell. In the instant case, Bristol sold the undamaged soybeans in the open market for an average price of $5.70 per bushel. There is no evidence that this was anything other than an arm's-length transaction, and the price of the soybeans that were actually sold

is highly probative of the "market value of the probable crop without injury."

Moreover, Bristol's damages are not any more speculative or uncertain because he actually marketed portions of the 1990 soybean crop at different times and, therefore, utilized an average or mean market price. Bristol is entitled to recover the value the crop would have if it had matured, and the evidence regarding actual market price was again sufficient for the trier of fact to estimate and assess Bristol's damages with a reasonable degree of certainty and exactness.

(d) Savings in Cost of Production and Transportation

The trial court accepted Bristol's unrefuted testimony that he saved $5 to $10 per acre irrigation costs and $10 per acre by not having to raise to maturity and harvest the soybeans destroyed in the flooding. Bristol specifically testified, in response to questions from the court, that there were no further cost savings by not having to harvest these specific soybeans.

Accordingly, when calculating damages, the trial court assessed a full $20 per acre against Bristol for production and transportation savings. We determine that there was sufficient evidence to support the trial court's findings regarding the costs saved by Bristol in not having to finish producing and in not having to harvest and transport the crop to market.

VIII. CONCLUSION

The county court was not clearly wrong in finding that Rasmussen negligently obstructed Indian Creek and that this negligence was the proximate cause of the flooding which destroyed 10 acres of Bristol's soybean crop. Furthermore, the trial court correctly determined the measure of damages, and there was sufficient evidence to support the findings and the judgment of the county court.

It is for these reasons that we reverse the judgment of the district court and remand with directions to reinstate the county court judgment in favor of the plaintiff-appellant, Bristol, and against the defendant-appellee, Rasmussen, in the sum of $2,935. The costs of this action are taxed to Rasmussen.

REVERSED AND REMANDED WITH DIRECTIONS.

JAMES L. HULLINGER, APPELLANT, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, A CORPORATE GOVERNMENTAL BODY, APPELLEE.

546 N.W.2d 779

Filed April 19, 1996. No. S-94-342.

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 conclusion irrespective of the determination made by the court below.
2. **Tort Claims Act: Governmental Subdivisions.** As the Board of Regents of the University of Nebraska is an agency of the state, tort claims against it must be brought in accordance with the provisions of the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1994).
3. **Tort Claims Act: Limitations of Actions.** A claimant who files a tort claim with the State Claims Board under the provisions of Neb. Rev. Stat. §§ 81-8,213 and 81-8,227 (Reissue 1994) 18 months or more after his or her claim has accrued, but within the 2-year statute of limitations, has 6 months from the first day on which the claim may be withdrawn from the claims board in which to begin suit.
4. **Limitations of Actions.** The purpose of a statute of limitations, which provides a period of repose, is designed, if asserted, to prevent recovery on stale claims.
5. ____. The mischief which a statute of limitations is intended to remedy is general inconvenience resulting from delay in assertion of a legal right which it is practicable to assert.
6. ____. The main purpose of a statute of limitations is to notify the defendant of a complaint against him or her within a reasonable amount of time so that the defendant is not prejudiced by having an action filed against him or her long after the time he or she could have had to prepare a defense against a claim.
7. **Estoppel: Fraud: Limitations of Actions.** The equitable doctrine of estoppel in pais may, in a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present.
8. **Estoppel.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Michael K. High, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., and Michael D. Carper for appellant.

John C. Wiltse for appellee.

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

CAPORALE, J.

I. INTRODUCTION

Finding that plaintiff-appellant James L. Hullinger's action under the provisions of the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1994), against the defendant-appellee, the Board of Regents of the University of Nebraska, was time barred, the district court sustained the Board of Regents' demurrer to Hullinger's amended petition and, upon stipulation that no further amendments could or would have been offered, dismissed the action. Hullinger asserts the district court erred in dismissing his amended petition in that it (1) wrongly computed the last date for filing the action and (2) mistakenly failed to find that in any event, the Board of Regents was estopped from asserting the time bar. We affirm.

II. SCOPE OF REVIEW

The issues presented by this appeal are controlled by statute. Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Solar Motors v. First Nat. Bank of Chadron, ante* p. 758, 545 N.W.2d 714 (1996).

III. FACTS

Hullinger alleges that he was injured when, on March 26, 1990, he stepped into a hole created by the removal of a grate composing part of the floor of a building the Board of Regents maintained. As a result, he filed a claim with the State Claims Board on March 24, 1992. On April 5, 1993, the claims board notified him that it would consider his claim on April 15. After receiving this notice, Hullinger requested that his claim be

withdrawn, and on April 15, it was so withdrawn. He then, on October 5, filed his initial petition in the district court.

IV. ANALYSIS

As the Board of Regents is an agency of the state, tort claims against it must be brought in accordance with the provisions of the act. *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979), *overruled on other grounds, Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988).

1. Last Filing Date

Hullinger's first assignment of error, that the district court wrongly computed the last date by which his petition must have been filed in the district court, is controlled by §§ 81-8,227(1) and 81-8,213. Section 81-8,227(1) reads:

> Every tort claim permitted under the State Tort Claims Act shall be forever barred unless within two years after such claim accrued the claim is made in writing to the State Claims Board in the manner provided by such act. The time to begin suit under such act shall be extended for a period of six months from the date of mailing of notice to the claimant by the board as to the final disposition of the claim or from the date of withdrawal of the claim from the board under section 81-8,213 if the time to begin suit would otherwise expire before the end of such period.

Section 81-8,213 reads:

> No suit shall be permitted under the State Tort Claims Act unless the State Claims Board has made final disposition of the claim, except that if the board does not make final disposition of a claim within six months after the claim is made in writing to the board, the claimant may, by notice in writing, withdraw the claim from consideration of the board and begin suit under such act.

The interplay of these two statutes was discussed in *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991). The plaintiff's cause of action therein accrued on December 14, 1985, and he filed his claim with the claims board on September 8, 1987. Because he had utilized an improper form, he resubmitted it on October 15. On June 14, 1988, the defendant's insurer denied the claim, and on July 5,

the plaintiff notified the claims board in writing that his claim was being withdrawn from its consideration. He then commenced suit in the district court on August 18.

The defendant successfully moved the trial court for summary judgment on the ground that the action was barred by the 2-year statute of limitations contained in the act. On appeal, the defendant argued that the time to begin suit in that case was not extended by 6 months as provided in § 81-8,227, because the statute of limitations would not otherwise expire before the end of the 6-month period. In other words, the defendant argued that § 81-8,227 provided a 6-month extension of the time to file suit only if there was some time remaining on the 2-year statute of limitations after the claims board had acted on the claim, or the claim had been withdrawn, and the time remaining was less than 6 months. According to the defendant, if there were no time remaining on the statute of limitations, then the "time to begin suit" would not otherwise expire before the end of 6 months because it had, in fact, already expired.

In rejecting the defendant's argument, and reversing the grant of summary judgment, we wrote:

> The source of [the plaintiff's] predicament is § 81-8,213. As stated, that section mandates that before suit may be filed in court, a claim may not be withdrawn from the State Claims Board for at least 6 months. In order to comply with § 81-8,213, [the plaintiff], who filed his claim with the board in the 22d month after his claim accrued, was prevented from filing his lawsuit in the district court before the 24-month statute of limitations ran. In essence, one statute prevents filing of a claim in court and another section requires filing of that same claim in court. This appears to be a classic example of the "right hand not knowing what the left hand is doing."
>
> . . . .
>
> A statutory scheme which precludes one from withdrawing a claim from the State Claims Board and thereby prevents that person from filing suit before the statute of limitations runs leads to absurd, unjust, or unconscionable results. We, therefore, hold that a claimant who files a tort claim with the Risk Manager of the State

> Claims Board 18 months or more after his or her claim has accrued, but within the 2-year statute of limitations, has 6 months from the first day on which the claim may be withdrawn from the claims board in which to begin suit.

237 Neb. at 499-501, 466 N.W.2d at 532-33.

The pleadings here reveal that Hullinger's cause of action accrued on March 26, 1990, when he was injured. He filed his claim with the claims board on March 24, 1992, more than 18 months after his claim accrued, but within the 2-year statute of limitations. Under *Coleman*, he therefore had 6 months from the first day on which his claim could be withdrawn from the claims board in which to bring suit. Section 81-8,213 prevented Hullinger from withdrawing his claim until 6 months after he made his written claim to the claims board. Thus, the first day on which he could withdraw his claim would be September 24, 1992. Accordingly, Hullinger had 6 months from that date in which to file suit in the district court; he therefore was required to file suit by March 24, 1993.

However, Hullinger argues that his case is distinguishable from *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991), in that here the claims board took the affirmative action of setting the matter for hearing on a date certain. But there is nothing in the act which contemplates the tolling of the limitations period or the granting of an extension of the limitations period because the claims board has set a date for hearing.

Hullinger argues further that the correct interpretation of *Coleman* is that a claimant has at least 6 months, rather than only 6 months, from the first day on which the claim may be withdrawn from the claims board in which to bring suit. But this contention overlooks our observation in *Coleman* that the holding therein

> ensures that effect is given to the legislative intent embodied in §§ 81-8,213 and 81-8,227 and that both are applied in a consistent and commonsense fashion. Furthermore, fourth-quarter claimants are given the same opportunity as those who file earlier to withdraw their claim and file suit within 6 months thereafter.

237 Neb. at 501, 466 N.W.2d at 533. The interpretation Hullinger urges would allow a claimant to file a claim with the claims board just before 2 years after the accrual of the cause of action, wait however long until just before final disposition of the claim by the claims board to withdraw the claim, and then receive an additional 6 months in which to file suit in the district court.

Such an interpretation does not comport with the purpose of a statute of limitations, which provides a period of repose designed, if asserted, to prevent recovery on stale claims. *Keefe v. Glasford's Enter.*, 248 Neb. 64, 532 N.W.2d 626 (1995). The mischief which a statute of limitations is intended to remedy is general inconvenience resulting from delay in assertion of a legal right which it is practicable to assert. *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962). The main purpose of a statute of limitations is to notify the defendant of a complaint against him or her within a reasonable amount of time so that the defendant is not prejudiced by having an action filed against him or her long after the time he or she could have had to prepare a defense against a claim. *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988).

The district court correctly determined that Hullinger's action is time barred.

2. Estoppel

The second assignment of error, that the district court erred in failing to find that in any event, the Board of Regents is estopped from asserting the statute of limitations, also rests on the fact that the claims board had set Hullinger's claim for hearing. Hullinger argues that this affirmative action on the part of the claims board equitably estops it from relying on the time bar imposed by the act.

The equitable doctrine of estoppel in pais may, in a proper case, be applied to prevent a fraudulent or inequitable resort to a statute of limitations, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present. *Reifschneider v. Nebraska Methodist Hosp.*, 233 Neb. 695, 447 N.W.2d 622 (1989).

The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. *Hamilton v. Hamilton*, 242 Neb. 687, 496 N.W.2d 507 (1993); *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991); *Reifschneider, supra*.

Hullinger argues that "[t]he State's affirmative action in scheduling the hearing on [his] claim before the [claims] board reaffirmed [his] belief that he possessed the right to pursue his claim as allowed by law." Brief for appellant at 11-12. While Hullinger may have indeed believed this, it is erroneous to conclude that the scheduling of such hearing satisfies the first element of equitable estoppel as to the party estopped. The fact that the claims board scheduled a hearing did not amount to any representation, false or otherwise, as to the timeliness or merits of the claim. If Hullinger interpreted it as such, the interpretation was unreasonable. As noted in subpart 1 above, because of the withdrawal of his claim, the last date on which Hullinger could have filed suit was March 24, 1993. His right to file suit having thus expired, he could not have relied to his detriment on claims board actions taken after that date.

The claims board having engaged in no conduct which warrants application of the doctrine of equitable estoppel, the district court did not err in ruling that the Board of Regents was not estopped from asserting the time bar.

V. JUDGMENT

Being correct, the judgment of the district court is, as first noted in part I, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. REED A. VEIMAN, APPELLANT.
546 N.W.2d 785

Filed April 19, 1996. No. S-94-551.

1. **Motions to Suppress: Appeal and Error.** Unless clearly wrong, an appellate court will not overturn findings of fact made by a trial court on a motion to suppress.
2. ____: ____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration its observations of the witnesses.
3. **Constitutional Law: Miranda Rights: Self-Incrimination.** In order to safeguard an uncounseled individual's Fifth Amendment privilege against self-incrimination, suspects interrogated while in police custody must be apprised of certain rights. Specifically, suspects must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation.
4. **Miranda Rights.** *Miranda* warnings are due only when a suspect interrogated by the police is in custody.
5. **Miranda Rights: Words and Phrases.** For purposes of the *Miranda* rule, custodial interrogation is defined as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
6. **Miranda Rights.** A person subjected to custodial interrogation is entitled to the benefit of *Miranda*'s procedural safeguards, regardless of the nature or severity of the offense of which he is suspected.
7. ____. Two discrete inquiries are essential to the determination of whether a suspect was in custody at the time of interrogation and thus entitled to *Miranda* warnings: The first inquiry requires an assessment of the circumstances surrounding the interrogation; the second asks whether a reasonable person would have felt that he was not at liberty to terminate the interrogation and leave.

8. **Miranda Rights: Motor Vehicles.** Whenever a motorist who has been detained pursuant to a traffic stop is subjected to treatment that renders him in custody, he is entitled to the full panoply of *Miranda* protections.
9. **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.

Petition for further review from the Nebraska Court of Appeals, IRWIN and MILLER-LERMAN, Judges, and NORTON, District Judge, Retired, on appeal thereto from the District Court for Douglas County, JOHN D. HARTIGAN, JR., Judge, on appeal thereto from the County Court for Douglas County, JOHN J. MCGRATH, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Patrick J. Boylan, of Hascall, Jungers, Garvey & Delaney, for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

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

WHITE, C.J.

This appeal from criminal convictions comes before this court on further review from the decision of the Nebraska Court of Appeals. *State v. Veiman*, 95 NCA No. 7, case No. A-94-551 (not designated for permanent publication). After a bench trial, the appellant, Reed A. Veiman, was found guilty of operating a motor vehicle while under the influence, leaving the scene of a property damage accident, and colliding with a fixed object. The district court affirmed, as did the Nebraska Court of Appeals. We reverse Veiman's convictions for operating a motor vehicle while under the influence of alcohol and leaving the scene of a property damage accident, and we affirm Veiman's conviction for colliding with a fixed object.

The appeal involves a one-car accident in the early morning hours of November 27, 1993. At about 2:30 a.m., Officer Billy Higgins of the Omaha Police Division was called to respond to a collision at the intersection of 42d and S Streets in Omaha.

On arrival, Higgins observed that a Ford Bronco had collided with a power pole; that the driver of the Bronco was not at the scene; that the Bronco was registered to two men by the name of Veiman; that the streets were slick and covered with snow; and that the collision had most likely occurred within the last hour, given the striations in the fresh snow and the damage to the Bronco. Higgins did not know which, if either, of the two men named "Veiman" had been driving the Bronco and saw no signs that the missing driver had been intoxicated. Higgins summoned a tow truck and remained at the accident scene until the tow truck arrived at 3:30 a.m. At that point, Higgins' involvement in the investigation ended.

Officer Brian Craig of the Omaha Police Division was notified by radio call that a tow truck en route from 42d and S Streets to its impound lot was being followed. The tow truck driver had surmised that the person following him might have been involved in the collision with the power pole. This radio call did not include a description of the car or a description of its occupants. At this time, Craig did not know whether the driver of the Bronco had been identified.

Craig proceeded to the impound lot, arriving at the same time that the tow truck arrived with the Ford Bronco. He did not speak with the tow-truck driver. Instead, he stopped a Ford Tempo on its way out of the impound lot to ask its driver whether he had been following the tow truck. At the time that Craig saw the Tempo, it was neither following the tow truck nor committing any traffic violations. Craig asked the driver of the car whether he had been following the tow truck; the driver, who was later identified as Veiman's father, answered that he had. Craig then asked Veiman's father, " 'Why? Is that your car?' " The passenger, Veiman, answered that the Bronco was his.

At trial, Craig testified to the following events:

> Well, I went around to [Veiman's] side of the car and asked him if he'd been driving the car, and he said yes, and his father said that they needed to get to a hospital because he had a head injury. So I asked him what hospital they were going to go to, and he said he was going to take him all the way down to Midlands. So I said, "I've got to

> investigate the accident. Why don't you just get in my car, and I'll take you up to Bergan-Mercy," which was extremely closer, and that way I could investigate the accident on the way, and he could get treatment a lot sooner than going all the way down south in Bellevue.

Veiman followed Craig's instructions. With regard to the circumstances under which Veiman and his father had tried to discontinue Craig's questioning and leave for the hospital of their choosing, Craig testified as follows under cross-examination:

> Q- You said that when you did approach the car, that you spoke to two people inside, and one or both of them indicated to you that Reed Veiman was going to be taken to a hospital. Is that correct?
>
> A- Correct. It was his father who —-
>
> Q- Okay. His dad said that?
>
> A- Yes.
>
> Q- Okay. So then you offered to take him to a closer hospital?
>
> A- A much closer hospital.
>
> Q- Did you tell him he had to go with you, or did you offer that as a concern, or whatever?
>
> A- Well, the way it was put to me by his father, was that he needed medical attention now. He was [i]n dire need. He could barely see out of one eye, as it was put to me.
>
> . . . .
>
> . . . So, since I have an accident to investigate, and if his son is in such poor medical shape — If I were to call an ambulance to take him, we'd have much more wasted time, and who knows what's going to happen to him. If I take him, if something happens to him while he's in my car, I have the ability to expedite.
>
> . . . .
>
> Q- And you say that Mr. Veiman . . . was not under arrest when you had him in this cruiser, taking him to the hospital?
>
> A- No.
>
> Q- Is that right?

A- That's correct.

Q- But I understand from what you're saying, that he wasn't free to go with his dad to a h[os]pital of his choice. Is that right?

A- For medical reasons, and since I have to investigate the hit and run, it was beyond my scope of reasoning why his dad, if his son is in such dire need of a doctor, why he would want to take him all the way to Midlands, which — correct me if I'm wrong — [i]s a much greater distance than to Bergan-Mercy, which was just up the street.

Q- That's your experience, as far as where those two hospitals are located.

A- Yes.

Q- So when he was in the car, you say he wasn't in custody, and you started to then question him about a traffic offense that had occurred, to your understanding, some time that morning at 42nd and "S" Street. Is that right?

A- Yeah. Maybe an hour or so before I got this call.

Q- Did you at any time advise him of his right to remain silent?

A- No.

Q- Did he have any warrants — Did you do any warrant check on him before he got in the cruiser with you to go to the hospital?

A- No. My main concern when he got in my car, was to get him to a hospital.

Q- But you also had a concern about a duty to investigate an accident scene?

A- That's secondary. I mean, I'm taking him to the hospital. I mean — he's not going to run off on me.

Craig also testified that he did not wait until arrival at the hospital to begin investigating the accident, but began questioning Veiman while en route from the impound lot to the hospital. Craig asked Veiman how the collision happened. As Veiman answered, Craig noticed that Veiman smelled like alcohol and that his speech was slurred; accordingly, Craig asked Veiman whether he had been drinking. According to Craig's testimony, this question was posed so Craig could both

ensure that Veiman's slurred speech was not caused by his injuries and investigate the collision. Veiman answered that he had had six or seven drinks prior to the collision. On the basis of this investigation, Craig cited Veiman for driving while intoxicated, leaving the scene of a property damage accident, and colliding with a fixed object.

Veiman moved to suppress his statements to Craig and any other evidence gleaned from the stop in the impound lot, claiming that Craig's questioning was prohibited by the Fifth Amendment and that the stop itself was not based on reasonable suspicion. The county court denied Veiman's motion. Veiman renewed the motion at trial; the county court affirmed its denial of the motion to suppress and subsequently found Veiman guilty as charged.

Unless clearly wrong, an appellate court will not overturn findings of fact made by a trial court on a motion to suppress. *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration its observations of the witnesses. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994).

Veiman assigns as error the county court's finding that no violation of Veiman's Fifth Amendment rights resulted when Craig questioned Veiman without the benefit of *Miranda* warnings. This assignment of error stems from holdings of both the U.S. Supreme Court and this court that in order to safeguard an uncounseled individual's Fifth Amendment privilege against self-incrimination, suspects interrogated while in police custody must be apprised of certain rights. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). See, also, *State v. Garza*, 241 Neb. 934, 492 N.W.2d 32 (1992). Specifically, suspects must be told that they have a right to remain silent, that anything they say may be used against them in court, and that they are entitled to the presence of an attorney, either retained or appointed, at the interrogation. *Thompson v. Keohane*, ____ U.S. ____, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995), citing *Miranda, supra*. See, also, *Garza,*

supra. *Miranda* warnings are due only when a suspect interrogated by the police is " 'in custody.' " 116 S. Ct. at 460.

The State does not argue with the fact that Craig failed to issue *Miranda* warnings, but insists instead that Craig was free to question Veiman as he pleased without the benefit of *Miranda* warnings because Veiman was not in custody. The State argues that Craig's questions to Veiman were merely "investigatory in nature" and that Craig was transporting Veiman to the hospital so he could investigate the collision involving Veiman's Bronco, as he was required to do. Brief for appellee at 10. The State further notes that Veiman was not under arrest at the time Craig was questioning him.

Whether the suspect is under formal arrest, however, is not dispositive; similarly, whether the officer claims that his questions were "investigatory in nature" is not dispositive. A suspect need not be handcuffed and locked in an interrogation room for custodial interrogation to occur, nor for the policies protected by *Miranda* to be jeopardized. Rather, what *is* dispositive in determining whether Craig should have issued *Miranda* warnings is whether a reasonable person would have felt free to leave under the circumstances then facing Veiman. See *Thompson, supra*. See, also, *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987). The U.S. Supreme Court has defined "custodial interrogation" as " 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " 116 S. Ct. at 463. A person subjected to custodial interrogation is entitled to the benefit of *Miranda*'s procedural safeguards, regardless of the nature or severity of the offense of which he is suspected. *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

Two discrete inquiries are essential to the determination of whether a suspect was in custody at the time of interrogation and thus entitled to *Miranda* warnings. The first inquiry is distinctly factual, requiring an assessment of the circumstances surrounding the interrogation. *Thompson, supra*. In this case, the circumstances included the following undisputed facts: Veiman and his father attempted to leave, stating that they were headed to a hospital; Craig stopped them from going to that

hospital (or anywhere else), instructing Veiman to get into the police cruiser so he could take Veiman to a hospital not of Veiman's choice and investigate the collision on the way; while Veiman sat in the police cruiser, Craig asked Veiman whether and how much he had been drinking, as well as other questions relating to the collision. To the extent that this determination would involve questions of credibility and demeanor, a reviewing court would accord more deference to the trial court's appraisal of the witnesses. *Thompson v. Keohane*, ____ U.S. ____, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). In this case, because this inquiry yields undisputed facts, credibility is not an issue.

The second inquiry in the determination of whether a suspect is in custody is whether a reasonable person would have felt that he was not at liberty to terminate the interrogation and leave. *Id.* The U.S. Supreme Court found in *Thompson* that because the first inquiry establishes the historical facts of the interrogation and thus identifies the " 'totality of the circumstances,' " this second inquiry is an objective evaluation of those circumstances: if encountered by a reasonable person, would the identified circumstances add up to custody as defined by *Miranda*? 116 S. Ct. at 466. The objective evaluation enables reviewing courts to identify recurrent patterns and to advance uniform outcomes, such that both citizens and police are more attuned to the constitutional limits of fighting crime. *Id.*

In this case, the undisputed facts of Craig's investigation present circumstances wherein the reasonable person would consider himself to be in custody. For the State to argue that a reasonable person would have felt at liberty to leave defies reason; for the State to assert that a reasonable person would not define the circumstances of Craig's questioning as adding up to custody defies credibility. Craig affirmatively thwarted Veiman's first attempt to leave, ordered Veiman into his police cruiser, and began driving. The record does not state whether Veiman was in the back or the front seat of the cruiser; if he were in the back seat, Veiman could not have left because the rear doors of a police cruiser do not open from the inside. Even assuming that Craig allowed Veiman, whom Craig evidently

suspected of a crime, to ride "shotgun" in the front seat, Veiman could not have felt free to leave from a moving vehicle.

The fact that Craig couched his instruction to get into the police cruiser in the form of "*why don't you* just get in my car" does not make Veiman's entry of the police cruiser voluntary; the phrase "why don't you" does not make an instruction into a permissive invitation, particularly when spoken by a police officer in response to a request to discontinue questioning and leave. Were an officer to ask, "why don't you give me your license and registration," a reasonable person would not interpret those words as a choice between handing over those documents and keeping them in his possession. Similarly, "why don't you get out of the car" could not reasonably be construed as leaving the motorist the volition to say "no, thank you" in response. "Why don't you just get in my car, and I'll take you up to Bergan-Mercy," as delivered by Craig in response to the senior Veiman's attempt to discontinue Craig's questioning and leave for another hospital is not a permissive invitation. It is an instruction. No reasonable person would have felt free to leave under the circumstances of Veiman's case.

Against his expressed wishes, as stated by his father, Veiman was being transported to a hospital not of his choosing by a police officer who was asking him whether he had committed a crime within the last few hours. Craig testified that he fully intended to investigate the collision by questioning Veiman on the way to the hospital. Indeed, it takes some effort to reconcile Craig's concern for Veiman's health with his inability to wait to begin investigating until after Veiman's medical examination—or at least until after Craig had issued *Miranda* warnings. If Craig did not suspect Veiman of a crime, he could have taken Veiman's name and address and waited to question him until the next day. If Craig did suspect Veiman of a crime, he could and should have issued *Miranda* warnings. He knew that Veiman could not leave the police cruiser, and he knew that his questioning could lead to Veiman's self-incrimination. That Craig's investigation may have begun as a routine traffic stop is irrelevant in light of what the investigation later became. Whenever a motorist who has been detained pursuant to a traffic stop is subjected to treatment that renders him in custody,

he is entitled to the full panoply of *Miranda* protections. *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). There is no excuse for Craig's failure to issue *Miranda* warnings, nor is there any remedy except suppression of Veiman's statements.

In its brief, the State argues that Veiman volunteered the fact that he was the driver of the Bronco before he left his father's vehicle. The State does not explain the legal significance of this fact; if it is meant to support an argument that Veiman waived his rights, it fails in that regard. Veiman's admission, offered prior to Craig's instruction to get into the police cruiser, does not constitute the knowing, voluntary, and intelligent waiver of rights that the Fifth Amendment requires before an officer can subject a suspect to custodial interrogation. See *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *cert. denied* ____ U.S. ____, 115 S. Ct. 2279, 132 L. Ed. 2d 282 (1995).

The admission that Veiman was the driver of the Bronco was significant only for the question of whether Veiman had collided with a fixed object in violation of Omaha Mun. Code, ch. 36, art. III, § 36-70 (1980), which prohibits approaching "a parked or stopped vehicle, or a fixed object in such a manner as to collide therewith." Veiman admitted to doing precisely what this ordinance prohibits, and he was in custody for *Miranda* purposes. We note that the validity of an ordinance that criminalizes a motor vehicle collision without regard to fault is suspect at best; Veiman did not question the ordinance's legitimacy, however, and we decline to raise the issue for him at this time.

The fact that every lower court to read this record has upheld Veiman's conviction for leaving the scene of a property damage accident necessitates this court's review under the plain error standard.

> 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.

In re Estate of Morse, 248 Neb. 896, 897, 540 N.W.2d 131, 132 (1995).

In Veiman's case, we find the plain error standard to be the appropriate means of addressing the finding of the Court of Appeals that "the driver of the Bronco had already committed a crime by leaving the scene of the accident" when Craig arrived at the impound lot. *State v. Veiman*, 95 NCA No. 7 at 72, case No. A-94-551 (not designated for permanent publication).

Craig issued Veiman a citation at 4:15 a.m. for leaving the scene of an accident and driving while intoxicated. What Craig knew at that time was that within the preceding 1 or 2 hours, Veiman had collided with a power pole in his Bronco, thus rendering the Bronco undriveable, and had left the scene before police arrived to investigate. These facts do not constitute a crime under Neb. Rev. Stat. § 39-6,104.02 (Reissue 1988) (now codified at Neb. Rev. Stat. § 60-696 (Cum. Supp. 1994)), the statute under whose auspices Veiman was charged with and convicted of leaving the scene of a property damage accident. Section 39-6,104.02 read as follows:

> The driver of any vehicle involved in an accident . . . upon a public highway . . . resulting in damage to property, shall (1) immediately stop such vehicle at the scene of such accident, and (2) give his name, address, and the registration number of his vehicle and exhibit his operator's . . . license to the owner of the property struck or the driver or occupants of any other vehicle involved in the collision. Any person violating this section shall, if he shall report such accident, by telephone or otherwise, to the appropriate peace officer within twelve hours, be guilty of a Class V misdemeanor or, if he does not report such accident within twelve hours, be guilty of a Class IV misdemeanor.

The provisions of § 39-6,104.02, applied to Veiman, made it impossible for Veiman to have violated that statute by the time of the investigative stop in the impound lot. The property with which Veiman collided was a power pole owned presumably by the city of Omaha, property which is most likely unattended at any hour of the day and certainly at 2:30 a.m., the estimated

time of the collision. Simply put, there was no property owner present to whom Veiman could have given his name and address at that time. By the terms of § 39-6,104.02, Veiman could not have violated the statute until 12 hours passed without Veiman taking steps to notify the city that he had struck its power pole.

That Craig was mistaken as to the terms of § 39-6,104.02 is immaterial, because ignorance of the law is no excuse. See, *State v. Wilson*, 194 Neb. 587, 234 N.W.2d 208 (1975); *Satterfield v. State*, 172 Neb. 275, 109 N.W.2d 415 (1961). If every criminal defendant, regardless of education or experience, is presumed to know the law, then certainly the same maxim must apply to police officers. The State cannot justify Craig's error of charging a nonexistent violation of § 39-6,104.02 by arguing that given another 10 hours, Veiman likely would have violated that law. Veiman's conviction for leaving the scene of an accident cannot stand.

We reverse Veiman's convictions for operating a motor vehicle while under the influence, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1992) (now codified at Neb. Rev. Stat. § 60-6,196 (Reissue 1993)), and for leaving the scene of an accident, in violation of § 39-6,104.02. Since the evidence obtained by Craig as a result of the initial violation of Veiman's right against self-incrimination is inadmissible, the cause is remanded with directions to dismiss all charges except colliding with a fixed object. In view of this holding, we need not address Veiman's remaining assignments of error.

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

CONNOLLY, J., dissenting.

In its opinion, the majority concludes that Veiman was under custodial arrest at the time Officer Craig transported him to the hospital, and thus, "[t]here is no excuse for Craig's failure to issue *Miranda* warnings, nor is there any remedy except suppression of Veiman's statements." The majority characterizes the record as stating that Craig *instructed* and "*ordered*" Veiman into his police cruiser. However, this characterization is not supported by the record, which reflects that Veiman entered the cruiser voluntarily to be taken to the nearest hospital.

The majority correctly states our standard of review is that unless clearly wrong, this court will not overturn findings of fact made by a trial court on a motion to suppress. *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, this court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

After observing the witnesses and weighing the evidence, the trial court denied Veiman's motion to suppress. I cannot go along with the majority's conclusion that this determination was clearly erroneous. I would therefore affirm.

WRIGHT and GERRARD, JJ., join in this dissent.

GERRARD, J., dissenting.

Although I join Justice Connolly's dissent, I write separately to address one further point in the majority opinion. I disagree with the majority's assertion that Veiman could not have violated the terms of Neb. Rev. Stat. § 39-6,104.02 (Reissue 1988), "until 12 hours passed without Veiman taking steps to notify the city that he had struck its power pole."

By its plain and unambiguous language, § 39-6,104.02 requires a motorist to do three things when he or she is involved in a property damage accident: (1) immediately stop at the scene of the accident; (2) give his or her name, address, and registration number to the property owner; and (3) show his or her operator's license to the owner of the property. Veiman theoretically complied with the first two provisions of § 39-6,104.02 when he left his Ford Bronco (with the registration certificate therein) unattended at the scene of the accident. However, Veiman did not show his operator's license to the owner of the property, nor did he make any effort to contact the owner of the property to exhibit his operator's license or identify himself in any manner prior to the time the police initiated contact at approximately 3:30 a.m. While the power pole may have been unattended at 2:30 a.m., it would not

have been difficult for Veiman to immediately contact either a peace officer or a representative of the city of Omaha in order to report the collision of his Bronco with the power pole. To simply leave the scene of a property damage accident without immediately attempting to contact the property owner or a peace officer violates both the letter of the law and the public policy underlying the statute.

Once Veiman left the scene of the accident and failed to immediately report the collision or exhibit his operator's license to the owner of the property, he was guilty of a misdemeanor. If Veiman had reported the accident, by telephone or otherwise, to the appropriate peace officer within 12 hours of the collision, he would have been guilty of a Class V misdemeanor. Whereas, if Veiman had not reported the collision within the first 12 hours, he would have been guilty of a Class IV misdemeanor.

While I may agree with the majority that § 39-6,104.02 was not a model of clarity as it existed on November 27, 1993, it was nonetheless the law at the time of Veiman's collision. Officer Craig was not mistaken as to the terms of § 39-6,104.02, and I would have affirmed Veiman's conviction for leaving the scene of a property damage accident.

WRIGHT and CONNOLLY, JJ., join in this dissent.

ERIC L. NIPP, APPELLANT, V. TWIN TOWERS CONDOMINIUM ASSOCIATION AND MID-AM, INC., APPELLEES.

546 N.W.2d 794

Filed April 19, 1996. No. S-94-737.

1. **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.
2. **Default Judgments.** Neb. Rev. Stat. § 25-2720 (Reissue 1995) sets forth the exclusive method which must be followed in order to have a default judgment reopened or set aside in the county court.

3. **Default Judgments: Courts: Jurisdiction: Costs.** Payment of the costs awarded against a defendant is a prerequisite to a county court's exercise of its jurisdiction to set aside a default judgment. Such prerequisite is not satisfied by the subsequent payment of such costs after the judgment has been set aside.

Appeal from the District Court for Douglas County, JAMES M. MURPHY, Judge, on appeal thereto from the County Court for Douglas County, WALTER H. CROPPER, Judge. Judgment of District Court reversed, and cause remanded with directions.

Dennis W. Clark and Thomas D. Wulff, of Welch, Wulff & Childers, for appellant.

Jerald L. Rauterkus, of Erickson & Sederstrom, P.C., for appellee Mid-Am, Inc.

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

WRIGHT, J.

Eric L. Nipp sued Twin Towers Condominium Association (Twin Towers) and Mid-Am, Inc. (Mid-Am), when the ceiling of his condominium collapsed, which resulted in water damage to the condominium and his belongings. Nipp obtained a default judgment against Mid-Am which was later set aside by the county court. The district court affirmed, and Nipp appeals.

SCOPE OF REVIEW

On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts. *Johnson v. Holdrege Med. Clinic, ante* p. 77, 541 N.W.2d 399 (1996).

FACTS

On November 15, 1993, Nipp filed an amended petition in the county court for Douglas County naming Twin Towers and Mid-Am as defendants. The record does not indicate the outcome of the case as to Twin Towers. No answer was filed by Mid-Am, and on January 21, 1994, a default judgment was entered in favor of Nipp and against Mid-Am in the sum of $12,727.96 plus court costs. On January 28, Mid-Am moved to set aside the judgment, representing that the court costs incurred by Nipp had been paid. On February 3, Nipp's counsel received

an amended motion to set aside the judgment, which again represented that Mid-Am had paid Nipp's court costs when the original motion to set aside the judgment was filed. The court sustained the amended motion and set aside the judgment.

On February 14, 1994, Nipp filed a notice of appeal, amended request for transcript, request for bill of exceptions, and statement of issues with the clerk of the Douglas County Court. Also on February 14, Mid-Am paid the $29.08 in court costs incurred by Nipp. The Douglas County District Court affirmed the county court's vacating of the default judgment, and Nipp appeals.

ASSIGNMENT OF ERROR

Nipp asserts that the district court erred in affirming the order of the county court which vacated the default judgment previously entered against Mid-Am.

ANALYSIS

Nipp argues that the county court did not have jurisdiction or authority to set aside the default judgment until after the statutory conditions of Neb. Rev. Stat. § 25-2720 (Reissue 1995) had been met. Section 25-2720 provides:

> When judgment shall have been rendered against a defendant in his absence, the same may be set aside upon the following conditions: (1) That he pay the costs awarded against him; (2) that his motion be made within thirty days after such judgment was entered; (3) that he notify in writing the opposite party, or his attorney, or cause it to be done, of the opening of such judgment and of the time and place of trial, at least five days before the time thereof, if the party reside in the county, and if neither the plaintiff nor his attorney be a resident of the county, by leaving a written notice thereof at the office of the clerk of the court ten days before the trial; *Provided*, that the time of trial shall not be more than forty days after the rendition of the judgment.

Credit Bureau of Hastings, Inc. v. George, 203 Neb. 338, 278 N.W.2d 608 (1979), dealt with the identically worded predecessor statute, Neb. Rev. Stat. § 24-537 (Cum. Supp. 1976). We held that this statute sets forth the exclusive method

which must be followed in order to have a default judgment reopened or set aside in the county court.

Prior to 1976, a similar statute, Neb. Rev. Stat. § 26-1,100 (Reissue 1964), set forth the procedure for opening or setting aside default judgments in courts in metropolitan and primary cities. In *State Furniture Co. v. Abrams*, 146 Neb. 342, 19 N.W.2d 627 (1945), we held that § 26-1,100 was exclusive and that the municipal court had no jurisdiction to set aside a default judgment unless the provisions set forth therein were followed.

The question in this appeal is whether Mid-Am substantially complied with the requirements of § 25-2720. We conclude that Mid-Am did not, and we therefore reverse the judgment of the district court and remand the cause to the district court with directions to remand to the county court with directions to reinstate the judgment in favor of Nipp.

The record demonstrates that Mid-Am had not paid the court costs prior to the time the default judgment was set aside by the county court on February 3, 1994. One of the requirements of § 25-2720 is that the defendant pay the costs awarded against him. We hold that the payment of these costs is a prerequisite to a county court's exercise of its jurisdiction to set aside a default judgment. These costs must be paid before the court may exercise its discretion to set aside the default judgment. Such prerequisite is not satisfied by the subsequent payment of the costs after the judgment has been set aside.

The order of the district court affirming the county court's order vacating the default judgment is reversed, and the cause is remanded to the district court with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF JORIUS G. AND CHERALEE G., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. LEANN G. AND DEE AND LEONARD BROWN, APPELLEES, AND DEPARTMENT OF SOCIAL SERVICES, APPELLANT.

546 N.W.2d 796

Filed April 19, 1996. No. S-95-709.

1. **Parental Rights: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights: Words and Phrases.** Children without proper support under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) meet the definition of "neglected" or "dependent" children under Neb. Rev. Stat. § 43-1301(4) (Reissue 1993).

Appeal from the Juvenile Review Panel, DANIEL BRYAN, JR., CURTIS L. MASCHMAN, and AUGUST F. SCHUMAN, Judges, on appeal thereto from the County Court for Lincoln County, KENT E. FLOROM, Judge. Judgment of Review Panel affirmed.

Don Stenberg, Attorney General, Royce Harper, and Beth Tallon, Special Assistant Attorney General, for appellant.

Joy Shiffermiller, of Ruff, Nisley & Lindemeier, for appellees Brown.

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

WRIGHT, J.

The Department of Social Services (DSS) appeals the decision of a juvenile review panel which affirmed the Lincoln County Court's denial of a change of placement recommended by DSS.

SCOPE OF REVIEW

Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and

accepted one version of the facts over another. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

FACTS

This case involves the foster care placement of Jorius G. and Cheralee G., children who have been adjudicated to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) as being without proper support through no fault of their parent. Prior to adjudication, the children's mother had custody of them. After adjudication, the Lincoln County Court, sitting as a juvenile court, placed the care and custody of the children with DSS for foster care placement. The children were subsequently placed by DSS with Dee and Leonard Brown on January 6, 1992.

On December 17, 1993, the mother entered into an open adoption agreement which purported to relinquish her parental rights to the Browns. The father was not involved because his parental rights were terminated. The adoption agreement had the initial support of DSS, which began a home study of the Browns.

Dennis O'Brien, a DSS caseworker, was assigned to the children in April or May 1994, and thereafter, DSS requested an evaluation of the Browns' appropriateness as adoptive parents. A psychological evaluation of the Browns was performed by Dr. Stephen Skulsky on September 10, 1994. Skulsky's conclusion was that "[u]nder the best of circumstances the Brown family would not be a good adoptive family for the children. . . . If no other more encompassing positive adoptive placements occur, of course, the Browns could be considered for placement of the children."

Following this evaluation, DSS determined that the Browns should not be permitted to adopt the children. Instead, DSS sought to change placement from the Browns to placement with a sister of the children's father. DSS filed a notice of change of placement, and on April 6, 1995, a hearing was held for an immediate review of placement by the Lincoln County Court. Present at the hearing were the deputy county attorney, the children's guardian ad litem, the mother and her counsel, and the Browns and their counsel.

Evidence in support of the change of placement was adduced by the deputy county attorney. The Browns presented evidence in opposition to the change of placement, and the guardian ad litem questioned witnesses from both sides. After reviewing the evidence, the county court held that a change of placement was not in the children's best interests. Upon review, a juvenile review panel affirmed the judgment of the county court. DSS now appeals.

ASSIGNMENTS OF ERROR

DSS assigns the following errors to the juvenile review panel: (1) The panel did not address the issue of whether foster parents have standing to object to a change of placement and (2) the panel erred in affirming the April 6, 1995, order of the county court.

ANALYSIS

Standing of Foster Parents

DSS argues that the Browns, as foster parents, do not have standing to object to DSS' plan to change placement of the children from the Browns' foster care. DSS claims that the parties who have standing to object to DSS' actions with respect to a change of placement are limited to those parties listed in Neb. Rev. Stat. § 43-285(2) (Reissue 1993), which provides:

> Following an adjudication hearing at which a juvenile is adjudged to be under subdivision (3) of section 43-247, the court may order the department to prepare and file with the court a proposed plan for the care, placement, and services which are to be provided to such juvenile and his or her family. . . . If any other party, including, but not limited to, the guardian ad litem, parents, county attorney, or custodian, proves by a preponderance of the evidence that the department's plan is not in the juvenile's best interests, the court shall disapprove the department's plan.

DSS points out that foster parents are not specifically included in § 43-285(2) and that, therefore, the court should not have admitted any evidence offered by the Browns at the dispositional hearing. DSS claims that without the evidence introduced on behalf of the Browns, its plan would have been

adopted. DSS was not present at the hearing, and the record does not indicate that DSS requested a continuance in order to secure legal counsel. Nevertheless, DSS complains that because it had no legal representation at the hearing, the county court should have on its own motion considered the issue of standing.

Section 43-285(3) provides:

> The department . . . shall file a report and notice of placement change with the court and shall send copies of the notice to all interested parties . . . before the placement of the juvenile is changed from what the court originally considered to be a suitable family home or institution to some other custodial situation . . . . The court, on its own motion or upon the filing of an objection to the change by an interested party, may order a hearing to review such a change in placement and may order that the change be stayed until completion of the hearing. . . . The department or any other party may request a review of the change in placement by a juvenile review panel in the manner set out in section 43-287.04.

Considering the language of § 43-285(2) and (3), we conclude that foster parents are interested parties. Section 43-285(2) states: "If any other party, *including, but not limited to*, the guardian ad litem, parents, county attorney, or custodian, proves by a preponderance of the evidence that the department's plan is not in the juvenile's best interests, the court shall disapprove the department's plan." (Emphasis supplied.)

The Foster Care Review Act, Neb. Rev. Stat. §§ 43-1301 to 43-1318 (Reissue 1993), addresses the "placements of neglected, dependent, or delinquent children." See § 43-1301(4). In the case at bar, the children were adjudicated to be without proper support through no fault of their parent under § 43-247(3)(a). Children without proper support under § 43-247(3)(a) meet the definition of "neglected" or "dependent" children under § 43-1301(4). Thus, the standing provisions of the Foster Care Review Act aid our determination of who is an interested party under § 43-285.

To this end, § 43-1314 provides:

> Except as otherwise provided in the Nebraska Indian Child Welfare Act, notice of the court review and the right

> of participation in all court reviews pertaining to a child in a foster care placement shall be provided by the court having jurisdiction over such child for the purposes of foster care placement either in court, by mail, or in such other manner as the court may direct. Such notice shall be provided to: (1) The person charged with the care of such child; (2) the child's parents or guardian unless the parental rights of the parents have been terminated by court action as provided in section 43-292 or 43-297; (3) the foster child if age fourteen or over; (4) the foster parent or parents of the foster child; (5) the guardian ad litem of the foster child; and (6) the state board.

Section 43-1314 states that foster parents shall have notice and the right to participate in all court reviews pertaining to a child in foster placement. Therefore, we conclude that the Browns have standing to participate in the foster care placement review as foster parents.

There is another reason why the Browns have standing. The children's mother has consented to an open adoption by the Browns and has signed a relinquishment to that effect. We have held that in a private adoption, the adoptive family stands on equal ground with a natural mother with respect to a determination of custody. For example, in *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981), a natural mother had relinquished custody of her child and sought return through a writ of habeas corpus. We held that after the valid relinquishment of the child by the natural mother, the adoptive family stood on equal ground with the natural mother with respect to determining custody. Likewise, in *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991), we recognized that upon execution of a valid relinquishment for adoption, the natural parent's rights were no longer superior to those of the prospective adoptive family and that the prospective adoptive family had standing to contest custody. In the present case, the children's mother has given a valid relinquishment in favor of the Browns. Therefore, as prospective adoptive parents, the Browns have standing to contest DSS' plan.

DSS' reliance upon *In re Interest of S.R.*, 217 Neb. 528, 352 N.W.2d 141 (1984), in support of its position that the Browns

do not have standing in the case is misplaced. In that case, the child was adjudicated as lacking proper parental care under § 43-247 and was placed in the temporary care of the child's grandparents. The parental rights of the child's parents were subsequently terminated. The juvenile court then removed the child from the grandparents' home and placed the child for potential adoption with the Nebraska Children's Home Society. The district court affirmed the change of placement, and the grandparents attempted to appeal. We held that the grandparents did not have standing because any connection they had with the child was legally severed by the termination of parental rights. On the factual basis alone, *In re Interest of S.R.* is distinguishable from the present case and, therefore, has no application.

County Court Order

Section 43-285(2) provides the applicable standard for adjudicating changes in placement: "If any other party, including, but not limited to, the guardian ad litem, parents, county attorney, or custodian, proves by a preponderance of the evidence that the department's plan is not in the juvenile's best interests, the court shall disapprove the department's plan." Our review is de novo on the record, and we are required to reach a conclusion independent of the trial court's findings. See *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

At some point during the foster care placement with the Browns, DSS decided that the adoption by the Browns should not be completed. When O'Brien was assigned to the case in April or May 1994, he requested a psychological evaluation of the Browns as adoptive parents. O'Brien testified that he requested the evaluation upon learning that the Browns maintained a second residence where Leonard slept. Leonard has apnea and significant snoring problems that require these sleeping arrangements.

Skulsky met briefly with the Browns and the children as a group and gave the Browns a few psychological tests. Skulsky reported that at the beginning of his interview, Dee Brown was pulling two chairs out of the interview room into the hallway.

She expressed irritation at music playing in the waiting room and appeared to be moving the chairs to avoid frustrations associated with the room. Skulsky stated that this behavior suggested that Dee had "such an easily upset frustration tolerance that it led her to somewhat inappropriate behaviors."

Skulsky reported a few observations that were noted in the Browns' foster care record. A DSS caseworker had opined that the Browns had a tendency to react quickly or overreact to some situations and seemed to internalize and place blame on themselves even when no one was at fault. The caseworker felt that Dee Brown was easily put into a stress mode if she was not prepared for a stressful situation. Skulsky referred to a letter from a Dr. Zedek, a psychiatrist in North Platte, who had stated that Dee has a severe form of attention deficit hyperactivity disorder, adult residual type. Zedek stated in his letter that Dee had difficulty following through with the simplest of instructions. Skulsky also noted that Leonard has a snoring problem and that he maintains a separate residence for sleeping purposes.

Skulsky's recommendations were as follows:

> 1. Of course any recommendations about adoption needs to take into account the possible options for given children. Under the best of circumstances the Brown family would not be a good adoptive family for the children. While they display an excellent capacity to create fun activities– the travel, the books filled with pictures of family events– and to help connections exist with the family of origin of these children, the Browns['] capacity to provide an emotional system where the children can both grow strong and close and challenge the parents as the children effect separation processes in later childhood and teen-aged years seems deeply blunted. The fact that Mr. Brown is so dependent on Mrs. Brown and that Mrs. Brown is not likely to be a good counseling candidate furthers this conclusion.
>
> 2. If no other more encompassing positive adoptive placements occur, of course, the Browns could be considered for placement of the children. The Browns[']

skills seem particularly suited to short[-] to mid[-]term foster care placements for children.

O'Brien testified that DSS' decision to change placement of the children was based on Skulsky's evaluation of the Browns, a letter from Zedek stating that Dee Brown was unable to make the simplest decisions, and a 1991 home study stating that the Browns would be appropriate for short-term placements only and would not be appropriate for long-term placements. Upon cross-examination, O'Brien admitted that the Browns gave the children appropriate care, including food and health care, and that there were never any physical problems with the care of the children.

The Browns introduced substantial evidence against the change of placement. Kendra Leonhardt, a certified professional counselor and psychotherapist who served as the children's therapist since February 1993 and worked closely with the Browns in the children's development, testified that when the children were first placed with the Browns, they had a significant amount of emotional instability and psychological issues relating to past physical and sexual abuse. One of the children had manifested a number of problems associated with this abuse. The child was having a hard time staying concentrated on a task, was wetting the bed, and was getting up at night and hoarding food. Leonhardt testified that the children's behavior had been stabilizing since their placement with the Browns and that they were responding well to the Browns' care. Leonhardt had warned DSS about the destructive impact that the transition to a new placement would have on the children. She noted that as soon as the children became aware that they were going to be removed from the home, they began to regress into their past behaviors. Leonhardt's professional opinion was that adoption by the Browns would be in the children's best interests.

Monica Kramer, one of the children's schoolteachers, testified that the Browns were very concerned parents and were very cooperative with her on behalf of the children. The teacher reported that Cheralee had shown notable progress in school during the time that she was living with the Browns, but had recently regressed in her performance. Kramer reported seeing

a definite deterioration in Cheralee's behavior once she understood she would be leaving the Browns. Cheralee once burst out crying in front of her classmates and explained that she was going to have to leave home. Kramer's testimony confirms Leonhardt's assessment of the positive relationship between the Browns and the children. The guardian ad litem also opposed the change of placement from the Browns.

Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994). From our review, we find that the Browns have proved by a preponderance of the evidence that the proposed change of placement would not be in the best interests of the children.

CONCLUSION

The judgment of the juvenile review panel is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANITA K. BENSING, APPELLANT.

547 N.W.2d 464

Filed April 19, 1996. No. S-95-904.

1. **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.
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. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially

affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, or fairness of the judicial process.

4. **Sentences.** A sentence of imprisonment should be sufficiently certain so that in and of itself it advises the accused and those charged with its execution of its duration.
5. ____. In imposing sentence, the court should state with care the precise terms of the sentence which is imposed.
6. ____. One of the circumstances which renders a sentence void is that the court lacked a legal basis to impose it.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Reversed and remanded for resentencing.

Thomas L. Spinar, Saline County Public Defender, for appellant.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

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

FAHRNBRUCH, J.

Anita K. Bensing was convicted of knowingly or intentionally possessing more than 1 pound of marijuana and possessing marijuana as a dealer without a tax stamp being affixed to it. She was sentenced to not less than 30 months' imprisonment on the possession charge and not less than 12 months' imprisonment on the tax charge, the sentences to run concurrently with each other and consecutively to any other sentence Bensing was then serving.

Bensing appealed her sentences to the Nebraska Court of Appeals, claiming they were excessive. The State petitioned to bypass the Court of Appeals, and we granted the State's petition.

We find plain error in the record because Bensing's sentences are not sufficiently certain as to precise terms of incarceration. Therefore, we reverse her sentences and remand the matter for resentencing.

ASSIGNMENTS OF ERROR

Restated and summarized, errors assigned by Bensing are that the trial court abused its discretion by imposing excessive

sentences and not placing Bensing on intensive supervised probation.

STANDARD OF REVIEW

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Kunath*, 248 Neb. 1010, 540 N.W.2d 587 (1995). 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. *State v. Ladig*, 248 Neb. 737, 539 N.W.2d 38 (1995).

FACTS

On November 21, 1994, Bensing was charged by information with (1) unlawfully and knowingly or intentionally manufacturing, distributing, delivering, or dispensing a controlled substance, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1994); (2) knowingly or intentionally possessing more than 1 pound of marijuana, in violation of § 28-416(10); and (3) being a dealer possessing a controlled substance without a tax stamp, in violation of Neb. Rev. Stat. § 77-4309 (Cum. Supp. 1994).

On March 9, 1995, the trial court dismissed without prejudice count I of the information, which alleged unlawful manufacture, distribution, delivery, or dispensing of a controlled substance. On that same day, Bensing pled guilty to knowingly or intentionally possessing more than 1 pound of marijuana and being a dealer in possession of a controlled substance without a tax stamp. See Neb. Rev. Stat. § 77-4301(2) (Cum. Supp. 1994) and §§ 77-4309 and 28-416(10). Each offense to which Bensing pled guilty is a Class IV felony, carrying a penalty of up to 5 years' imprisonment, up to a $10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1989). The trial court accepted the guilty pleas and sentenced Bensing to not less than 30 months for possession of 1 pound or more of marijuana and not less than 12 months for possession of a controlled substance without a tax stamp, the sentences to be served concurrently with each other, but consecutively with all other sentences.

ANALYSIS

Bensing argues that the sentences imposed upon her are excessive. In reviewing her sentences, we note plain error in that her sentences are not sufficiently certain as to the terms of incarceration. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, or fairness of the judicial process. *State v. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995).

A sentence of imprisonment should be sufficiently certain so that in and of itself it advises the accused and those charged with its execution of its duration. *State v. Jurgens*, 187 Neb. 557, 192 N.W.2d 741 (1971), *overruled on other grounds, State v. Texel*, 230 Neb. 810, 433 N.W.2d 541 (1989). In imposing sentence, the court should state with care the precise terms of the sentence which is imposed. *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992).

The trial court sentenced Bensing *to not less than 30 months* for possession of 1 pound or more of marijuana and *not less than 12 months* for possession of a controlled substance without a tax stamp, the sentences to be served concurrently. Bensing's sentences provide no guidance as to the maximum duration of each sentence.

The State claims that the trial court issued determinate sentences. We disagree; the trial court did not sentence Bensing to fixed terms. Rather, the language of the trial court sentences merely specifies minimum durations of 30 months and 12 months for two Class IV felony convictions. These minimum durations are within the statutory limits of § 28-105. However, the sentences do not specify for how long Bensing may be imprisoned for either conviction and, thus, violate the statutory limits. One of the circumstances which renders a sentence void is that the court lacked a legal basis to impose it. *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995). A void sentence is no sentence. *Id.*

CONCLUSION

By sentencing Bensing to indefinite sentences of not less than 30 months and not less than 12 months, the trial court committed plain error and abused its discretion. We reverse Bensing's sentences and remand the cause for resentencing.

REVERSED AND REMANDED FOR RESENTENCING.

BERNARD BERNTSEN, APPELLANT, V. COOPERS & LYBRAND, A GENERAL PARTNERSHIP, APPELLEE.

RHEEM MANUFACTURING COMPANY, APPELLANT, V. COOPERS & LYBRAND, A GENERAL PARTNERSHIP, APPELLEE.

RICHARD BERNTSEN, APPELLANT, V. COOPERS & LYBRAND, A GENERAL PARTNERSHIP, APPELLEE.

546 N.W.2d 310

Filed April 25, 1996. Nos. S-94-226, S-94-280, S-94-283.

1. **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.
2. **Limitations of Actions.** Under the discovery principle, discovery occurs when there has been discovery of facts constituting the basis of a cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.
3. **Limitations of Actions: Torts.** A statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs.
4. **Limitations of Actions.** The 1-year discovery exception of Neb. Rev. Stat. § 25-222 (Reissue 1995) is a tolling provision. It tolls the statute of limitations, thereby permitting an injured party to bring an action beyond the time limitation for bringing the action in those cases in which the injured party did not discover and could not reasonably have discovered the existence of the cause of action within the applicable statute of limitations.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, JAMES M. MURPHY, and MICHAEL MCGILL, Judges. Affirmed.

Thomas H. Dahlk and Sandra L. Dougherty, of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C., for appellants.

Jerrold L. Strasheim and Mary Leiter Swick, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee.

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

WRIGHT, J.

Bernard Berntsen, Rheem Manufacturing Company, and Richard Berntsen (collectively referred to as "the appellants") appeal from the granting of demurrers filed by Coopers & Lybrand. In each case, the district court ruled that the cause of action was barred by the applicable statute of limitations. The appeals have been consolidated for purposes of this opinion.

SCOPE OF REVIEW

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. *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995); *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

FACTS

In summary, this case revolves around two audits of Capitol Group, Inc., and its wholly owned subsidiary, Capitol Supply, Inc., which were conducted by Coopers & Lybrand. The following allegations are common to all of the appellants' petitions:

On or about November 9, 1988, Coopers & Lybrand was retained to perform an audit of the financial statements of Capitol Group for the year ending December 31, 1988. Coopers & Lybrand advised Capitol Group that no physical inventory would be taken at the Norfolk, Grand Island, or Fairbury

locations. Prior to the end of 1988, Capitol Group personnel made inventory adjustments at the Norfolk, Grand Island, and Fairbury locations which increased the value of the total inventory by $611,053. These inventory adjustments were reversed on January 4, 1989.

On April 4, 1989, Coopers & Lybrand's internal documents contained a notation that as of January 31, Capitol Supply's inventories were valued at $6,979,621. Around April 12, Coopers & Lybrand completed and mailed its audit, representing that it had conducted its audit in accordance with generally accepted auditing standards and that the financial statements of Capitol Group and Capitol Supply " 'present[ed] fairly, in all material respects, the consolidated financial position of Capitol Group, Inc. and subsidiary as of December 31, 1988 . . . .' "

On May 17, 1989, Coopers & Lybrand was retained by Capitol Supply to issue a second audit report in accordance with generally accepted auditing standards concerning Capitol Supply's financial statements for the year ending December 31, 1988. On both audits, inventories were reported to be valued at $7,551,370. On May 23, Coopers & Lybrand mailed copies of the second audit report to Capitol Supply. Coopers & Lybrand again represented that it had conducted its audit in accordance with generally accepted auditing standards and that the audit of Capitol Group and Capitol Supply presented their consolidated financial positions fairly in all material respects.

The appellants alleged that Coopers & Lybrand's representations were false because the financial statements of Capitol Group and Capitol Supply were materially misstated and were not presented in accordance with generally accepted accounting principles. The appellants further alleged that Coopers & Lybrand made an adjustment to the valuation of inventory that capitalized costs, resulting in a further inflation of inventory value in the amount of $668,850.

Bernard and Richard Berntsen alleged in their petitions that on October 10, 1989, Capitol Group faxed a copy of the audit report to them in connection with negotiations concerning the sale of Plumbing Products & Supply, Inc., by the Berntsens to Capitol Supply. In considering whether to sell their business,

the Berntsens and their representatives relied upon the audit report of Coopers & Lybrand. The Berntsens allege that on January 11, 1990, in reliance upon the audit report, they entered into an agreement for the sale of Plumbing Products & Supply to Capitol Supply and that had they been advised of the irregularities of the audit, they would not have entered into the agreement.

The Berntsens received the first installment due under the terms of the agreement in February 1990. However, they did not receive the March 1990 installment or any other installment thereafter. In March 1990, the Berntsens met with a representative from Capitol Supply and were told that there were some minor problems with the financial affairs of Capitol Group and Capitol Supply, but that a plan was in place to work out the financial difficulties. In July 1990, Capitol Group and Capitol Supply filed for bankruptcy.

Bernard Berntsen alleged that as a proximate result of Coopers & Lybrand's wrongful conduct, he suffered damages, including $158,473 and his share of a $77,000 brokerage fee. Richard Berntsen alleged that he suffered damages, including $164,941 and his share of a $77,000 brokerage fee.

Rheem Manufacturing Company (Rheem) alleged that at all times relevant hereto, Coopers & Lybrand knew that Rheem was a principal supplier of Capitol Group. On September 18, 1989, Capitol Group sent an audit report to Rheem's air conditioning division, and Rheem alleged that it relied on the audit report in making credit decisions. Rheem alleged that in reliance on the audit report and the reports of credit agencies, Rheem extended credit to Capitol Group in January 1990 in the following amounts: (1) air conditioning division—$339,881.13 and (2) water heating division—$333,012.75. Rheem alleged that had it been advised of the irregularities and inaccuracies in the financial statements prepared by Coopers & Lybrand, it would not have approved a deferred billing program or otherwise extended credit to Capitol Group or Capitol Supply beginning in January 1990. Rheem alleged that as a proximate result of Coopers & Lybrand's wrongful conduct, it suffered damages of $673,853.88, plus interest and related expenses.

All of the appellants filed their initial petitions on February 28, 1992. The appellants alleged that they did not discover, nor could they reasonably have discovered, the false representations made in the audit reports and the financial statements of Capitol Group and Capitol Supply or the fraudulent concealment of the true financial status of the two companies until the fall of 1990.

On January 7, 1994, the district court sustained the demurrer against Bernard Berntsen. The court examined several dates on which his cause of action could have accrued: April 12, 1989, when Coopers & Lybrand mailed copies of its audit report to Capitol Group; May 23, 1989, when Coopers & Lybrand mailed copies of this audit to Capitol Supply; October 10, 1989, when Capitol Group faxed a copy of the audit reports to Bernard Berntsen in connection with the negotiations for the purchase of the business from Bernard and Richard Berntsen; and January 11, 1990, when the Berntsens entered into an agreement for the sale of Plumbing Products & Supply to Capitol Supply. The court found that where fraud and malpractice allegations are made, the malpractice statute of limitations set forth in Neb. Rev. Stat. § 25-208 (Reissue 1989) applies. The district court found that Bernard Berntsen discovered the alleged fraud or malpractice in the fall of 1990, within the 2-year statute of limitations and that, therefore, the petition could not fit within the discovery exception of Neb. Rev. Stat. § 25-222 (Reissue 1995).

In sustaining the demurrer against Richard Berntsen, the court found that the audit report was issued by Coopers & Lybrand to Capitol Group on April 12, 1989; that Richard Berntsen's petition was filed on February 28, 1992, outside the 2-year statute of limitations; and that the petition was also outside the 1-year discovery exception. Similarly, with regard to Rheem, the court sustained the demurrer on February 4, 1994, without opinion and gave Rheem until February 28 to file a fifth amended petition.

The appellants did not file any additional amended petitions, and their actions were dismissed by the district court.

ASSIGNMENT OF ERROR

The appellants assign the following error to the district court: The district court erred in granting the demurrers on the basis that the discovery provision contained in § 25-222 was applicable in a case governed by § 25-208.

ANALYSIS

The case at bar requires us to address the relationship between §§ 25-208 and 25-222. Section 25-208 provides in relevant part: "The following actions can only be brought within the periods herein stated: . . . where the statute giving such action prescribes a different limitation, the action may be brought within the period so limited; within two years, an action for malpractice which is not otherwise specifically limited by statute."

Section 25-222 provides in relevant part:

> 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 . . . .

The district court applied these two statutes and held that § 25-222 provides the only method by which a party can file an action more than 2 years after accrual of the action. Coopers & Lybrand agrees. The appellants argue that pursuant to § 25-208, they have 2 years from the date of their discovery of the alleged malpractice claim sounding in fraud in which to commence the actions against Coopers & Lybrand.

Both the appellants and Coopers & Lybrand rely upon our treatment of these two statutes in *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993). St. Paul had sued Touche Ross for negligence and

negligent misrepresentations regarding financial statements prepared for Commonwealth Company, Inc. St. Paul claimed that Touche Ross provided inaccurate and misleading documents to assist Commonwealth in obtaining various types of credit and bonds from St. Paul. St. Paul had relied upon the documents in extending credit and issuing bonds to Commonwealth and claimed that it did not know and could not have known of the inaccurate and misleading nature of the documents until it received a report provided by another accounting firm on or about July 15, 1986. Touche Ross demurred to St. Paul's petition on the basis that the cause of action was time barred.

As a part of our analysis of whether St. Paul had timely pled its negligence allegations, we examined the relationship between §§ 25-208 and 25-222. We stated:

> While traditionally a statute of limitations begins to run as soon as the action accrues, and a cause of action in tort accrues as soon as the act or omission occurs, [citation omitted], § 25-222 permits commencement of the action within 1 year from discovery if discovery could not reasonably have occurred sooner.

St. Paul Fire & Marine Ins. Co., 244 Neb. at 417, 507 N.W.2d at 281. We concluded that St. Paul's claim for fraudulent misrepresentation was governed by the 2-year malpractice limitation set forth in § 25-208 and that the discovery doctrine discussed with regard to § 25-222 applied to the period of limitations set forth in § 25-208.

In the case at bar, the appellants claim that the district court misinterpreted *St. Paul Fire & Marine Ins. Co.* The appellants argue that under *St. Paul Fire & Marine Ins. Co.*'s treatment of § 25-208, the statute of limitations in an action for malpractice based upon fraud under § 25-208 is 2 years from either the discovery of the facts constituting the basis of the cause of action or the discovery of the existence of facts sufficient to put a reasonable person on inquiry. Under the discovery principle, discovery occurs when there has been discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. *St. Paul Fire & Marine Ins. Co., supra.*

The appellants claim that the discovery exception of § 25-222 should not be read into the provisions of § 25-208 and that § 25-222 does not enact a tolling principle applicable to an action governed by § 25-208. Instead, the appellants insist that under § 25-208, a cause of action does not accrue until discovery. The appellants appear to rely upon the following statement made in *St. Paul Fire & Marine Ins. Co.*:

> While § 25-208 does not by its terms provide for a period of discovery, in *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962), we held that a cause of action for malpractice against a physician who failed to remove a foreign object did not accrue until the patient discovered, or in the exercise of reasonable diligence should have discovered, the presence of the object. Thus, the discovery doctrine discussed with regard to § 25-222 in part IV(1)(b) of this opinion applies as well to the period of limitations set forth in § 25-208.

244 Neb. at 421-22, 507 N.W.2d at 284.

The appellants' reliance upon *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962), is misplaced. *Spath* was decided in 1962, and the Legislature subsequently enacted § 25-222 in 1972. One of the obvious purposes of § 25-222 was to prevent the unjust result of having a cause of action in tort accrue and become barred by the applicable statute of limitations before the injured party knew or could reasonably have discovered the existence of the cause of action.

Importantly, § 25-222 does not alter our long-held approach to when a cause of action accrues. We continue to abide by the occurrence rule in actions arising in tort and in malpractice actions based upon fraudulent misrepresentation. Under that rule, a statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993). See, also, *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984).

Instead, the 1-year discovery exception of § 25-222 is a tolling provision. It tolls the statute of limitations, thereby permitting an injured party to bring an action beyond the time

limitation for bringing the action in those cases in which the injured party did not discover and could not reasonably have discovered the existence of the cause of action within the applicable statute of limitations.

The tolling provision of § 25-222 does not apply in the present case, however. There is no application of the discovery provision provided for in § 25-222 in actions governed under § 25-208 if the injured party knew or could reasonably have discovered the cause of action within the time set forth in § 25-208. The discovery provision contained in § 25-222 would apply only if such party did not know or could not reasonably have discovered the existence of the cause of action within such time.

The appellants have alleged that they could not have discovered the facts that established their causes of action until "the fall of 1990." The appellants' causes of action accrued, at the earliest, on April 12, 1989—the date that Coopers & Lybrand mailed out the first audit of Capitol Group and Capitol Supply—or, at the latest, on January 11, 1990—the date the Berntsens sold their business to Capitol Group while Coopers & Lybrand allegedly watched silently. The appellants' admitted discovery of the fraudulent concealment in the fall of 1990 is within the 2-year statute of limitation provided by § 25-208. However, the appellants did not file their actions until February 28, 1992. Thus, the appellants' actions against Coopers & Lybrand are time barred.

The judgments of the district court sustaining the demurrers of Coopers & Lybrand and dismissing the appellants' causes of action are affirmed.

AFFIRMED.

CAPORALE, J., not participating.

SOUTHERN NEBRASKA RURAL PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION, ET AL., APPELLANTS, V. NEBRASKA ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC., AN ELECTRIC COOPERATIVE CORPORATION, AND NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION, APPELLEES.

546 N.W.2d 315

Filed April 25, 1996. No. S-94-275.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
2. **Public Policy: Words and Phrases.** Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community.
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. **Public Utilities: Electricity: Public Policy.** Neb. Rev. Stat. § 70-1101 (Reissue 1990) is applicable in instances where two or more electric systems are competing against each other for consumer business within a given municipality.
5. **Statutes: Legislature: Intent.** A preamble or policy statement in a legislative act is not generally self-implementing, but instead is generally used, if needed, for assisting in interpreting the legislative intent for the specific act of which the statement is a part.
6. ____: ____: ____. To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question.
7. **Public Utilities: Electricity: Boundaries: Nebraska Power Review Board.** The intended purpose of Neb. Rev. Stat. § 70-1001 (Reissue 1990) is limited to legalizing service area boundary agreements between public power districts and municipally owned electric systems and to establishing a power review board.
8. **Courts: Contracts: Public Policy.** The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt. It is not the province of courts to destroy the right to contract by enabling parties to escape their contractual obligations on the ground of public policy unless the preservation of the public welfare imperatively so demands.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

Kenneth H. Elson for appellants.

Thomas M. Maul, of Grant, Rogers, Maul & Grant, for appellee Nebraska Electric Generation and Transmission Cooperative, Inc.

Gene D. Watson for appellee Nebraska Public Power District.

John H. Skavdahl, of Skavdahl & Wickersham, for amicus curiae Tri-State Generation and Transmission Association, Inc.

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

CONNOLLY, J.

The appellants, Southern Nebraska Rural Public Power District (Southern), Elkhorn Rural Public Power District (Elkhorn), and Niobrara Valley Electric Membership Corporation (Niobrara), brought this action for declaratory judgment pursuant to Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1995). The appellants seek to have their wholesale electric power contracts with the appellee Nebraska Electric Generation and Transmission Cooperative, Inc. (NEG&T), declared void as against the public policy of this state. At trial, the action was submitted on stipulated facts. The district court found in favor of the appellees and dismissed the appellants' third amended petition. Southern, Elkhorn, and Niobrara appeal.

Upon the authority granted to us by Neb. Rev. Stat. § 24-1106 (Reissue 1995) to regulate the caseloads of the appellate courts of this state, we remove the appeal to this court. We conclude that the wholesale electric power contracts between the appellants and NEG&T are not void as against the public policy of this state. We therefore affirm.

BACKGROUND

HISTORICAL BACKGROUND

The appellants Southern and Elkhorn are rural public power districts organized as public corporations and political subdivisions. The appellant Niobrara is a nonprofit corporation. Each of the appellants owns and operates electrical distribution

facilities and is a retail supplier of electrical energy to consumers in its district. The appellee NEG&T is an electrical cooperative corporation. The appellee Nebraska Public Power District (NPPD) is a public corporation and political subdivision that supplies wholesale electrical energy to various public power districts and nonprofit corporations throughout this state.

A brief history of the development of electrical energy transfers in this state will be helpful for an understanding of the current wholesale power supply contracts between the appellants and NEG&T. Rural electrics in Nebraska receive the hydropower they distribute to their customers from the federal government. This federal hydropower, known as WAPA power, is marketed by the Western Area Power Administration and is brought into Nebraska from other states. At the time of the creation of NEG&T in May 1956, each of the appellants was contracting with Loup River Public Power District and Platte Valley Public Power and Irrigation District, doing business as Nebraska Public Power System, for the intrastate purchase of all its wholesale electric power requirements.

Prior to the incorporation of NEG&T, power districts in Nebraska could not obtain federal hydropower because state law did not authorize public power districts to do business outside the state. Furthermore, the cost of transmitting this power through the individual action of state primary users was prohibitive.

In October 1958, NEG&T's cooperative structure enabled it to enter into a loan contract for low-cost, long-term financing with the federal government, as represented by the Rural Electrification Administration (REA), in order to construct an electric system. Mortgages were given to secure the loans in which NEG&T assigned to the REA all of NEG&T's right, title, and interest in the wholesale power contracts it had with its members. NEG&T, with funding from the REA, then contracted for the construction of a 230-kilovolt transmission line from Fort Randall, South Dakota, to Columbus, Nebraska, which line was energized on July 1, 1960. This 230-kilovolt line was the first of its size in Nebraska interconnecting with the Federal Transmission System. After the Fort Randall to

Columbus line was constructed, NEG&T financed and contracted to build, with loans from the REA, transmission lines from Mission, South Dakota, to Valentine, Nebraska, and from Hinton, Iowa, to west of Dakota City, Nebraska.

Assignment of Appellants' Interests to NEG&T

In 1965, the appellants assigned their wholesale power contracts with Loup River Public Power District and Platte Valley Public Power and Irrigation District to NEG&T in order to "unify their efforts and to secure low cost federal hydropower." The following year Southern and Elkhorn, and in 1971 Niobrara, entered into requirements contracts with NEG&T for the purchase of all their wholesale power. In January 1972, NEG&T entered into a power purchase contract with NPPD. Under the contract, NEG&T leased its transmission lines to NPPD, and all the wholesale power requirements contracts previously assigned to NEG&T were combined to provide for the purchase by NEG&T and the sale by NPPD of the quantities of electric power required by NEG&T for the appellants and NEG&T's other members.

The wholesale power contracts between the appellants and NEG&T have been supplemented at various times in response to the REA's insistence that NEG&T take steps to ensure that its loan from the REA will be repaid. More specifically, as a condition to the extension of credit by the REA, NEG&T was required to amend its wholesale power contract with the appellants and other members to extend the term of the agreement to a date no less than 35 years from October 1, 1970. As a result, NEG&T's wholesale power contracts with the appellants now extend through the year 2006.

Current Distribution and Billing System

The current distribution system operates such that electric power produced by NPPD is transmitted by NPPD to the appellants for distribution by the appellants to their respective customers. NPPD then reads the appellants' meters monthly and submits the power bills for the appellants, as well as 20 other members of NEG&T, to NEG&T. NEG&T then bills the appellants for the power supplied by NPPD after adding dues and assessment charges for membership in NEG&T. The

appellants and other members of NEG&T then send their payment checks to NEG&T. After deducting the amount charged for membership dues and assessments from each payment received, NEG&T then forwards a check to NPPD for payment of the power used by the appellants and other NEG&T members.

During the last 10 years, the administration expense of NEG&T has been more than $3,000,000. During this 10-year period of time, Southern was assessed dues and assessments totaling $241,167, Elkhorn was assessed dues and assessments totaling $87,048, and Niobrara was assessed dues and assessments totaling $63,024. All of said dues and assessments were used by NEG&T in paying administration expenses.

There are other rural public power districts within Nebraska, such as Norris Public Power District and Cedar-Knox County Rural Public Power District, which contract directly with NPPD for the purchase of all their wholesale power requirements under the same wholesale power rate schedules which are applicable to wholesale purchases made by NEG&T. By contracting directly with NPPD, these power districts avoid the dues and assessments charged to the appellants by NEG&T.

ASSIGNMENT OF ERROR

The appellants allege the trial court erred in failing to declare their wholesale electrical power contracts with NEG&T void as against the public policy of the State of Nebraska.

STANDARD OF REVIEW

In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995); *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995); *Columbia Nat. Ins. v. Pacesetter Homes*, 248 Neb. 1, 532 N.W.2d 1 (1995).

ANALYSIS

The appellants allege their wholesale electrical power contracts with NEG&T are void as against the public policy of this state. More specifically, the appellants argue that if it were

not for their contracts with NEG&T, they could contract directly with NPPD, and thus avoid the dues and assessments charged to them by NEG&T. Thus, the appellants assert that the costs of retail electrical energy would be lowered because they would not have to transfer their costs for dues and assessments onto consumers who purchase electrical energy from them. The appellants do not contend that the statutory provisions under which NEG&T was created are unconstitutional, that NEG&T is unauthorized to enter into wholesale power supply contracts, or that NEG&T breached its contracts with the appellants.

Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community. *New Light Co. v. Wells Fargo Alarm Servs.*, 247 Neb. 57, 525 N.W.2d 25 (1994).

> " 'It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands. * * * "the power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." . . .' "

OB-GYN v. Blue Cross, 219 Neb. 199, 204, 361 N.W.2d 550, 554 (1985), quoting from *E. K. Buck Retail Stores v. Harkert*, 157 Neb. 867, 62 N.W.2d 288 (1954).

The appellants base their public policy argument on Neb. Rev. Stat. §§ 70-1001 and 70-1101 (Reissue 1990). Section 70-1001 states:

> In order to provide the citizens of the state with adequate electric service at as low overall cost as possible, consistent with sound business practices, it is the policy of this state to avoid and eliminate conflict and competition between public power districts, public power and irrigation districts, individual municipalities, registered groups of municipalities, electric membership associations, and

> cooperatives in furnishing electric energy to retail and wholesale customers, to avoid and eliminate the duplication of facilities and resources which result therefrom, and to facilitate the settlement of rate disputes between suppliers of electricity.

Section 70-1101 states:

> It is hereby declared to be the policy of the state to provide for dependable electric service at the lowest practical cost to all of the citizens of the state, including the residents of cities and villages.
>
> The maintenance of competing electric systems within such cities or villages results in duplication of facilities and personnel and the needless expenditure of public funds by both such competing systems; that such needless expenditure for duplicating service by publicly owned agencies is not in accord with sound public policy. Whenever such duplicating competition exists in any municipality between a public power district organized under the provisions of Chapter 70, article 6, and other public agencies, including municipalities, such competition should be eliminated in the public interest for economy of operation and lower rates to the consumer.

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. *Becker v. Nebraska Acct. & Disclosure Comm., ante* p. 28, 541 N.W.2d 36 (1995); *White v. State*, 248 Neb. 977, 540 N.W.2d 354 (1995).

§ 70-1101

It is clear from the plain language of § 70-1101 that the Legislature intended it to be applicable in instances where "competing electric systems within . . . cities or villages" are at issue. In the instant case, we are not dealing with a scenario where two or more electric systems are competing against each other for consumer business within a given municipality. As a result, we conclude that the appellants' assertion that their

contracts with NEG&T are void as against public policy based on § 70-1101 is without merit.

§ 70-1001

It appears the appellants' argument based on § 70-1001 is that their contracts with NEG&T are void as against public policy because the contracts create a duplication of resources proscribed by that section. A preamble or policy statement in a legislative act is not generally self-implementing, but instead is generally used, if needed, for assisting in interpreting the legislative intent for the specific act of which the statement is a part. See, 82 C.J.S. *Statutes* § 349 (1953); Black's Law Dictionary 1175 (6th ed. 1990). To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question. *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995); *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988). In the introducer's statement of purpose to L.B. 220 (1963 Neb. Laws, ch. 397, p. 1258), the bill later enacted as chapter 70, article 10, of the Nebraska Revised Statutes, Senator Arnold Ruhnke stated:

> The intent of LB 220 is to provide for the legalizing of boundary agreements between public power districts and municipally owned electric systems. The legalizing of these agreements will stop the duplications of facilities and prohibit the pirating of customers. The bill establishes a Power Review Board. The Board will have the power to establish boundaries between power districts, coops, and municipally owned electric systems in the event the districts fail to voluntarily work out such agreements.

Committee on Public Works, 73d Leg. (Feb. 11, 1963).

This legislative history does not indicate that § 70-1001 was intended to be an all-encompassing statement of public policy for contractual agreements within the electrical power industry. Instead, the legislative history clearly illustrates that this section's intended purpose was limited to legalizing service area boundary agreements between public power districts and municipally owned electric systems and to establishing a power review board. Applying § 70-1001 in an all-encompassing

manner as encouraged by the appellants would bring into question whether all electrical power purchase contracts, except those that involve a direct purchase by the consumer from the original power source, are void as against public policy. This court has expressly stated:

> "The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt. It is not the province of courts to destroy the right to contract by enabling parties to escape their contractual obligations on the ground of public policy unless the preservation of the public welfare imperatively so demands."

Blanco v. General Motors Acceptance Corp., 180 Neb. 365, 374, 143 N.W.2d 257, 262 (1966). Accord *Custer Public Power Dist. v. Loup River Public Power Dist.*, 162 Neb. 300, 75 N.W.2d 619 (1956).

In the instant case, NEG&T has played a significant role in the appellants' development as public power districts in this state. NEG&T's cooperative structure enabled it to enter into low-cost, long-term financing contracts with the federal government. These federal contracts in turn enabled NEG&T to construct a first-of-its-kind transmission line that brought low-cost federal hydropower into Nebraska for consumption by the appellants. The appellants assigned and entered into wholesale power contracts with NEG&T in order to unify their efforts and to secure this low-cost federal hydropower that was formerly unattainable.

Thus, given the plain language and legislative history of the statutes relied upon by the appellants, and the significant role NEG&T has played in the appellants' development, we hold that the preservation of the public welfare does not imperatively demand that the contracts at issue be declared void as against the public policy of this state. " 'If every contract could be declared void because of a showing by an individual, a group of individuals, or even a significant portion of individuals that they could save money by breaking it, chaos would result. . . .' " See *Upper Mo. G & T Co-op v. McCone Elec. Co-op, Inc.*, 160 Mont. 498, 504, 503 P.2d 1001, 1004 (1972). As a result, we

conclude that the trial court did not err in dismissing the appellants' third amended petition.

CONCLUSION

We conclude that the wholesale power contracts between the appellants and NEG&T are not void as against the public policy of this state.

AFFIRMED.

FAHRNBRUCH, J., not participating.

CAPORALE, J., concurring.

Although I agree with the judgment reached by the majority, I write separately because its reference to the statement of the introducer of L.B. 220, 1963 Neb. Laws, ch. 397, § 1, p. 1258, and other unspecified so-called legislative history of Neb. Rev. Stat. § 70-1001 (Reissue 1990) is both unnecessary and, for the reasons developed in my concurrence in *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995), improper.

In describing the policy considerations underlying its determination to establish the Nebraska Power Review Board and giving it the powers and duties set forth in the rest of the act, the Legislature enacted § 70-1001, which reads:

> In order to provide the citizens of the state with adequate electric service at as low overall cost as possible, consistent with sound business practices, it is the policy of this state to avoid and eliminate conflict and competition between public power districts, public power and irrigation districts, individual municipalities, registered groups of municipalities, electric membership associations, and cooperatives in furnishing electric energy to retail and wholesale customers, to avoid and eliminate the duplication of facilities and resources which result therefrom, and to facilitate the settlement of rate disputes between suppliers of electricity.

I accept that if legislative intent is in question, an enacted policy statement such as the foregoing introductory language may be considered in resolving that issue. See, *Shinrone Farms, Inc. v. Gosch,* 319 N.W.2d 298 (Iowa 1982); *Bricelyn School Dist. v. Board of Co. Commrs.*, 238 Minn. 53, 55 N.W.2d 597

(1952). However, such language must give way to the specific terms of the statutes composing the act. See *Application of Atkinson*, 291 N.W.2d 396 (Minn. 1980). See, also, *State ex rel. Spire v. Public Emp. Ret. Bd.*, 226 Neb. 176, 410 N.W.2d 463 (1987) (legislative declaration of constitutionality did not overcome true unconstitutional nature of statute). Moreover, a preamble cannot enlarge the scope and operation of a statute. *Smith v. Brookfield*, 272 Wis. 1, 74 N.W.2d 770 (1956).

But no question of legislative intent is involved. This case presents no issue concerning the elimination of conflict and competition, or the duplication of facilities and resources which result therefrom, or any rate dispute. Thus, there is no issue which is cognizable by the power review board, and for that reason, the case does not fall within the purview of the preamble.

Stated another way, the contracts at issue no more come within the language of § 70-1001 than they come within the language of Neb. Rev. Stat. § 70-1101 (Reissue 1990), a part of the act dealing with the retail distribution of electric service.

LANPHIER, J., joins in this concurrence.

FORD MOTOR CREDIT COMPANY, APPELLEE, V. ALL WAYS, INC., A NEBRASKA CORPORATION, AND GARY L. ROSS, AN INDIVIDUAL, APPELLANTS.

546 N.W.2d 807

Filed April 25, 1996. No. S-94-669.

1. **Summary Judgment: Appeal and Error.** In 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.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences

that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

3. **Summary Judgment: 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.
4. ____: ____. 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.
5. **Actions: Uniform Commercial Code.** An action under the Uniform Commercial Code is one at law.
6. **Negotiable Instruments: Words and Phrases.** A negotiable instrument is an unconditional promise or order to pay a fixed amount of money.
7. **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 Keya Paha County: WILLIAM CASSEL, Judge. Affirmed.

John W. DeCamp and Thomas L. Winkler, DeCamp Legal Services, P.C., for appellants.

Andrew E. Grimm, W. Eric Wood, and Lisa A. Sarver, of Dwyer, Pohen, Wood, Heavey, Grimm, Goodall & Lazer, for appellee.

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

PER CURIAM.

Ford Motor Credit Company (Ford) filed a replevin action against the defendants, All Ways, Inc., and its president, Gary L. Ross, alleging that the defendants tendered to Ford nonnegotiable documents in payment of two motor vehicle installment contracts and thereby defaulted on the contracts.

The district court for Keya Paha County entered summary judgment in favor of Ford, and the defendants appealed that judgment to the Nebraska Court of Appeals. Pursuant to our authority to regulate the caseloads of the appellate courts, we moved this case from the Court of Appeals' docket to this court's docket.

We affirm the summary judgment of the trial court because the defendants (1) did not tender to Ford negotiable instruments,

i.e., an unconditional promise or order to pay a fixed amount of money, and (2) defaulted on their installment contracts, thereby entitling Ford to replevin the vehicles involved in this action.

ASSIGNMENTS OF ERROR

The defendants claim that the trial court erred in finding that (1) the tendered documents were not negotiable instruments, (2) Ford's duty to present the tendered documents to the drawee was excused, and (3) the defendants' obligations were not discharged upon tender of the documents. The defendants also claim that the trial court erred in overruling their motion for a rehearing.

STANDARD OF REVIEW

In 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. *Zion Wheel Baptist Church v. Herzog, ante* p. 352, 543 N.W.2d 445 (1996). 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. *C.S.B. Co. v. Isham, ante* p. 66, 541 N.W.2d 392 (1996).

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. *Kocsis v. Harrison, ante* p. 274, 543 N.W.2d 164 (1996). 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. *Blackbird v. SDB Investments, ante* p. 13, 541 N.W.2d 25 (1995).

FACTS

In its replevin petition, Ford alleged in substance as follows:

The defendants signed two retail installment contracts for the purchase of a Lincoln passenger car and a Ford truck from Seward County Ford Lincoln Mercury, Inc. The two contracts were secured by liens on the vehicles. Seward County Ford Lincoln Mercury, Inc., assigned its interests in the contracts to Ford.

On October 27, 1993, the defendants tendered to Ford two "certified money orders" as payment in full on the two vehicles. In reliance upon the "certified money orders," Ford released its liens on the vehicles.

Ford also alleged that the "certified money orders" given it by the defendants were fraudulent instruments having no value. Ford further alleged that its security interests in the two vehicles remained in effect because the release of its liens was obtained by fraud. Ford further claimed that the defendants defaulted on the installment contracts. Ford prayed for possession of the two vehicles and joint and several judgments against the defendants.

Following the defendants' answers, Ford moved for summary judgment.

The tendered documents in question were made out to Ford for $20,500 and $25,200. The documents stated that the sums were to be paid "*On Demand, Money of Account of the United States, as required by law at Section 20 of Coinage Act of 1792 from the time of official determination of the substance of said money: OR, in U.C.C. 1-201(24) Credit Money.*" (Emphasis supplied.) The documents stated they were "REDEEMABLE AT FULL FACE VALUE WHEN PRESENTED[;] To: O.M.B.[;] W. D. McCALL[;] P.O. BOX 500-284[;] VICTORIA, TEXAS POSTAL ZONE 77901."

Viewed in a light most favorable to the defendants, the record reflects the following undisputed facts: Upon receiving the documents, Ford applied the purported payments to the defendants' accounts and deposited the documents in a bank. The documents were returned by the bank as nonnegotiable because there were no bank routing numbers on the documents, and no bank was identified through which to charge. Without routing numbers a bank would have no obligation to accept or make payment on the documents.

Ford informed the defendants that the documents were not accepted and that the defendants would need to pay Ford in U.S. legal tender. However, no payments were forthcoming. As a result, the defendants defaulted on the account.

The trial court found that the tendered documents do not order the payment of *money* and contain stipulations not contemplated by Nebraska's Uniform Commercial Code or other applicable provisions of the law. The trial court further found that the documents were not negotiable instruments and that the defendants' obligations to Ford were never suspended or discharged. The trial court sustained Ford's motion for summary judgment and ordered the defendants to deliver the two vehicles to Ford or pay $35,810 to Ford, if return of the vehicles could not be had.

Thereafter, the defendants filed a motion for rehearing which the trial court construed as a motion for a new trial. The motion was overruled.

ANALYSIS

There are no material factual disputes in the record. Whether the documents tendered by the defendants were negotiable instruments is governed by Nebraska's Uniform Commercial Code. An action under the Uniform Commercial Code is one at law. *FirsTier Bank v. Triplett*, 242 Neb. 614, 497 N.W.2d 339 (1993).

A negotiable instrument is an unconditional promise or order to pay a fixed amount of money. Neb. U.C.C. § 3-104(a) (Reissue 1992). The tendered documents are not within the definition of a negotiable instrument. The documents purport to provide the creditor an unspecified "Credit Money" when presented to a post office box. This cannot be construed as an unconditional promise or order to pay a fixed sum of money.

Because the defendants tendered documents of no monetary value, the trial court correctly found that Ford was entitled to summary judgment as a matter of law. As a result, we need not address the defendants' second and third assigned errors. As to the overruling of the motion for a rehearing, the defendants did not address this assigned error in their brief. 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. *Standard Fed. Sav. Bank v. State Farm*, 248 Neb. 552, 537 N.W.2d 333 (1995).

CONCLUSION

Because there was no dispute as to a material issue of fact in this case, the trial court properly entered summary judgment in favor of Ford.

AFFIRMED.

IN RE INTEREST OF RONDELL B., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. GINA B., APPELLANT.

546 N.W.2d 801

Filed April 25, 1996. No. S-95-549.

1. **Judgments: Appeal and Error.** As to a question of law, an appellate court is obligated to reach an independent conclusion irrespective of the determination made by the court below.
2. **Pleadings.** An amended pleading supersedes the original pleading, whereupon the original pleading ceases to perform any office as a pleading.
3. ____. Although the prayer for relief is part of a petition, it is not a portion of the statement of facts required to constitute a cause of action.
4. **Statutes.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.
5. **Pleadings: Jurisdiction.** Before filing any other pleading or motion, one may file a special appearance for the sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the objector.
6. **Jurisdiction.** An appearance is special when its sole purpose is to question the jurisdiction of the court.
7. ____. One who, having entered a special appearance, seeks further relief or makes a later request for other relief may be held to have made a general appearance.
8. **Jurisdiction: Waiver: Service of Process.** Under the provisions of Neb. Rev. Stat. § 25-516.01 (Reissue 1995), one's participation in proceedings on any issue

other than jurisdiction over the person waives any objection that the court erred in overruling the special appearance except the objection that the defendant is not amenable to process issued by a court of this state.

9. **Motions for Continuance: Jurisdiction.** The filing of a motion for a continuance constitutes a general appearance and confers jurisdiction over the moving party.
10. **Records: Appeal and Error.** It is an appellant's duty to include in the bill of exceptions matters which are material to the issues presented for review.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Vacated and set aside.

Milo Alexander for appellant.

Marti L. English, of Child Support Services of Nebraska, for appellee.

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

CAPORALE, J.

I. STATEMENT OF CASE

The Douglas County Separate Juvenile Court ordered Gina B., the appellant mother, to pay monthly support for Rondell B., the juvenile at interest. The mother urges that as she was not served with summons on the separate support hearing at which that issue was considered and decided, the juvenile court lacked jurisdiction over her person in that regard, and, thus, the support order is null and void. The mother being correct, we vacate and set aside the support order.

II. SCOPE OF REVIEW

As a matter controlled by statute, this case presents a question of law. With respect to such a question, an appellate court is obligated to reach an independent conclusion irrespective of the determination made by the court below. *Nipp v. Twin Towers Condo. Assn.*, *ante* p. 888, 546 N.W.2d 794 (1996).

III. FACTS

On January 27, 1994, the county attorney for Douglas County filed a petition alleging that the subject juvenile, being under the age of 18 years and lacking proper parental care by reason of the faults or habits of his mother, came within the

court's jurisdiction under the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). An amended petition was filed on March 14, a second amended petition on July 15, and a third amended petition on August 2. Each amended petition continued to allege that the juvenile came within the purview of § 43-247(3)(a), but modified other allegations. Neither the petition, amended petition, nor second amended petition contained any support allegations, but each nonetheless prayed for orders concerning the "care, custody, control and support" of the juvenile as might be appropriate. The third amended petition contained no support allegations and prayed only for "such orders" as might be appropriate. The mother was personally served with a summons and copy of the petition and the second and third amended petitions. Each summons referred to the respective petition, but did not otherwise specify the relief sought.

After the filing of the amended petition but before the filing of the second amended petition, the county attorney, on June 20, 1994, filed a motion for support. The motion was mailed to counsel representing the mother, together with a notice of hearing thereon. No summons was served on anyone with regard thereto. Although the hearing on the motion was originally scheduled to be heard on July 25, 1994, it was continued five times and was not held until March 9, 1995. In the meantime, on November 9, 1994, the juvenile court held a dispositional hearing, at which it ordered, inter alia, that the juvenile remain in the custody of the Nebraska Department of Social Services.

The record does not reveal at whose behest or why the continuances on the support motion came about. In any event, a notice of the hearing to be held March 9, 1995, on the support motion was directed to counsel for the mother. At the hearing, counsel orally objected to the juvenile court's jurisdiction to order support on the ground that the mother had not been served with summons. No other matters were treated at the hearing, and the court took the jurisdictional issue under advisement.

In its order dated April 17, 1995, the juvenile court determined that it had personal jurisdiction over the mother. It

then held a hearing on May 15 to determine various issues, including support. Counsel for the mother continued to assert that the court lacked jurisdiction to order his client to pay support. The court nonetheless entered the subject support order.

IV. ANALYSIS

Resolution of the issue presented requires that we consider the statutes relating to the service of process and notice in the juvenile court and the manner in which the jurisdiction of the court was questioned.

1. Service of Process and Notice

Neb. Rev. Stat. § 43-274 (Reissue 1993) empowers a county attorney having knowledge of a juvenile falling within the purview of § 43-247(3)(a) to institute proceedings to determine whether support is to be ordered pursuant to Neb. Rev. Stat. § 43-290 (Reissue 1993). Section 43-290 provides, in relevant part, that

> whenever the care or custody of a juvenile is given by the court to someone other than his or her parent . . . 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. Such proceeding, which may occur prior to, at the same time as, or subsequent to adjudication, shall be in the nature of a disposition hearing.
>
> At such proceeding, after summons to the parent of the time and place of hearing served as provided in sections 43-262 to 43-267, the court may order and decree that the parent shall pay . . . a reasonable sum that will cover in whole or part the support . . . of the juvenile . . . .

Neb. Rev. Stat. § 43-263 (Reissue 1993) provides that upon "the filing of the petition, a summons with a copy of the petition attached shall issue requiring the person who has custody of the juvenile or with whom the juvenile may be staying to appear personally . . . ." Neb. Rev. Stat. § 43-267(2) (Reissue 1993) further provides that

> [n]otice of the time, date, place, and purpose of any juvenile court hearing subsequent to the initial hearing, for which a summons or notice has been served or waived, shall be given to all parties either in court, by mail, or in such other manner as the court may direct.

In this case, the support proceeding clearly was a separate one conducted subsequent to adjudication. Nonetheless, the county attorney argues that the language of § 43-290, reading "[a]t such proceeding, after summons to the parent of the time and place of hearing served as provided in sections 43-262 to 43-267, the court may order and decree that the parent shall pay," means that the court may proceed with a support hearing after the parent has been served with a summons concerning the underlying juvenile action. But the words "at such proceeding" refer to the support hearing conducted and require that a summons be served on the parent of the time and place of that hearing. Thus, if the support hearing is not conducted at the same proceeding at which placement, study, or treatment is determined for which the parent was issued a summons, then in order to comply with § 43-290, a separate summons must be served.

Contrary to the contention of the county attorney, that requirement of § 43-290 is not changed by the language of § 43-267(2). In the first place, upon the filing of the third amended petition, the preceding petitions ceased to have any function. See *Midwest Laundry Equipment Corp. v. Berg*, 174 Neb. 747, 119 N.W.2d 509 (1963) (amended pleading supersedes original pleading; after amendment, original pleading ceases to perform any office). See, also, *Woodworth v. Thompson*, 44 Neb. 311, 62 N.W. 450 (1895). As the operative third amended petition made no reference to support, it can hardly be said that summons had been either served or waived in regard to that issue. Moreover, whatever the adequacy or inadequacy of any of the various petitions with respect to support, *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984) (although prayer part of petition, it is no portion of statement of facts required to constitute cause of action), we simply are not free to disregard the requirement of § 43-290 that in the event of a separate support hearing, a summons with

regard thereto is to be served. In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994). See, also, *State v. Campbell*, 247 Neb. 517, 527 N.W.2d 868 (1995).

Consequently, unless conferred by the mother's conduct, the juvenile court lacked jurisdiction over the mother's person and thus lacked jurisdiction to order her to pay support.

2. METHOD OF QUESTIONING JURISDICTION

This premise brings us to the manner in which the mother questioned the juvenile court's jurisdiction. The bill of exceptions demonstrates that counsel for the mother orally called to the juvenile court's attention its lack of jurisdiction over the mother with respect to the support issue.

We have held that before filing any other pleading or motion, one may file a special appearance for the sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the objector. *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989). An appearance is special when its sole purpose is to question the jurisdiction of the court. *West Town Homeowners Assn. v. Schneider*, 221 Neb. 674, 380 N.W.2d 265 (1986). It unquestionably would have been better practice for counsel to have filed such a written special appearance. But the fact that he did not do so did not serve to confer upon the juvenile court jurisdiction over the mother's person.

It is also true, as the county attorney argues, that one who, having entered a special appearance, seeks further relief or makes a later request for other relief may be held to have made a general appearance. *West Town Homeowners Assn., supra.* Moreover, Neb. Rev. Stat. § 25-516.01 (Reissue 1995) provides that a defendant's "participation in proceedings on any issue other than jurisdiction over the person waives any objection that the court erred in overruling the special appearance except the

objection that the defendant is not amenable to process issued by a court of this state."

Thus, the filing of a motion for a continuance constitutes a general appearance and confers jurisdiction over the moving party. *Eliason v. Devaney*, 228 Neb. 331, 422 N.W.2d 356 (1988); *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980). But while the record shows that the support hearing was continued numerous times, there is nothing in the record showing that the mother either personally or through counsel sought any of these postponements. We cannot assume that any of those delays were requested by the mother.

In so writing, we are not unmindful that it is an appellant's duty to include in the bill of exceptions matters which are material to the issues presented for review. See *Bell Fed. Credit Union v. Christianson*, 244 Neb. 267, 505 N.W.2d 710 (1993). We similarly held in *Ward v. Ward*, 220 Neb. 799, 373 N.W.2d 389 (1985), an appeal from a decree dissolving the marriage of the parties, dividing their property, and awarding the wife alimony, that a bill of exceptions containing only the evidence adduced by the appellant husband was inadequate and provided no basis for modifying the trial court decree. We reasoned that without all the evidence, we could not undertake the required de novo review to determine whether the trial court had abused its discretion in entering its decree. That being so, we held that it was not incumbent upon the wife to have filed a supplemental request for the preparation of a bill of exceptions which included the evidence she adduced.

However, here, the mother provided us with a bill of exceptions which demonstrates that she entered a special appearance. Given that our review is for an error of law, the evidence she has presented in the bill of exceptions satisfies her burden to show that she properly objected to the juvenile court's assertion of jurisdiction over her person. If evidence existed to establish that the mother in some manner waived the service of summons, it was incumbent upon the county attorney to ask the court reporter to include such evidence in the bill of exceptions. See Neb. Ct. R. of Prac. 5B(1)c (rev. 1995).

What the record does reveal, however, is that in response to the juvenile court's question at the support hearing as to

whether counsel for the mother had any objection to the court's receiving in evidence an exhibit consisting of this court's child support guidelines, counsel responded: "None, Your Honor." It would certainly have been more cautious practice for counsel to have said something such as, "With all due respect, I am not here, Your Honor," or "I have no comment, Your Honor." But the fact remains that counsel's statement did not amount to such participation in the proceeding that he thereby entered a voluntary appearance on behalf of his client. After all, counsel did not volunteer that he had no objection to the receipt of the exhibit, he merely responded to a question the court had no reason to pose. In the absence of anyone making an objection, there is none upon which a court can rule. In the context made, counsel's statement constituted no more than a refusal to interject in the proceeding.

V. JUDGMENT

Since as to the separate support proceeding the juvenile court acquired no jurisdiction over the person of the mother, the order directing her to pay such is null and void, and we accordingly vacate and set it aside.

VACATED AND SET ASIDE.

GERRARD, J., dissenting.

I dissent from the majority opinion for the reason that the juvenile court had personal jurisdiction over the mother; thus, the court had the statutory power to order her to pay support in the postdisposition proceeding.

Neb. Rev. Stat. § 43-290 (Reissue 1993) allows the support obligation of a parent whose child is in the care or custody of another to be determined in a proceeding separate from the proceeding at which placement is determined. "At such proceeding, after summons to the parent of the time and place of hearing *served as provided in sections 43-262 to 43-267*, the court may order and decree that the parent shall pay . . . a reasonable sum that will cover in whole or part the support . . . of the juvenile . . . ." (Emphasis supplied.) § 43-290.

I disagree with the majority's determination that a separate summons is required when a hearing on a motion for support is subsequent to the initial hearing for which a summons was

served. Neb. Rev. Stat. § 43-267 (Reissue 1993) provides, once service has been perfected to a parent for a prior hearing, that notice of "any juvenile court hearing subsequent to the initial hearing, for which a summons or notice has been served or waived, shall be given to all parties either in court, by mail, or in such other manner as the court may direct."

In the instant case, the mother was personally served with a summons and a copy of the initial petition. Prior to the hearing for support, notice of a hearing concerning a motion for support was mailed to the mother's counsel.

The hearing at which the mother contested personal jurisdiction concerned the separate motion for support, for which the mother had received adequate notice, and the court had previously obtained personal jurisdiction. I would affirm the order of the juvenile court.

WRIGHT, J., joins in this dissent.

IN RE INTEREST OF BRITTANY B., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. JENNA B., APPELLANT.
546 N.W.2d 811

Filed April 25, 1996. No. S-95-614.

Appeal from the Separate Juvenile Court of Douglas County: SAMUEL P. CANIGLIA, Judge. Vacated and set aside.

Christina Thornton for appellant.

Marti L. English, of Child Support Services of Nebraska, for appellee.

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

CAPORALE, J.

The Douglas County Separate Juvenile Court ordered Jenna B., the appellant mother, to pay monthly support for Brittany B., the juvenile at interest. The mother urges that as she was not served with summons on the separate support hearing at which that issue was considered and decided, the juvenile court lacked jurisdiction over her person, and, thus, the support order is null and void. The mother being correct, we vacate and set aside the support order.

On November 29, 1994, the State filed a petition alleging that the juvenile, being under the age of 18 years and lacking proper parental care by reason of the faults or habits of her mother, came within the court's jurisdiction under the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993). Although it contained no support allegations, it prayed for orders concerning the "care, custody, control and support" of the juvenile as might be appropriate.

After two unsuccessful efforts to serve process on the mother, a third summons was ultimately served on her on December 21, 1994, along with a copy of the petition, for a hearing scheduled the next day. At the December 22 hearing, the juvenile court determined that the mother had not received timely service and granted her counsel's motion for a continuance.

A fourth summons was then served upon the mother, along with a copy of the petition, for a hearing scheduled at 2:30 p.m. on January 24, 1995, together with a separate notice restating the date and time of the hearing.

As a result of that hearing, the juvenile court entered an order which, among other things, purported to delegate its judicial duty with regard to the setting of support under the provisions of Neb. Rev. Stat. § 43-290 (Reissue 1993) by requiring the mother, as "parent of said [juvenile]," to "contribute a sum for the [juvenile] as . . . support as mutually agreed upon by the parent and the [State]" and which further provided that if "a sum cannot be agreed upon, the [State] shall have the matter set for hearing . . . ."

Whatever may be the legality of the foregoing order, on January 30, 1995, the State filed an amended petition which continued to allege that the juvenile came within the purview

of § 43-247(3)(a), modified other allegations, and, notwithstanding that it contained no support allegations, prayed for the same relief as did the initial petition. After the mother was served with a fifth summons which referred to the operative amended petition and a separate notice for a pretrial hearing on the superseded November 29, 1994, petition, a sixth summons was served on her directing her to appear at 2 p.m. on April 3, 1995. This summons did not refer to any petition, nor did it make any reference to support being an issue. On this occasion, the mother was also served with a separate notice which informed her that an adjudication hearing would take place under the November 29, 1994, petition. In like fashion, the praecipe directed that the mother be served with a copy not of the amended petition, but of the "petition." In any event, service was by certified mail, and the record does not reflect that she was sent any petition. The record reflects that the adjudication hearing was held on April 14, 1995; it does not explain why it was not held as scheduled on April 3.

On April 18, 1995, the State filed with the juvenile court a motion for a support order. A copy of the support motion and a notice of hearing were hand delivered to counsel for the mother, but no summons regarding the motion was served on anyone.

The support hearing was held as originally scheduled on May 1, 1995, at which time counsel for the mother unsuccessfully orally objected to the juvenile court's exercise of jurisdiction over her on the basis that the mother had not been personally served with a summons as required by § 43-290.

There being no evidence that counsel for the mother sought any affirmative relief with respect to the support proceeding, this case is controlled by *In re Interest of Rondell B., ante* p. 928, 546 N.W.2d 801 (1996). The juvenile court having acquired no jurisdiction over the mother, its order of support is null and void.

Accordingly, the order of support is vacated and set aside.

VACATED AND SET ASIDE.

GERRARD, J., dissenting.

I dissent for essentially the same reasons expressed in *In re Interest of Rondell B., ante* p. 928, 546 N.W.2d 801 (1996).

Neb. Rev. Stat. § 43-267 (Reissue 1993) provides, once service has been perfected to a parent for a prior hearing, that notice of "any juvenile court hearing subsequent to the initial hearing, for which a summons or notice has been served or waived, shall be given to all parties either in court, by mail, or in such other manner as the court may direct." A separate summons is not required when, as in the instant case, the hearing on the motion for support is subsequent to the initial hearing for which a summons and petition were served.

In this case, on December 21, 1994, a summons and the petition were served on the mother. The petition contained a prayer for an order concerning the support of the juvenile. On December 22, a hearing was held at which a continuance was granted. At this point, a copy of the motion and notice of the hearing regarding support were properly delivered to the mother's counsel, and no further service of summons was required.

I would affirm the order of the juvenile court.

WRIGHT, J., joins in this dissent.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. LAWRENCE R. GOTTFRIED, RESPONDENT.

546 N.W.2d 322

Filed April 25, 1996. No. S-96-403.

Original action. Judgment of disbarment.

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

PER CURIAM.

Lawrence R. Gottfried was admitted to the practice of law in the State of Nebraska on February 23, 1971.

On April 16, 1996, Gottfried filed a voluntary surrender of his license to practice law in Nebraska. In voluntarily surrendering his license, Gottfried stated that on August 19, 1994, he entered a plea of guilty to a criminal information charging him with a felony violation of 18 U.S.C. § 2071(b) (1994) in the U.S. District Court for the District of Columbia, which plea was accepted by that court.

Section 2071 provides:

> (a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined under this title or imprisoned not more than three years, or both.
>
> (b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States. As used in this subsection, the term "office" does not include the office held by any person as a retired officer of the Armed Forces of the United States.

Based upon the above-mentioned conviction, Gottfried consented to his disbarment from the practice of law in the District of Columbia, and on March 14, 1996, the District of Columbia Court of Appeals entered an order of his disbarment.

In Gottfried's surrender of his license, he freely, knowingly, and voluntarily admits that his conviction of a felony criminal offense constitutes violations of Canon 1, DR 1-102(A)(3) and (6), of the Code of Professional Responsibility adopted by the Supreme Court of Nebraska.

DR 1-102(A) provides that a lawyer shall not: "(3) [e]ngage in illegal conduct involving moral turpitude" or "(6) [e]ngage in

any other conduct that adversely reflects on his or her fitness to practice law."

He also states in his filing that he freely, knowingly, and voluntarily surrenders his license to practice law in Nebraska and consents to the entry of an order of disbarment and that he freely, knowingly, and voluntarily waives his right to notice, appearance, or hearing prior to the entry of such order.

We accept Gottfried'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.

STEVE WASHA, APPELLANT, V. JAMES P. MILLER, APPELLEE.
LARRY MARTIN, APPELLANT, V. JAMES P. MILLER, APPELLEE.
546 N.W.2d 813

Filed May 3, 1996. Nos. S-94-407, S-94-408.

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: Evidence.** A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion.
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. **Trial: Evidence: Appeal and Error.** To preserve a claimed error in the admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence.
5. **Evidence: Words and Phrases.** Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence, or the evidence tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred.

6. **Summary Judgment: Affidavits.** If the movant for summary judgment submits an affidavit as to a material fact, and that fact is not contradicted by the adverse party, the court will determine that there is no issue as to that fact.
7. **Summary Judgment: Affidavits: Records: Appeal and Error.** In order to receive consideration on appeal, any affidavits used on a motion for summary judgment must have been offered in evidence in the trial court and preserved in and made a part of the bill of exceptions.
8. **Affidavits: Records: Appeal and Error.** The fact that an affidavit is filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal of a cause to an appellate court.
9. **Unjust Enrichment.** The doctrine of unjust enrichment is recognized only in the absence of an agreement between the parties.
10. **Contracts: Unjust Enrichment.** The enrichment of one party at the expense of the other is not unjust where it is permissible under the terms of an express contract.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Mark Quandahl, of Brumbaugh & Quandahl, P.C., for appellants.

James H. Monahan for appellee.

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

CONNOLLY, J.

The appellants, Larry Martin and Steve Washa, brought separate suits against the appellee, attorney James P. Miller, seeking to recover $10,000 ($5,000 each) they allegedly entrusted to Miller. The district court for Douglas County consolidated the cases, and the cases have also been consolidated in this court for briefing and oral argument. Counts I through IV of Washa's petition and Miller's amended petition asserted causes of action sounding in negligence (count I), unjust enrichment (count II), misrepresentation (count III), and breach of contract (count IV). Miller answered the petitions with a general denial and filed a motion for summary judgment. The district court for Douglas County sustained Miller's motion

and dismissed the appellants' petitions. Martin and Washa appeal.

We conclude there is no genuine issue as to any material fact on any of the counts asserted in the appellants' petitions, and thus, Miller is entitled to judgment as a matter of law. We therefore affirm.

I. BACKGROUND

Miller is an attorney who was hired by the appellants to defend them on felony assault and extortion charges in Douglas County, Nebraska. At the time Miller was hired, the appellants paid a $5,000 fee ($2,500 each) to retain his services. While the criminal charges were pending, the appellants transferred an additional $10,000 ($5,000 each) to Miller. Eventually, the appellants pled no contest to the charges, pursuant to a plea agreement, and Miller retained the $10,000.

The appellants brought suit against Miller, seeking to recover the $10,000. The district court consolidated the cases. Washa's petition and Martin's amended petition are identical. The appellants alleged in their petitions that the $10,000 was given to Miller in trust to be offered as restitution to the victim of the criminal case in an attempt to have the charges dismissed. While the petitions are not a model of clarity, we read counts I through IV to allege causes of action sounding in negligence, unjust enrichment, misrepresentation, and breach of contract.

More specifically, count I alleges in pertinent part that Miller's failure

> (a) to inform [the appellants] that restitution in criminal cases was not available as a defense, and (b) to properly inform [the appellants] of all consequences of [their] guilty pleas, and (c) to return the $10,000.00 given to [Miller] for restitution, was a breach of [Miller's] duty to exercise reasonable care, skill, and diligence.

Count II alleges in pertinent part that

> $2[,]500.00 [each] was not a fair and reasonable price for the services provided by [Miller] and that $5,000.00 [each] was given to [Miller] to be held in trust for the benefit of [the appellants].

> . . . [Miller] would be unjustly enriched at the expense of [the appellants] if said [$5,000] fee and [$10,000], given to Miller in trust for restitution, [are] retained by [Miller].

Count III alleges in pertinent part that the "representations of [Miller], when made, were false or were made recklessly without knowledge of the truth or falsity and as a positive assertion."

Count IV alleges in pertinent part that "[o]n or about September 18, 1991, for good and valuable consideration . . . Miller orally agreed to return $12,500.00 to [the appellants] and to sign a promissory note for prompt repayment of the same."

Miller answered the petitions with a general denial and filed a motion for summary judgment.

1. NSBA's Disciplinary Investigation

Before the hearing on Miller's motion for summary judgment was conducted, the appellants filed a disciplinary complaint against Miller with the Nebraska State Bar Association (NSBA). Dennis G. Carlson, Counsel for Discipline for the NSBA, investigated the complaint and concluded, in a letter sent to the appellants' attorney, that no disciplinary action should be taken against Miller. Carlson's letter stated that he "carefully considered this issue and determined that . . . [d]ue to the lack of documentation or other supporting evidence, the true purpose of the advanced $10,000 cannot be proven."

2. Miller's Exhibits

On March 3, 1994, the hearing on Miller's motion for summary judgment was conducted. At the hearing, Miller offered three exhibits into evidence. Exhibit 1 is a sworn affidavit prepared by Miller. Exhibit 2 is Carlson's letter to the appellants' attorney discussing the findings of Carlson's disciplinary investigation. Exhibit 3 is a transcript of the criminal proceedings against the appellants in Douglas County District Court.

Exhibit 1, Miller's affidavit, contains the following declarations of fact:

> 1. He is a licensed practicing attorney in Omaha,Douglas [sic] County, Nebraska.

2. He was retained by Larry Martin and Steve Washa to represent both of them on pending criminal charges in Omaha, Douglas County, Nebraska.

3. That the agreement required a $2,500.00 retainer from each of them *with an additional payment of $10,000.00 to* [*be*] *paid after arraignment for conclusion of their cases*. (Emphasis supplied.)

[4]. That a complete hearing was had before Judge James A. Buckley with both defendants present in which they testified, waive [sic] any perceived conflict of interest, after an exhaustive interrogation by Judge Buckley, and further testified that they were satisfied with the legal services rendered in their behalf.

[5]. That both criminal cases were concluded to the satisfaction of the defendants.

[6]. That he was not a member of any partnership in this matter.

[7]. Further affiant sayeth not.

At the hearing on Miller's motion for summary judgment, the appellants' counsel did not make any specific objections to exhibits 1 and 3, objected to exhibit 2 on the grounds of relevance and hearsay, and requested additional time to submit an affidavit controverting Miller's affidavit. The district court overruled the appellants' objection to exhibit 2 and granted the appellants 10 days to submit a controverting affidavit.

3. Appellants' Affidavit

Washa filed an affidavit with the clerk of the district court for Douglas County on March 18, 1994, that alleged the $10,000 was given to Miller to hold in trust. Although this affidavit is contained within the transcript, Washa never offered it as evidence at the hearing on Miller's motion for summary judgment or had it preserved in, and made a part of, the bill of exceptions. Martin did not file an affidavit in the summary judgment proceeding before us.

The district court for Douglas County sustained Miller's motion for summary judgment and dismissed the appellants' petitions with prejudice, finding that no genuine issue of

material fact was raised by the appellants. Martin and Washa appeal the district court's decision.

II. ASSIGNMENTS OF ERROR

The appellants assign four errors, which allege in summary that (1) the district court erred in admitting evidence over the objections of the appellants' counsel and (2) the district court erred in sustaining Miller's motion for summary judgment because genuine issues of material fact remain for trial.

III. 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. *C.S.B. Co. v. Isham, ante* p. 66, 541 N.W.2d 392 (1996); *Talle v. Nebraska Dept. of Soc. Servs., ante* p. 20, 541 N.W.2d 30 (1995).

A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion. *Keefe v. Glasford's Enter.*, 248 Neb. 64, 532 N.W.2d 626 (1995); *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (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. *Blackbird v. SDB Investments, ante* p. 13, 541 N.W.2d 25 (1995); *Hearon v. May*, 248 Neb. 887, 540 N.W.2d 124 (1995).

IV. ANALYSIS

1. Admission of Evidence

The appellants first allege the district court erred in admitting evidence, at the hearing on Miller's motion for summary judgment, over the objections of the appellants' counsel. As for exhibits 1 and 3, no specific objections were raised by the

appellants' counsel. To preserve a claimed error in the admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence. *Paulsen v. State, ante* p. 112, 541 N.W.2d 636 (1996). As a result, we conclude the district court did not err in admitting exhibits 1 and 3.

The appellants' counsel timely objected to the admission of exhibit 2, the Counsel for Discipline letter, on the specific grounds of relevance and hearsay. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or the evidence tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred. *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994); *Moore v. State*, 245 Neb. 735, 515 N.W.2d 423 (1994). We conclude that Carlson's letter (exhibit 2) was irrelevant and improperly admitted into evidence because it did not have the tendency to make the existence of any fact that is of consequence to the determination of this action more or less probable than it would be without the evidence. See Neb. Rev. Stat. § 27-401 (Reissue 1995).

However, in its order of dismissal, the district court merely stated that "[u]pon consideration of the evidence and arguments of counsel, both oral and written, the Court finds that there is no genuine issue of material fact and that the Defendant is entitled to judgment as a matter of law." Simply put, the letter did not create or negate any issue of fact as to any issue raised. Therefore, any error in admitting the letter was harmless.

2. Granting Summary Judgment

The appellants next allege that the district court erred in sustaining Miller's motion for summary judgment because genuine issues of material fact remain for trial. Neb. Rev. Stat. § 25-1332 (Reissue 1995) states in pertinent part that a motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment

as a matter of law." This section has been construed to mean that if the moving party submits an affidavit as to a material fact, and that fact is not contradicted by the adverse party, the court will determine that there is no issue as to that fact. *Raskey v. Michelin Tire Corp.*, 223 Neb. 520, 391 N.W.2d 123 (1986).

(a) Counts I, III, and IV

In the instant case, counts I, III, and IV of the appellants' petitions essentially alleged that the $10,000 was given to Miller in trust to be offered as restitution to the victim of the appellants' crimes. In support of his motion for summary judgment, Miller submitted an affidavit (exhibit 1) alleging that he and the appellants entered into an agreement whereby they would pay him an additional $10,000 after arraignment for conclusion of their case. Miller met the burden of proving his prima facie case in regard to counts I, III, and IV by introducing this affidavit into evidence. In other words, the affidavit, by itself, sustained the district court's necessary factual findings that Miller is entitled to judgment as a matter of law, should the evidence remain uncontroverted on those counts. See, *Keefe v. Glasford's Enter.*, 248 Neb. 64, 532 N.W.2d 626 (1995); *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995).

In an attempt to controvert Miller's affidavit, Washa filed an affidavit on March 18, 1994, that alleged the $10,000 was given to Miller to hold in trust. Although Washa filed this affidavit with the clerk of the district court and it is contained within the transcript, he never offered it as evidence at the hearing on Miller's motion for summary judgment or had it preserved in, and made a part of, the bill of exceptions. The bill of exceptions does not contain an affidavit of Martin.

In *Snyder v. Nelson*, 213 Neb. 605, 606-07, 331 N.W.2d 252, 253 (1983), this court held:

> "In order to receive consideration on appeal, any affidavits used on a motion for summary judgment must have been offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. . . . Included within the transcript is an affidavit . . . and a copy of a petition . . . . However, neither of these items was received in

> evidence . . . they do not form a part of the bill of exceptions, and under the rule cited above may not be considered on appeal." It has long been the rule that assignments of error requiring an examination of the evidence are not available on appeal in the absence of a bill of exceptions, the bill of exceptions being the only vehicle for bringing evidence to this court. This remains so even though certain evidence has been physically filed in the office of the clerk of the trial court.

Likewise, in *Blanco v. General Motors Acceptance Corp.*, 180 Neb. 365, 371, 143 N.W.2d 257, 261 (1966), this court held:

> The fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal of a cause to this court. If such an affidavit is not preserved in the bill of exceptions its existence or contents cannot be known by this court.

See, also, *Bulger v. McCourt*, 179 Neb. 316, 138 N.W.2d 18 (1965); *Peterson v. George*, 168 Neb. 571, 96 N.W.2d 627 (1959).

In the instant case, because the appellants' affidavit was not properly preserved in the bill of exceptions, the condition of the record requires us to hold that the appellants failed to contradict Miller's properly preserved affidavit in regard to counts I, III, and IV of the appellants' petitions. As a result, we conclude the trial court was correct in granting Miller's motion for summary judgment on those counts because the appellants failed to raise a genuine issue of material fact. See *Raskey v. Michelin Tire Corp.*, 223 Neb. 520, 391 N.W.2d 123 (1986).

(b) Count II

Count II of the appellants' petitions stated a cause of action, sounding in unjust enrichment, that alleged the $5,000 ($2,500 each) "was not a fair and reasonable price for the services provided by [Miller]." Because the appellants failed to contradict Miller's affidavit that alleged the appellants agreed to pay Miller the $5,000 as a retainer for his legal services, we

conclude, as a matter of law, that such an express contract existed.

The doctrine of unjust enrichment is recognized only in the absence of an agreement between the parties. *Zuger v. North Dakota Ins. Guar. Ass'n*, 494 N.W.2d 135 (N.D. 1992); *Kolentus v. Avco Corp.*, 798 F.2d 949 (7th Cir. 1986), *cert. denied* 479 U.S. 1032, 107 S. Ct. 878, 93 L. Ed. 2d 832 (1987); *Maxted v. Barrett*, 198 Mont. 81, 643 P.2d 1161 (1982). The doctrine does not operate to rescue a party from the consequences of a bad bargain. *George v. Tanner*, 108 Idaho 40, 696 P.2d 891 (1985). In other words, the enrichment of one party at the expense of the other is not unjust where it is permissible under the terms of an express contract. *Kolentus v. Avco Corp., supra*; *S & M Constructors v. Columbus*, 70 Ohio St. 2d 69, 434 N.E.2d 1349 (1982). As a result, we conclude the trial court was correct in granting Miller's motion for summary judgment on count II because the appellants failed to raise a genuine issue of material fact.

V. CONCLUSION

Because the affidavit submitted by Miller was the only evidence properly preserved in the bill of exceptions, we conclude there is no genuine issue as to any material fact on any of the counts asserted in the appellants' petitions. We therefore affirm the district court's granting of Miller's motion for summary judgment.

AFFIRMED.

RICHARD J. MAHLIN AND CYNTHIA S. MAHLIN, APPELLANTS, V. CAROLINE GOC, APPELLEE.

547 N.W.2d 129

Filed May 3, 1996. Nos. S-94-515, S-94-516, S-94-517.

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. **Joint Tenancy: Words and Phrases.** An interest held in joint tenancy is considered "per my et per tout"—by the half and by the whole—which means that each joint tenant owns the whole of the property from the time at which the interest is created.
3. **Joint Tenancy: Conveyances: Decedents' Estates.** A surviving joint tenant's interest attaches by means of the original conveyance, not by transfer from the decedent.

Appeal from the District Court for Hamilton County: BRYCE BARTU, Judge. Affirmed.

Richard K. Watts, of Mills, Papik & Watts, and, on brief, D. Steven Leininger, of Luebs, Leininger, Smith, Busick & Johnson, for appellants.

Joseph F. Bachmann, of Perry, Guthery, Haase & Gessford, P.C., for appellee.

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

CONNOLLY, J.

This appeal presents the question of whether the operation of common-law joint tenancy upon the death of one joint tenant operates as a "transfer" under the Uniform Fraudulent Transfer Act, as adopted in Nebraska and codified at Neb. Rev. Stat. §§ 36-701 through 36-712 (Reissue 1993). We conclude that on the facts of this appeal, it does not, and thus, we affirm.

FACTUAL BACKGROUND

On July 1, 1993, Richard J. Mahlin and Cynthia S. Mahlin, who are both attorneys, filed on behalf of their clients a petition praying for replevin of certain thoroughbred racing horses, as well as a number of items of racing business equipment and

horse tack items which were allegedly being wrongfully detained by Jerome Goc. In addition, the petition asked for $100,000 in damages, representing lost racing and breeding income which resulted from the wrongful detention of the property.

On July 26, 1993, the Mahlins entered onto property owned by Jerome and Caroline Goc to conduct business related to the replevin litigation. While the Mahlins were on the property, Jerome Goc shot Richard Mahlin in the face, chest, arm, and upper body with a 12 gauge shotgun. Jerome Goc shot Cynthia Mahlin in the face with the shotgun and kicked her in the head and body with his foot as she lay on the ground after being shot.

Jerome Goc died soon after being struck by a vehicle driven by Richard Mahlin, who was apparently trying to escape. The Mahlins now seek to avoid the "transfer" of Jerome Goc's interest in a number of parcels of land formerly held in joint tenancy by Jerome and Caroline Goc. The Mahlins allege that the vesting of Jerome Goc's one-half interest in the joint tenancy property in Caroline Goc upon his death was a "transfer" for purposes of the Uniform Fraudulent Transfer Act.

The Gocs owned parcels of real estate in three counties: Hall, Hamilton, and Merrick. Of the parcels located in Hamilton County, one was acquired in 1968, two in 1972, and one in 1989. The plots located in Hall County were both acquired in 1982. The plots situated in Merrick County were acquired in 1989 and 1990. All of the plots were held in joint tenancy from the time they were acquired until the time of Jerome Goc's death. The Mahlins filed identical but separate actions in the district court for each county in which real property was located, seeking to avoid the transfer of Jerome Goc's one-half interest in the parcels to Caroline Goc. On November 8, 1993, the parties jointly stipulated that the cases should be consolidated in the district court for Hamilton County.

Caroline Goc moved for summary judgment, asserting that there was no genuine issue as to any material fact and that she was entitled to judgment as a matter of law. On April 25, 1994, the district court sustained Caroline Goc's motion for summary judgment and dismissed the case.

ASSIGNMENT OF ERROR

The Mahlins assign that the trial court erred in sustaining Caroline Goc's motion for summary judgment because issues of material fact exist.

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. *Zion Wheel Baptist Church v. Herzog, ante* p. 352, 543 N.W.2d 445 (1996); *John Markel Ford v. Auto-Owners Ins. Co., ante* p. 286, 543 N.W.2d 173 (1996); *Kocsis v. Harrison, ante* p. 274, 543 N.W.2d 164 (1996).

ANALYSIS

The Mahlins allege that the vesting of Jerome Goc's interest in the joint tenancy property was a transfer pursuant to § 36-702. Section 36-702 defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance."

The Mahlins contend that the definition of the term "transfer" found at § 36-702 encompasses the passing of Jerome Goc's one-half interest in the joint tenancy property to Caroline Goc upon his death. However, Caroline Goc denies that the extinguishment of Jerome Goc's interest in the property constituted a transfer. In particular, Caroline Goc argues that under the common-law rules governing joint tenancy, no interest is transferred to the surviving joint tenant when another joint tenant dies.

In order for us to determine that the extinguishment of Jerome Goc's interest in the property was a transfer, we must conclude that he "dispos[ed] of or part[ed] with" his interest in the property. We first examine the common-law rules on the operation of joint tenancy upon death. In his treatise on property law, Cornelius J. Moynihan explains:

> The most important characteristic of a joint tenancy is the right of survivorship or *jus accrescendi*. On the death of one of the joint tenants his interest does not descend to his heirs or pass under his will; the entire ownership remains in the surviving joint tenants. The interest of the deceased joint tenant disappears and the whole estate continues in the surviving tenants or tenant.

Cornelius J. Moynihan, Introduction to the Law of Real Property, ch. 10, § 3 at 220 (1962).

At common law, an interest held in joint tenancy is considered "per my et per tout"—by the half and by the whole—which means that each joint tenant owns the whole of the property from the time at which the interest is created. See *Hein v. W. T. Rawleigh Co.*, 167 Neb. 176, 92 N.W.2d 185 (1958). See, also, *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995). The survivor's interest attaches by means of the original conveyance, not by transfer from the decedent. 4A Richard R. Powell, The Law of Real Property ¶ 617[3] (1996). The original conveyances of the property to Jerome and Caroline Goc took place in 1968, 1972, 1982, and 1989—long before any potential claim of the Mahlins arose. Under the common law, Jerome Goc's interest in the property held in joint tenancy was extinguished at the time of his death, but Caroline Goc's interest did not change: she remained the owner of the whole of the property. Thus, if common-law principles apply to this case, Caroline Goc must prevail.

We note that the Legislature has previously modified the effect of death on the operation of common-law joint tenancy in order to protect creditors. A statute passed in 1955 subjected joint tenancy property to the debts of a deceased joint tenant under certain limited circumstances. See Neb. Rev. Stat. § 30-624 (Cum. Supp. 1955). However, this statute was repealed by the Legislature when it adopted the Nebraska Probate Code, which became operative in 1977.

The question which remains is whether § 36-702 supersedes the common-law rules on the rights of creditors to reach property formerly held in joint tenancy. We have previously held that statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a

construction which restricts or removes a common-law right should not be adopted unless the plain words of the act compel it. *Paulsen v. Courtney*, 202 Neb. 791, 277 N.W.2d 233 (1979); *Bishop v. Bockoven, Inc.*, 199 Neb. 613, 260 N.W.2d 488 (1977). See, also, *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989). In light of the fact of the prior, repealed statute subjecting a surviving joint tenant to the debts of the deceased tenant, the Legislature's failure to explicitly indicate its intent to alter the common-law rights of joint tenants is instructive.

While the Legislature has defined transfer as "every mode . . . of disposing of or parting with . . . an interest in an asset," nothing in this statutory language indicates a legislative intent to abrogate the operation of joint tenancy upon death. Therefore, we are compelled to find that the definition of "transfer" in § 36-702 does not include the extinguishment of Jerome Goc's interest in the property.

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. *Zion Wheel Baptist Church v. Herzog, ante* p. 352, 543 N.W.2d 445 (1996); *John Markel Ford v. Auto-Owners Ins. Co., ante* p. 286, 543 N.W.2d 173 (1996); *Kocsis v. Harrison, ante* p. 274, 543 N.W.2d 164 (1996).

We conclude that summary judgment was proper. Because no transfer occurs at the time of a joint tenant's death, we determine that under the facts of this case, the Uniform Fraudulent Transfer Act's definition of "transfer" does not apply. As we conclude that no transfer occurred, no genuine issues of material fact remain in this appeal, and Caroline Goc is entitled to judgment as a matter of law.

CONCLUSION

The definition of "transfer" found in § 36-702 does not apply to the facts of this case; therefore, Caroline Goc was entitled to judgment as a matter of law, and summary judgment was proper.

AFFIRMED.

EDDIE R. NELSON, APPELLEE, V. METROPOLITAN UTILITIES DISTRICT, A POLITICAL CORPORATION, APPELLANT.

547 N.W.2d 133

Filed May 3, 1996. No. S-94-528.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
2. **Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Trial: Witnesses.** 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.
4. **Witnesses: Property.** Whether an owner of property is qualified to testify is decided by an analysis of the owner's familiarity with the property.
5. ____: ____. An owner who is shown to be familiar with the value of his land shall be qualified to estimate the value of such land for the use to which it is then being put, without additional foundation.
6. **Trial: Evidence: Presumptions: Appeal and Error.** There is a presumption that a court trying a case without a jury, in arriving at a decision, will consider only competent and relevant evidence, and an appellate court will not reverse a case so tried because other evidence was admitted when there is material, competent, and relevant evidence admitted sufficient to sustain the judgment of the trial court.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Daniel G. Crouchley 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.

LANPHIER, J.

Appellee, Eddie R. Nelson, filed an amended petition in the Douglas County District Court under the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1987), against appellant, Metropolitan Utilities District of Omaha (MUD). A house owned by Nelson was destroyed

in an explosion. Nelson alleged that MUD negligently (1) inspected and restored gas service at a residential property owned by Nelson and (2) failed to advise Nelson that there was a deficiency in the gas system. Following a bench trial, the district court entered judgment in favor of Nelson and ordered MUD to pay $26,000 plus court costs.

MUD appealed to the Nebraska Court of Appeals, claiming that the trial court erred in allowing Nelson to testify as to the value of the house and in admitting evidence of insurance. We removed this case to our docket pursuant to our power to regulate the caseloads of the lower courts. We affirm.

BACKGROUND

Nelson owned a house on Wirt Street in Omaha, Nebraska, which he rented to others. On July 11, 1990, Mark Bell, a senior mechanic with MUD, arrived at the Nelson property to replace a broken water meter. Bell turned on the gas and water to the house.

Seven days later, Michael Foster, an occupant of the property, lit a cigarette lighter and an explosion occurred. The source of the explosion was an uncapped gasline, which had an open valve.

During trial, both sides presented evidence relating to the market value of the house. The MUD appraiser stated that the fair market value was $15,000 and that the replacement value was $28,000. The trial court allowed Nelson to testify that the value of his property was $30,000 to $35,000. Finally, evidence was adduced that the property was insured at a value of $31,800.

ASSIGNMENTS OF ERROR

MUD alleges the following assignments of error:

1. The trial court erred as a matter of fact and a matter of law and abused its discretion in allowing the opinion of Eddie Nelson regarding the fair market value of the real estate at 3827 Wirt Street without adequate foundation.

2. The trial court erred as a matter of fact and law in that plaintiff failed to prove, by expert testimony or otherwise, the fair market value of the property.

3. The trial court was clearly wrong in finding that the fair market value of the real property damaged was $26,000.00.

4. The trial court finding of damages in the amount of $26,000.00 was contrary to the evidence and not supported by substantial evidence.

5. The trial court erred in allowing the introduction of evidence of insurance, both oral evidence and Exhibit 36 "Proof of Loss", objected to by defendant.

STANDARD OF REVIEW

In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *McIntosh v. Omaha Public Schools, ante* p. 529, 544 N.W.2d 502 (1996); *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Whitten v. Malcolm, ante* p. 48, 541 N.W.2d 45 (1995); *Lee Sapp Leasing v. Catholic Archbishop of Omaha*, 248 Neb. 829, 540 N.W.2d 101 (1995); *McCook Nat. Bank v. Bennett*, 248 Neb. 567, 537 N.W.2d 353 (1995); *Dillard Dept. Stores v. Polinsky*, 247 Neb. 821, 530 N.W.2d 637 (1995); *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995).

ANALYSIS

In its assignments of error, MUD does not contest the trial court's finding of liability on its part. The assignments of error can be divided into two sections: (1) the admission of the testimony of the property owner as to value and (2) the admission of evidence of insurance.

MUD argues that the trial court erred in allowing the value testimony of Nelson, the owner of the property.

Over MUD's objection, Nelson stated: "[M]y opinion was [the Wirt Street property] was worth 30-35,000 and the

appraisal says 15–, so, obviously, I am not qualified." MUD argues that this statement was an admission by Nelson that he was not qualified to testify. The judge allowed the value estimate by Nelson, stating:

> Number one, I don't think that was — that remark that Mr. Nelson made just prior to the break was a concession on his part that he didn't have an opinion on what the value of his property was. I took it that the appraiser value came in so far below what he valued his property that he was, in effect, expressing his disbelief in what the appraiser said.

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).

Further, whether an owner of property is qualified to testify is decided by an analysis of the owner's familiarity with the property. In *Langfeld v. Department of Roads*, 213 Neb. 15, 26, 328 N.W.2d 452, 458 (1982), we stated: "We therefore restate the rule to be that an owner who is shown to be familiar with the value of his land shall be qualified to estimate the value of such land for the use to which it is then being put, without additional foundation."

Nelson stated that he owned rental properties other than the property on Wirt Street, that he owned other properties in the vicinity of Wirt Street, that he had made improvements to the Wirt Street property, that he received $350 a month rent for the Wirt Street property, and that he had increased the rent for the Wirt Street property because its value had increased.

We conclude that Nelson, as an owner shown to be familiar with the value of the property, was competent to testify. See *id.*

MUD offered expert testimony at trial, which was admitted, and which stated that the value of the property was $15,000 and that its replacement value was $28,000. Nelson offered evidence, which was admitted, and which stated that the value of the property was $30,000 to 35,000. Nelson then offered evidence that the property was insured for $31,800. MUD now argues that it was error to admit the evidence of insurance.

This case was heard in a bench trial. There is a presumption that a court trying a case without a jury, in arriving at a decision, will consider only competent and relevant evidence, and an appellate court will not reverse a case so tried because other evidence was admitted when there is material, competent, and relevant evidence admitted sufficient to sustain the judgment of the trial court. *Suess v. Lee Sapp Leasing*, 229 Neb. 755, 428 N.W.2d 899 (1988); *Kristensen v. Reese*, 220 Neb. 668, 371 N.W.2d 319 (1985); *In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985).

We find that there is material, competent, and relevant evidence admitted sufficient to sustain the judgment. Therefore, the trial court was not clearly wrong in finding that the fair market value of the property damaged was $26,000.

CONCLUSION

The trial court's finding of damages in the amount of $26,000 was supported by substantial evidence. The trial court not being clearly erroneous, its decision is hereby affirmed.

AFFIRMED.

EDITH OCHS, CONSERVATOR FOR THE ESTATE OF JOSEPHINE CASTKA, A PROTECTED PERSON, APPELLANT, V. LEONARD MAKOUSKY, APPELLEE.

547 N.W.2d 136

Filed May 3, 1996. No. S-94-540.

1. **Guardians and Conservators: Estates: Parties.** In a suit instituted by the conservator of the estate of a protected person, it is the protected person who is the real party in interest.
2. **Judgments: Appeal and Error.** A correct decision will not be reversed merely because it was reached for the wrong reasons.
3. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf

of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.

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. **Torts: Conversion: Property: Words and Phrases.** Tortious conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Affirmed.

Robert D. Westadt, of Otradovsky, Bieber & Westadt, for appellant.

Denise E. Frost, of Domina & Copple, P.C., for appellee.

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

PER CURIAM.

The plaintiff-appellant, Edith Ochs, conservator for the estate of Josephine Castka, a protected person, alleges that the defendant-appellee, Leonard Makousky, "unlawfully took and converted" to his own use and benefit $55,000 of Josephine Castka's funds. Pursuant to verdict, the district court entered judgment in favor of Makousky. Ochs appealed to the Nebraska Court of Appeals, and we, on our own motion, removed the matter to this court in order to regulate the caseloads of the two courts.

In 1967, Josephine Castka, who was born on April 16, 1901, and her sister Carrie Castka sold their farm to Makousky but continued to live in the house located thereon rent free. In 1982, Josephine Castka moved into an apartment and in 1991 into a nursing home. At some point she became mentally incompetent, and Ochs was appointed her conservator on March 2, 1993. This suit was filed March 9, 1993.

Makousky and his wife took care of the Castka sisters while they lived on the farm. Makousky's wife did their laundry, cleaned their house, and took them shopping and to visit

doctors. Makousky and his wife continued to care for Josephine Castka when she moved into the apartment.

While living in the apartment, Josephine Castka began sharing a joint checking account with Makousky. Although she was the sole source of the money, she never drew a check on the account. Makousky used the account to pay her bills.

On September 5, 1991, Makousky wrote a check from the joint checking account to himself in the amount of $55,000. Over Ochs' objection, he testified that he did so because Josephine Castka told him before she moved into the nursing home that she wanted all of her bills paid, including any money owed him for rent and payment for all services provided and chores performed by him over the years. After Makousky's withdrawal, approximately $7,000 remained in the account.

Ochs asserts the district court erred in two respects, in permitting Makousky to testify as described earlier and in not directing a verdict in her favor.

With regard to the first assignment of error, Ochs urges that the questioned testimony constituted inadmissible hearsay.

Neb. Evid. R. 801(4)(b), Neb. Rev. Stat. § 27-801(4)(b) (Reissue 1995), provides, in part, that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . his own statement, in either his individual or a representative capacity . . . ." In a suit instituted by the conservator of the estate of a protected person, it is the protected person who is the real party in interest. *Schmidt v. Schmidt*, 228 Neb. 758, 424 N.W.2d 339 (1988). Thus, § 27-801(4)(b) excludes statements made by a protected person from the definition of hearsay. The district court therefore properly received Makousky's testimony as to what Josephine Castka told him with regard to paying her bills.

It is true that at trial, Makousky argued not that the questioned testimony was not hearsay, but, rather, that the testimony was admissible under various exceptions to the rule making hearsay inadmissible. However, even if we were to assume that in making its ruling the district court relied on the erroneous reasoning Makousky advanced, a correct decision will not be reversed merely because it was reached for the wrong reasons. *Winfield v. CIGNA Cos.*, 248 Neb. 24, 532

N.W.2d 284 (1995); *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994).

That brings us to Ochs' claim that the district court erred in overruling her motion for a directed verdict.

In reviewing a trial court's ruling on such a motion, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *ConAgra, Inc. v. Bartlett Partnership*, 248 Neb. 933, 540 N.W.2d 333 (1995); *Melcher v. Bank of Madison*, 248 Neb. 793, 539 N.W.2d 837 (1995). 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. *Id.*

Tortious conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights. *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992). Ochs' having chosen the remedy of tortious conversion and the issues having been thus framed, the fact in controversy is whether Makousky wrongfully asserted dominion over the funds in the joint account. Makousky presented evidence that Josephine Castka intended that he pay himself from this account for past rent and services. This evidence controverts a claim of tortious conversion. The question thus became one of credibility for the jury to resolve. Accordingly, it would have been prejudicially erroneous to direct a verdict in Ochs' favor.

There being no merit to either of Ochs' assignments of error, the judgment of the district court must be affirmed.

AFFIRMED.

CHARLES C. KEYS, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES, AN ADMINISTRATIVE AGENCY OF THE STATE OF NEBRASKA, APPELLANT.

546 N.W.2d 819

Filed May 3, 1996. No. S-94-549.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** An aggrieved party may obtain review of any judgment or final order entered by a district court under the Administrative Procedure Act.
2. ____: ____: ____: ____. The judgment rendered or final order made by the district court in an Administrative Procedure Act appeal may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record.
3. **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.
4. **Motor Vehicles: Blood, Breath, and Urine Tests.** A motorist who provides a sufficient sample of breath to register a digital reading on an Intoxilyzer, but who does not provide enough breath to cause the machine to print the result on a test record card, has submitted to a breath test as required by Nebraska law in the absence of any statutory or regulatory requirement that the results be printed on a test record card, and in the absence of any evidence of willful noncooperation.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

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

Phillip G. Wright, of Quinn & Wright, for appellee.

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

CONNOLLY, J.

In this appeal, we are asked to determine whether a motorist who provides a sufficient sample of breath to register a digital reading on an Intoxilyzer, but who does not provide enough breath to cause the machine to print the result on a test record card, has submitted to a breath test as required by Nebraska law.

Following an administrative hearing, the driver's license of Charles C. Keys was revoked for a period of 1 year by the

director of the Department of Motor Vehicles for refusing to submit to, or failing to complete, a chemical test of his breath. See Neb. Rev. Stat. §§ 60-6,205 to 60-6,208 (Reissue 1993). On appeal, the district court for Cass County reversed the director's order of revocation and reinstated Keys' driver's license, concluding that Keys "did submit to and complete a chemical test of his breath as required by law." The department appeals the district court's decision.

Upon the authority granted to us by Neb. Rev. Stat. § 24-1106 (Reissue 1995) to regulate the caseloads of the appellate courts of this state, we remove the appeal to this court. We conclude that Keys submitted to and completed a chemical test of his breath as required by Nebraska law. We therefore affirm the district court's decision.

BACKGROUND

On January 23, 1994, Keys was arrested by Officer Brian Paulsen of the Plattsmouth Police Department for driving while under the influence of alcohol (DUI). Following his arrest, Keys was transported to the Cass County sheriff's office where he was requested by Paulsen to submit to a chemical breath test. Paulsen administered the breath test on an Intoxilyzer Model 4011AS following a checklist procedure. At the administrative hearing, Paulsen testified:

> Mr. Keys was instructed . . . how to blow in the machine, he failed to properly blow into the machine. The training is that the administrating officer should hold the mouthpiece and part of the reason you hold the mouthpiece is to feel air coming around the mouthpiece rather than through it. On the first attempt, that was exactly what was going on. I was holding the mouthpiece and he was blowing around the mouthpiece. I could feel the air hitting my hand. Also the light — the indicator light on the Intoxilyzer was not lighting up, meaning the air was not going into the machine.

As a result, the Intoxilyzer did not register any measure of Keys' blood alcohol content, digitally or by printout, on this first attempt. Keys was then "given a second attempt" to provide a sufficient sample of breath. Paulsen again explained to Keys

that a long sustained breath was needed to properly cycle the machine, rather than short puffs. Paulsen also warned Keys that if the sample of breath provided was not sufficient on the second attempt, he would be cited for refusing to submit to the test.

On the second attempt, Keys again failed to provide a sufficient sample of breath for the Intoxilyzer to print the result on a test record card. However, Keys provided enough breath for the Intoxilyzer to register a digital reading of .110 of 1 gram of alcohol per 210 liters of his breath. No testimony was adduced that Paulsen felt air around the mouthpiece, or of any other willful noncooperation on the second attempt.

Keys was cited for DUI and refusing to submit to a chemical breath test. Following an administrative hearing, the director revoked Keys' driver's license for 1 year. The district court for Cass County reversed the director's order. The department appeals.

ASSIGNMENTS OF ERROR

The department alleges the district court erred in (1) reversing the director's order of revocation and ordering the director to reinstate Keys' operator's license and (2) finding that Keys did submit to and complete a chemical test of his breath as required by law.

STANDARD OF REVIEW

An aggrieved party may obtain review of any judgment or final order entered by a district court under the Administrative Procedure Act. Neb. Rev. Stat. § 84-918 (Reissue 1994); *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995).

The judgment rendered or final order made by the district court in an Administrative Procedure Act appeal may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record. *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995); *Rose Equip., Inc. v. Ford Motor Co.*, 248 Neb. 344, 535 N.W.2d 404 (1995); *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994).

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. *White v. State*, 248 Neb. 977, 540 N.W.2d 354 (1995); *Rose Equip., Inc. v. Ford Motor Co., supra*; *George Rose & Sons v. Nebraska Dept. of Revenue*, 248 Neb. 92, 532 N.W.2d 18 (1995).

ANALYSIS

The department alleges the district court erred in concluding that Keys "did submit to and complete a chemical test of his breath as required by law." Neb. Rev. Stat. § 60-6,197(4) (Reissue 1993) states in pertinent part:

> Any person arrested [for driving under the influence] may, upon the direction of a peace officer, be required to submit to a chemical test or tests of his or her blood, breath, or urine for a determination of the concentration of alcohol or the presence of drugs. . . . Any person who refuses to submit to such test or tests required pursuant to this section shall be subject to the administrative revocation procedures provided in sections 60-6,205 to 60-6,208 and shall be guilty of a crime and upon conviction punished as [set forth in subsections (a) through (c).]

Section 60-6,205(2) states in pertinent part:

> If a person arrested pursuant to section 60-6,197 refuses to submit to the chemical test of blood, breath, or urine required by that section . . . the arresting peace officer, as agent for the Director of Motor Vehicles, shall verbally serve notice to the arrested person of the intention to immediately impound and revoke the operator's license of such person and that the revocation will be automatic thirty days after the date of arrest unless a petition for hearing [before the director of the Department of Motor Vehicles] is filed within ten days after the date of arrest . . . .

Section 60-6,206(1) states in pertinent part:

> At the expiration of thirty days after the date of arrest pursuant to section 60-6,197 or if after a hearing pursuant to section 60-6,205 the Director of Motor Vehicles finds that the impounded operator's license should be revoked,

> the director shall (a) revoke the operator's license of a person arrested for refusal to submit to a chemical test of blood, breath, or urine as required by section 60-6,197 for a period of one year . . . .

The department argues that although the Intoxilyzer registered a digital reading of .110 on the second sample of breath that Keys provided, Keys nonetheless failed to complete the test, because the sample was insufficient to cause the machine to print the result on a test record card. Our DUI and administrative license revocation statutes are silent on whether the results of a chemical breath test must be shown on a test record card in order to be legally sufficient, or whether a digital Intoxilyzer reading will suffice. The department relies upon *State v. Clark*, 229 Neb. 103, 108, 425 N.W.2d 347, 351 (1988), in which this court held:

> An arrested motorist refuses to submit to a chemical test authorized by [§ 60-6,197(4)] to determine the motorist's blood-alcohol level when the motorist's conduct, demonstrated under the circumstances confronting the officer requesting the chemical test, justifies a reasonable person's belief that the motorist understood the officer's request for a test and manifested a refusal or unwillingness to submit to the requested test. [Citations omitted.] Anything less than an unqualified, unequivocal assent to an arresting officer's request to submit to a chemical test constitutes a motorist's refusal to submit to a chemical test authorized by [§ 60-6,197(4)].

The *Clark* court elaborated that

> notwithstanding an arrested motorist's expressed consent or agreement to take a breath test authorized by [§ 60-6,197(4)], the motorist's subsequent conduct may be the basis for an inference that the motorist has withdrawn or revoked the previous consent to such test or has feigned consent to the test and, therefore, has refused to submit to the statutorily authorized breath test.

229 Neb. at 109, 425 N.W.2d at 351.

As in the instant case, Clark's breath test was administered on an Intoxilyzer Model 4011AS. In that case, after three attempts, Clark failed to supply a sufficient sample of breath for

a test. The officer testified that each time the green light " 'come [sic] on and then it went off, and he didn't blow hard enough . . . .' " *Id.* at 106, 425 N.W.2d at 350. The officer further testified that " '[i]t appeared that [Clark] was putting his tongue over the end of the tube. . . .' " *Id.* at 105, 425 N.W.2d at 350. The court concluded that "[t]here is sufficient evidence to sustain the county court's findings of fact and Clark's guilt, namely, that Clark refused to submit to the breath test authorized by [§ 60-6,197(4)]." 229 Neb. at 110, 425 N.W.2d at 352.

However, in *Clark*, the issue was not whether the failure to provide a sufficient sample of breath to produce a test record card, even though a digital reading was attained, constitutes a failure to comply with a chemical breath test as requested by an officer. In fact, in *Clark*, there is no indication that any digital reading was attained. Furthermore, the officer testified that on all three attempts, Clark either " 'didn't blow hard enough' " or that he " 'was putting his tongue over the end of the tube.' "

In the instant case, Paulsen testified that on Keys' first attempt, Keys was blowing around the mouthpiece, because as the officer was holding the mouthpiece, he could feel Keys' breath hitting his hand. Paulsen further testified that "the indicator light on the Intoxilyzer was not lighting up, meaning the air was not going into the machine." However, no such testimony of willful noncooperation was adduced concerning the second sample of breath provided by Keys. In fact, on the second attempt, Keys provided enough breath to register a digital reading of .110 on the Intoxilyzer. As a result, *Clark* is distinguishable in that it fails to address the same facts and circumstances that are before this court in the instant case.

The department also cites *Call v. Kansas Dept. of Revenue*, 17 Kan. App. 2d 79, 831 P.2d 970 (1992), and *Baker v. Colorado*, 42 Colo. App. 133, 593 P.2d 1384 (1979), in support of their position. However, as with *State v. Clark, supra*, these cases are distinguishable.

In *Call*, the court held that a "failure to provide a deep lung breath sample required for testing by the intoxilyzer machine constitutes a test refusal." 17 Kan. App. 2d at 83, 831 P.2d at 973. In that case, Call submitted to a breath test which

produced a breath alcohol measure of .124. As in the instant case, the printout from the machine indicated that the provided sample was insufficient to register a test result on the printout. However, in *Call*, both sides stipulated that when the machine indicates " 'deficient sample,' " it means that a deep lung sample has not been obtained. *Id.* at 80, 831 P.2d at 971. In the instant case, there was no such stipulation.

In *Baker v. Colorado, supra*, the court held that Baker failed to comply with Colorado's implied consent statute by not cooperating in blowing up a balloon on a blood alcohol testing device. In that case, the state was able to procure a reading of Baker's blood alcohol content from what breath he blew into the balloon. The test on the partially filled balloon measured Baker's blood alcohol concentration at .228. However, at Baker's hearing, the arresting officer testified that "Baker had a coin in his mouth which he was biting, while placing his tongue over the entrance to the balloon so that air could not go into it." 42 Colo. App. at 134, 593 P.2d at 1385. Again, in the instant case, no such testimony of willful noncooperation was adduced concerning the second sample of breath provided by Keys.

Because neither our statutes nor case law addresses the issue before us, we look to the applicable Nebraska Department of Health regulations for guidance. The regulations provide the rules "relating to analyses for the determination of the alcohol content in blood, breath, or urine while driving or boating under the influence of alcohol." 177 Neb. Admin. Code, ch. 1 (1993). The definition section of title 177 provides in pertinent part that "[s]pecifically designed testing device or testing device means an instrument designed and manufactured specifically for the purpose of alcohol analysis by a particular method for blood, urine, or breath and is calibrated to provide *digital readings, graphic results, or both.*" (Emphasis supplied.) 177 Neb. Admin. Code, ch. 1, § 001.07. Attachment 3 to 177 Neb. Admin. Code, ch. 1, provides a checklist of the techniques, approved and prescribed by the Department of Health, to be used by Class B permitholders when conducting chemical tests, via breath specimens, on an Intoxilyzer Model 4011AS. Paragraph 12 of attachment 3 specifically calls for the testing

officer to set forth the *digital* reading obtained through the testing of the sample.

Because there is no statutory or regulatory requirement that the results of a chemical breath test be shown on a test record card, and no testimony of willful noncooperation was adduced concerning the second breath sample provided by Keys, we conclude that the district court's decision that Keys submitted to the breath test conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

CONCLUSION

We conclude that a motorist who provides a sufficient sample of breath to register a digital reading on an Intoxilyzer, but who does not provide enough breath to cause the machine to print the result on a test record card, has submitted to a breath test as required by Nebraska law in the absence of any statutory or regulatory requirement that the results be printed on a test record card, and in the absence of any evidence of willful noncooperation. We therefore affirm.

AFFIRMED.

BYFORD LOCKARD AND LORETTA LOCKARD, HUSBAND AND WIFE, APPELLANTS, V. NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLEE.

546 N.W.2d 824

Filed May 3, 1996. No. S-94-587.

1. **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 lower courts.
2. **Actions: Governmental Subdivisions: Property.** An inverse condemnation action is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings.

3. ____: ____: ____. In a condemnation action, some right in property must be taken or damaged to afford a basis for relief. The action must involve a direct interference in some property, and although it need not be a direct physical invasion of the property, there must be a taking of or damage to the property itself.
4. ____: ____: ____. In a condemnation action, there must be an actual invasion of private property rights or an impairment or destruction of a private right.
5. **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.
6. **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.

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

Douglas E. Merz, of Weaver & Merz, for appellants.

Noyes W. Rogers, of Grant, Rogers, Maul & Grant, for appellee.

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

WRIGHT, J.

Byford Lockard and Loretta Lockard filed this inverse condemnation action against the Nebraska Public Power District (NPPD), alleging that the installation of a faulty electric meter caused damage to their property for which they were entitled to be compensated. From an award by the appraisers, NPPD appealed to the district court. The district court granted summary judgment to NPPD, and the Lockards appeal.

SCOPE OF REVIEW

On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Kramer v. Miskell, ante* p. 662, 544 N.W.2d 863 (1996).

FACTS

The Lockards owned a grocery store in Richardson County, Nebraska, from September 1973 to June 1984. NPPD provided electrical service to the Lockards' property and installed an electric meter to measure the electrical power used by the business.

Through either improper installation or a faulty meter, the Lockards were charged for twice the power actually provided to the business by NPPD. The overcharges were discovered around March 1988. Through negotiations, the parties were able to determine the amount of the overcharges plus accumulated interest, and on June 24, 1988, NPPD tendered $31,747.21. The amount of the overcharges is not an issue in this case.

In May 1988, the Lockards filed this inverse condemnation action against NPPD, alleging that the installation of the faulty meter caused damage to their property for which they were entitled to be compensated. The petition alleged that the overcharges damaged the value of the business property, but was not specific as to how the value was damaged. In a separate action, NPPD sought to enjoin the Lockards and the county court from proceeding with the inverse condemnation action. An injunction was granted by the district court, but this court dissolved the injunction. See *Nebraska Pub. Power Dist. v. Lockard*, 237 Neb. 589, 467 N.W.2d 53 (1991).

After remand, this inverse condemnation action was allowed to proceed. The appraisers ultimately awarded the Lockards $105,000. NPPD appealed to the district court and moved for summary judgment, alleging that the acts of NPPD were not subject to an inverse condemnation action. The Lockards also moved for summary judgment, requesting that the district court dismiss the appeal. The district court granted summary judgment in favor of NPPD, and the Lockards appeal.

ASSIGNMENTS OF ERROR

The Lockards assert that the district court erred in (1) failing to dismiss NPPD's appeal and (2) granting NPPD's motion for summary judgment.

ANALYSIS

Procedural Arguments

The Lockards' assertions that NPPD's appeal to the district court should have been dismissed because NPPD did not file a bond for costs, failed to diligently prosecute the appeal, and failed to deposit the amount of the award of the appraisers with the county court are without merit and are not supported by any authority. Neb. Rev. Stat. § 70-680 (Reissue 1990) provides that no bond shall be required of a public power district. Neb. Rev. Stat. § 76-711 (Reissue 1990) provides that the condemnor shall not acquire any interest in or right to possession of the property condemned until he or she has deposited with the court for the use of the condemnee the amount of the condemnation award. Here, the claim is based on overcharges for electrical service. Therefore, the failure to deposit the amount of the award under the facts of this case could not result in an abandonment of the condemnation proceedings. There is no evidence as to why the appeal took 3 years and, therefore, no basis for an argument that the district court should have dismissed the appeal because NPPD was not diligent.

The Lockards also assert that NPPD accepted the appraisers' award by tendering $1,005.28 to be applied toward the judgment. The record indicates NPPD paid this amount as the costs assessed, the payment of which did not constitute an acceptance or waiver of NPPD's right to appeal.

Finally, the Lockards assert that NPPD failed to file a statement of errors pursuant to Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1992) and failed to deposit a docket fee as provided by Neb. Rev. Stat. § 25-2729(1)(b) (Reissue 1989). The Lockards rely upon the wrong statute. The procedure for an appeal is governed by Neb. Rev. Stat. § 76-717 (Reissue 1990), which provides that the filing of the notice of appeal shall confer jurisdiction on the district court.

None of these arguments have any merit.

Claim for Damages

We now address the basic issue of whether a claim for damages resulting from overcharges for electrical service can be brought in an action for inverse condemnation. The Lockards

argue that their property was damaged for a public use when they were overcharged for electrical service and that, therefore, they are entitled to compensation. Neither of the parties specifically set forth what the damages are.

The Lockards' brief states: "Byford Lockard and Loretta Lockard are entitled to compensation based upon the full extent of the taking and the full extent of the rights actually acquired by Nebraska Public Power District." Brief for appellants at 15. The Lockards argue that their "measure of compensation is not the diminished market value, but the value of the use for the property damaged." *Id.* at 16. It would appear that the Lockards claim their damages are the value to NPPD of the use of the money collected as a result of the overcharges.

An inverse condemnation action is "a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings." *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 684, 515 N.W.2d 401, 405 (1994). In a condemnation action, some right in property must be taken or damaged to afford a basis for relief. The action must involve a direct interference in some property, and although it need not be a direct physical invasion of the property, there must be a taking of or damage to the property itself. See *City of Omaha v. Matthews*, 197 Neb. 323, 248 N.W.2d 761 (1977). See, also, *Patrick v. City of Bellevue*, 164 Neb. 196, 82 N.W.2d 274 (1957). There must be an actual invasion of private property rights or an impairment or destruction of a private right. See *Spurrier v. Mitchell Irrigation District*, 119 Neb. 401, 229 N.W. 273 (1930), *overruled on other grounds, Snyder v. Platte Valley Public Power and Irrigation District*, 144 Neb. 308, 13 N.W.2d 160 (1944), and *Halstead v. Farmers Irr. Dist.*, 200 Neb. 314, 263 N.W.2d 475 (1978).

In *Whitehead Oil Co., supra*, we awarded damages in an inverse condemnation action for the fair rental value of the Whitehead property as a site for a convenience store from the date the use permit should have been issued by the city of Lincoln. The Lockards have asked this court, in effect, to extend the doctrine of inverse condemnation to the loss of use of their money as a result of the electrical service overcharges.

This we decline to do. Compensation for the loss of use of money is usually in the form of interest. We hold that the Lockards' claim for damages resulting from overcharges for electric service does not constitute a taking or damaging of property for purposes of an action for inverse condemnation.

CONCLUSION

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. *Zion Wheel Baptist Church v. Herzog, ante* p. 352, 543 N.W.2d 445 (1996). 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.* We find that NPPD is entitled to judgment as a matter of law. The district court's decision granting summary judgment in favor of NPPD is affirmed.

AFFIRMED.

CONNOLLY, J., not participating.

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